CONTRACT FORMATION AND MISTAKE IN CYBERSPACE – THE SINGAPORE EXPERIENCE

The present article analyses the many important issues that are raised by what is probably the first case on Internet mistake – the Singapore High Court decision of *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594. In addition to the law of (especially, unilateral) mistake, issues relating to the formation of a contract will be considered (including the law relating to offer and acceptance with regard to both website advertisements as well as electronic mail transactions, and the weakness of (and, hence, need to reform) the doctrine of consideration).

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I. Introduction

1 It should not, perhaps, be surprising that what is probably the first case on Internet mistake has emerged from a jurisdiction which, though small, has always endeavoured to place itself at the forefront of information technology.[1] The facts in the Singapore High Court decision of *Chwee Kin Keong v Digilandmall.com Pte Ltd*[2] were extremely

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1 This jurisdiction, Singapore, was the first to adopt the UNCITRAL Model Law on Electronic Commerce: see the Singapore Electronic Transactions Act (Cap 88, 1999 Rev Ed). See also generally A Phang & D Seng, "The Singapore Electronic Transactions Act 1998 and the Proposed Article 2B of the Uniform Commercial Code" (1999) 7 International Journal of Law and Information Technology 103.

2 [2004] 2 SLR 594 ("the *Digilandmall* case") (The decision was very recently affirmed by the Singapore Court of Appeal in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] SGCA 2, albeit on somewhat different grounds and where the focus was on the law of unilateral mistake rather than formation of contract.)]. See now, also, T M Yeo, "Unilateral Mistake in Contract: Five Degrees of Fusion of Common Law and Equity" [2004] SJLS 227 as well as Kwek Mean Luck, "Law, Fairness and Economics – Unilateral Mistake in *Digilandmall*" (2005) 17 SAcLJ 411.

straightforward. However, the issues the case raised were rather more complex, covering a spectrum of very important issues in the law of contract – particularly in the context of cyberspace.[3] In addition to the law of mistake, this decision also analysed – in some detail – issues relating to offer and acceptance in relation to both websites as well as electronic mail ("e-mail") transactions (and, albeit more briefly, the doctrine of consideration). Given the real dearth of cases emanating from any jurisdiction, the *Digilandmall* case is a path-breaking one. Interestingly, the decision also attempts to integrate the various technical analyses with issues of fairness and justice. This is all the more important in an area where the level of technicality can overwhelm what is, in the final analysis, the true (and perhaps only) purpose of the law – the attainment of justice.

2 The present article will first set out the facts in the *Digilandmall* case. It will then proceed to analyse the various issues raised in the context of formation of contract. The doctrine of unilateral mistake (itself a vitiating factor going to formation) is then considered. A great many issues arise in this particular context, including the importance of the objective test, especially when viewed in the context of the actual facts of the case concerned; the criteria of fundamentality and knowledge; the possible application of the alternative doctrine of unconscionability; as well as the more general (yet no less important) issues raised with respect to the relationship between common law and equity. I will then proceed to consider, briefly, a problem that has bedevilled the law of mistake and which is raised, once again, by the present case: To what extent is the law of mistake viable if the technique of construction of the contract can be utilised instead? The article will then conclude with a consideration of how the court integrates both theory and practice in order to arrive at a holistic result that is both just and fair.

3 It should be noted that since this article was completed, an appeal was heard. However, the judgment of V K Rajah JC (as he then was) contains (as we shall see) so much perceptive analysis that it deserves an extended treatment in its own right.

4 Let us now proceed to set out, in brief, the facts of the *Digilandmall* case itself.

3 For a very brief flavour of the issues involved, see A Phang and T M Yeo, "The Impact of Cyberspace on Contract Law" in *The Impact of the Regulatory Framework on E-Commerce in Singapore* (D Seng ed) (Singapore Academy of Law, 2002) pp 39–58 at 40 *ff*.

II. The facts of the *Digilandmall* case

5 In summary, the facts of the *Digilandmall* case were very straightforward. The six plaintiffs, who were friends, placed orders over the Internet for a total of 1,606 Hewlett Packard commercial laser printers on the defendant's (seller's) websites – an astonishing number of machines as none of the plaintiffs was apparently in the business of selling such a product. Also significant was the fact that these orders were placed at a price of $66 each, whereas the actual price was $3,854 each. In summary, for a total outlay of $105,996, the plaintiffs had procured laser printers worth a total market value of $6,189,524. This great disparity in price was due to the fact that the defendant had made a mistake in posting the price on its websites on which the printers were advertised,[4] which websites operated on an automated system, with confirmation notes being despatched to the plaintiffs within a few minutes. Not surprisingly, on learning of the error, the defendant removed the advertisement forthwith from its websites. It should also be noted that 778 others had placed similar orders on the defendant's websites: significantly, perhaps, the total number of printers ordered by the 784 persons was 4,086 (of which, as we have just noted, 1,606 were by the six plaintiffs[5]). The defendant also informed all who had placed these orders that there had been an unfortunate error and that it would therefore not be meeting any of the orders.

4 This originated from an employee's inadvertent uploading of a template during a training session conducted by an entity related to the defendant at the defendant's premises: see *supra* n 2, at [6]–[9].

5 Rajah JC observed (*supra* n 2, at [10]):

> 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.

Towards the end of his judgment, the learned judge also observed (*id* at [154]) that:

> 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 these 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.

Interestingly, although Rajah JC was of the view that the defendant had nevertheless "pursued some unmeritorious contentions", he would not, "[t]aking into account the nature of the claims, the conduct of these proceedings by the plaintiffs and how the case for the plaintiffs unravelled", interfere with the normal order of costs which ought to follow the result and therefore awarded the defendant its taxed costs from the plaintiffs in full (see *id* at [156]).

6 Not surprisingly, in addition to arguing that there had been no concluded contracts, the defendant argued that it had made a genuine (here, unilateral) mistake which was known (or ought to have been known) to the plaintiffs and that it was therefore not liable to the plaintiffs. The plaintiffs, on the other hand, argued that they had not been aware of the defendant's mistake when they placed their orders and that they had believed that the defendant's offer was genuine. They also argued that if the contracts concerned were not enforced because of the application of the doctrine of mistake, undesirable uncertainty would prevail in commercial transactions, especially over the Internet.

7 The learned judge, V K Rajah JC (as he then was), reviewed the facts and evidence with great care and thoroughness.[6] This underscores the vital importance of the facts – especially in so far as the law relating to unilateral mistake is concerned. Indeed, we shall "revisit" the relevant facts in more detail later when we consider the court's consideration of this particular issue.[7]

8 In summary, Rajah JC held that although there had been concluded contracts between the plaintiffs and the defendant (as ascertained on an objective basis),[8] these contracts had nevertheless been vitiated by the doctrine of unilateral mistake. More significantly, and as already mentioned, the learned judge considered (in the process) a number of difficult – even controversial – issues in the law relating to contract formation as well as contractual mistake: all of which will be considered and analysed, in turn, in the present article.

6 In addition to the first two paragraphs of his judgment, where Rajah JC succinctly set out the broad factual circumstances as well as the main legal issues, the learned judge devoted a total of 77 paragraphs to his review of the factual matrix. The entire judgment comprised a total of 156 paragraphs.

7 See the main text accompanying *infra* n 100 *ff*.

8 For further elaboration in so far as the main issues relating to the conclusion of the contracts in relation to the factual matrix was concerned (including analysis of the relationship between the concepts of unilateral mistake and agreement), see the main text accompanying *infra* n 178 *ff*. And for similar elaboration and analysis with regard to the nature – and satisfaction on the facts of the instant case – of the requirement of consideration, see the main text accompanying *infra* n 77 *ff*.

III. Formation of contracts in cyberspace

A. General

9 There has been not a bit of uncertainty as to the rules relating to formation of contracts in cyberspace. Leaving aside conflict of laws issues, which are both complex and which merit articles or even individual monographs of their own,[9] it is still less than clear whether or not the basic rules relating, in the main, to offer and acceptance apply in the context of cyberspace. The present writer has, in a joint essay, suggested that, even on a general level, the basic principles of contract law would continue – in the main, at least – to apply and that the main difference would lie in the sphere of the *application* of such established principles.[10] This observation now has the support of Rajah JC in the present case, where the learned judge stated that:[11]

> 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.

10 The learned judge nevertheless proceeded wisely to observe further thus:[12]

> 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.

This last observation, it is suggested, relates to the sphere of *application* and, once again, supports the basic proposition set out above.[13]

11 Rajah JC also confirmed another important point – that whilst the Singapore Electronic Transactions Act[14] "places Internet contractual dealings on a firmer footing",[15] the Act itself "is essentially permissive".[16] As the present writer has pointed out in a joint article, this is due to the

9 For a brief rendition of the main issues and difficulties in this particular sphere, see Phang and Yeo, *supra* n 3, pp 54–58.
10 See generally Phang and Yeo, *supra* n 3.
11 *Supra* n 2, at [91].
12 *Ibid*.
13 See *supra* n 10.
14 *Supra* n 1.
15 *Supra* n 2, at [92].
16 *Ibid*. Some brief elaboration of a few key sections follows in the same paragraph of the judgment.

fact that the Act is based on the UNCITRAL Model Law which attempts to interfere as little as possible with the domestic contract law of countries which have adopted it – and (perhaps more importantly) possibly encourages countries which might be open to adopting it to do so.[17] This, however, raises the question as to whether or not such an Act is less than helpful when crucial issues of legal substance arise.[18] It is, however, also acknowledged that there is a tension that arises naturally between the need to adopt international legal norms whilst safeguarding the domestic (here, contract) law that has hitherto worked well. There is, of course, no tension where there is a coincidence of interests, but this, unfortunately, will not always be the case. I would suggest that there might be scope for an approach that nevertheless does not lapse into unacceptable compromise. This would involve selecting those areas of the law of contract that are most in need of statutory clarification and then proceeding to effect the necessary amendments to the Electronic Transactions Act. This is no easy task, but it would appear that some clarification with respect to an issue that is crucial in the context of Internet contracts relates to the formation of a contract. This brings naturally to mind not only the doctrines of offer and acceptance, consideration and intention to create legal relations, but also the doctrine of mistake as well, since the latter also concerns the issue of the formation of contract. Significantly, all these areas (barring intention to create legal relations) were involved in the present case. If, however, the area of formation of contract is considered to be too vast an area for substantive reform, more specific sub-issues in this particular sphere can nevertheless be dealt with first. This would include the status of website advertisements as well as e-mail transactions – issues to which I return below.[19]

12 More specifically, however, it should be noted that the learned judge had no difficulties in holding that there had been concluded contracts, based on the facts of the present case – thus rejecting the defendant's arguments on this particular issue. Rajah JC held that the e-mail responses sent out by the defendant "had all the characteristics of an unequivocal acceptance"[20] of the defendant's offer on its websites[21] – notwithstanding the argument to the contrary that had been proffered by

17 And see Phang and Seng, *supra* n 1, at 106–107.
18 For current attempts at amendment, see Consultation Papers, available at the time of writing at <http://www.agc.gov.sg>.
19 See the main text accompanying *infra* n 23 *ff*.
20 *Supra* n 2, at [136].
21 See *infra* n 39.

the defendant.[22] The learned judge nevertheless took the opportunity to clarify many difficult *issues* that arose from the application of the various principles relating to the formation of contracts in the context of cyberspace. Although there were not – for the most part at least – definitive conclusions laid down, this is not surprising. First, many of the issues contain arguments that are – as we shall see – very finely balanced and which therefore do not admit of any conclusive answers. Second, and this is a closely related point, because of the difficulties involved, the clarification of the *issues* are (in and of themselves) of immense assistance and constitute clear (even foundational) starting-points from which further analysis can take place – both in the courts as well as in scholarly literature. This would, in fact, be an appropriate point at which to turn to Rajah JC's views on these various issues.

B. Website advertisements

13 In the present case, Rajah JC opined that a "[w]ebsite advertisement is in principle no different from a billboard outside a shop or an advertisement in a newspaper or periodical".[23] However, the learned judge did admit that "[t]he reach of and potential response(s) to such an advertisement are … radically different" inasmuch as the Internet is a worldwide phenomenon, and further observed that "[i]n effect the Internet conveniently integrates into a single screen traditional advertising, catalogues, shop displays/windows and physical shopping".[24]

14 More specifically, the general common law proposition to the effect that shop displays are generally invitations to treat was noted.[25] However, Rajah JC refused to adopt this as a proposition of law that was

22 As to which see the main text accompanying *infra* n 178 *ff*.
23 *Supra* n 2, at [93].
24 *Ibid*.
25 *Supra* n 2, at [94]. And see the oft-cited English decision of *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ld* [1953] 1 QB 401.

writ in stone.[26] Such an approach is to be welcomed because, even in the more traditional context of a physical shop display, the rationale for the general proposition just mentioned is not wholly persuasive – a point to which we return below.[27]

15 However, a closer examination of Rajah JC's views suggests that the learned judge might have adopted a more radical approach – *at least* in so far as *products sold over the Internet* are concerned. In this regard, Rajah JC was of the view in the present case that:[28]

> 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 … 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.
>
> 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

26 "This is essentially a matter of language and intention, objectively ascertained": *per* Rajah JC, *supra* n 2, at [94] (in the context of whether or not a merchant could be construed as making the offer of either a bilateral or a unilateral contract instead). The learned judge also observed, in the same paragraph, thus:

> 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.

See also the classic decision relating to a unilateral contract in *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256. However, the reach of the Internet is potentially very much wider.

27 See, in particular, the extremely perceptive critique by Prof Treitel in *The Law of Contract* (Sweet & Maxwell, 11th Ed, 2003) at pp 12–13 (criticising the leading decision in *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ld*, *supra* n 25).

28 *Supra* n 2, at [95]–[96].

> 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.

Notwithstanding the relative weakness of the argument of the merchant running out of stock (a point considered below), it is one of the main reasons utilised to justify the rule (referred to in the preceding paragraph) to the effect that shop displays are generally invitations to treat. The learned judge correctly points to the fact that this particular argument is wholly undermined in the context of *digital products*, where (generally and technically speaking) the stock (by its very nature) is *inexhaustible*. In the circumstances, this could explain Rajah JC's apparent suggestion above to the effect that, in so far as such products are concerned, the advertisement concerned ought to be construed as an *offer* instead – with the onus resting on the merchant to ensure that it words its advertisement carefully in order to achieve the precise legal effect it intends.[29] "Apparent" may be the best description at this juncture, however, because, on another reading, the learned judge may also be referring to *all* products sold via the Internet. This second approach may draw some support from some of the language utilised in the above quotation as well as the reference by Rajah JC to the "amalgamated nature" of the Internet in para 13 above.

16 The issue remains as to whether or not, from the perspective of *possible legislative reform*, the Singapore Electronic Transactions Act ought to be amended to include a *prima facie* default rule to the effect that all website advertisements are to be construed as invitations to treat in the first instance – although *yet another possible* default rule will *also* be considered *below* (at para 21 below). However, such a default rule could be rebutted by proof that an offer was intended instead. Given, however, the less than cogent rationale for what appears to be a default rule of sorts at common law (at least in so far as shop displays are concerned),[30] it might be best to allow the courts to construe the precise language and intention of the website advertisement concerned, without tying it down

29 See also *supra* n 26.
30 See Treitel, *supra* n 27.

to any default rule.[31] Indeed, where there is a default rule, the onus then falls on the other party to rebut what is, in effect, a legal presumption – the standard of proof of which will vary according to the particular jurisdiction's rules of evidence. And, given the myriad ways in which a website advertisement can be phrased, it might be more practical to utilise the more flexible approach just mentioned. While it could be argued that having a default rule would conduce towards more certainty, this will, I suggest, only be the case if there is widespread publicity – at least in the local context. This may not in fact be feasible and, certainly, more empirical research is necessary before one can conclude whether or not (and, if so, how) the general public can be made aware of such a default rule. In the meantime, however, it might well be that the best approach is to adopt a more open process that allows the court to analyse the precise language and intention concerned. Indeed, such an open and flexible approach is itself a kind of default rule, albeit not in the more traditional sense.

17 However, notwithstanding the view proffered in the preceding paragraph, it could nevertheless be argued that the arguments are still quite finely balanced. In particular, it might be argued that if a default rule – to the effect that website advertisements are, presumptively at least, invitations to treat (in accordance with the present position under English and, presumably, Singapore law) – is embodied within the Electronic Transactions Act, such statutory amendment might itself constitute sufficient notice not only domestically but also internationally as well. It is admitted that there is no little merit in this argument – especially if we take into account the fact that such an unusual statutory development would probably generate sufficient publicity of its own (probably, and ironically perhaps, by way of the Internet itself!). More importantly, perhaps, assuming that such a default rule was sufficiently public, it *would* then establish that degree of certainty that is all-the-more important in so far as commercial transactions are concerned. If such a

31 Reference may also be made to S Christensen, "Formation of Contracts by Email – Is it Just the Same as the Post?" (2001) 1(1) Queensland University of Technology Law & Justice Journal 22 (this article is available online at the Australian Legal Information Institute website at http://www.austlii.edu.au). The author of this article helpfully distinguishes between non-interactive and interactive websites, arguing (in so far as the latter is concerned) that "[w]here a person is able to log into a website, chose [*sic*] an item for sale, enter payment details and conclude the agreement the display on the site may go beyond a mere invitation to treat" (see at 28). However, no one proposition is conclusive, for "[i]f by analogy the website is considered to be the same as a display of goods in a store window or on a shelf a court may be reluctant, depending on the terms placed on the website, to find the existence of an offer" (see *ibid*).

statutory amendment could also provide that, in exceptional situations, the court could make a finding (based on an objective construction of the language, layout and context utilised) that the intention of the party responsible for the website advertisement was to make an offer instead, this would provide for the balance necessary to furnish justice where the default rule is truly inappropriate. But what, then, of the critique against the traditional rule with regard to shop displays levelled by Prof Treitel which I referred to earlier?[32] In this respect, there are three basic criticisms.[33]

18 In summary, Prof Treitel first argues that the modern shop or supermarket is not, as some argue, a place for bargaining. Secondly, the customer would *not* be *automatically* bound if the priced good on display were an offer because the mere picking up of the good concerned would be, in and of itself, too equivocal an act to constitute an act of acceptance as such. Finally, the argument (already referred to) that there is a danger that the shopkeeper (or owner of the good concerned) would be unfairly bound if he or she ran out of stock could be avoided because, in Prof Treitel's words, "such an offer could be construed as one which automatically expired when the [retailer's] stock was exhausted: this would probably be in keeping with the common expectation of both [retailer] and customer".[34] The shopkeeper could, of course, also pre-empt these potential difficulties by stating that his or her "offer" was open "only while stocks last", although this would not of course always be the case.

19 Would the above criticisms apply equally in the context of cyberspace? It is arguable that the first might. However, in so far as the second criticism is concerned, it might be argued that the act of signalling purchase of an item over a website might be less equivocal than the picking up of a good in a physical store. The third criticism, on the other hand (as we have already seen), is even more persuasive in so far as the *digital environment* is concerned, as it might be argued that software, for example, is always available although availability is obviously subject to the relevant copyright restrictions.[35] However, in so far as *other* products are concerned, the cogency of this (third) criticism is dependent, very much, on whether or not one accepts that – in the absence of an express

32 See *supra* n 27.
33 See generally Treitel, *supra* n 27.
34 See Treitel, *supra* n 27, at 12–13.
35 See Diane Rowland & Elizabeth MacDonald, *Information Technology Law* (Cavendish, 2nd Ed, 2000) at 297.

term that the offer is only open whilst stocks last – Prof Treitel's argument from an *implied term* is persuasive.

20 It is submitted that whilst the argument that the merchant might run out of stocks is not persuasive with regard to digital products (as mentioned above), it is much more persuasive with respect to other products. In this regard, such an argument might conceivably be met by the argument from an implied term as suggested by Prof Treitel above. Rajah JC, however, appears to reject this argument, as suggested by the passage in his judgment quoted above.[36] It is submitted, however, that there is no reason in principle why such a term should not be implied on grounds of either business efficacy or under the "officious bystander" test.[37] In particular, even in a physical sale, it does not always follow that a prospective purchaser will be able to view the physical stock available as, quite often, only samples of products are displayed. On the other hand, it is conceivable that the physical stock available might be displayed on a website. The only cogent argument against the implication of a term is the fact that the court would then have to make a distinction between digital and other products. It is suggested that there is no reason in principle why – contrary to what appear to be Rajah JC's views – such a distinction ought not to be made. In other words, *neither* the argument that the vendor might run out of stock *nor* the argument that a term could be implied to bail the merchant out would apply with regard to digital products (*only*) which are, theoretically at least, limitless in supply. In this regard, such products might then be excluded from the possible default rule discussed above to the effect that website advertisements are *prima facie* invitations to treat. This would, I suggest, be a policy decision for the Legislature based on its assessment as to whether the other two reasons in favour of such a default rule under traditional law are sufficiently strong to merit retention of such a default rule even for digital products, notwithstanding that the vendor would not (again, theoretically at least) run out of stock. The adoption of such an approach would also be consistent with Rajah JC's apparent suggestion above that digital products in website advertisements ought to be treated as offers. Hence, in summary, the better approach might be that, if a default rule is formulated, such a rule should be that all products be treated (presumptively) as invitations to treat, albeit with digital products

36 See *supra* n 28.

37 As to which see *The Moorcock* (1888) LR 14 PD 64 at 68 and *Shirlaw v Southern Foundries (1926), Limited* [1939] 2 KB 206 at 227 (affirmed in *Southern Foundries (1926), Limited v Shirlaw* [1940] AC 701), respectively.

constituting an exception to this presumptive rule. Another possible approach, which is the same in substance, is to treat non-digital products as (presumptively) invitations to treat whilst treating digital products as (presumptively) offers. However, this may well be *perceived* to be a less than neat approach. Of course, yet another alternative – also canvassed above – is simply to adopt a more open process, leaving the court concerned to analyse the precise language and intention concerned, thereby constituting a default rule of sorts, albeit not in the more traditional sense.

21 *Yet another possible approach* is to amend the Electronic Transactions Act by introducing a *quite different prima facie* default rule to the effect that all website advertisements are to be construed as *offers* instead. Such an approach does draw strong support from the weaknesses in the traditional rule with regard to shop displays as well as from Rajah JC's views briefly considered at para 15 above. The various arguments of general import regarding the merits of having a default rule (considered at paras 16 to 17 above) would, of course, apply equally to the approach proposed in the present paragraph.

22 In contrast to transactions via e-mail (considered in the very next Section), however, Rajah JC was of the view that "transactions over the worldwide web appear to be clearer and less controversial".[38] In his view:[39]

> Transactions over websites are almost invariably instantaneous and/or interactive. The sender will usually receive a prompt response. The recipient rule[40] appears to be the logical default rule.

However, the learned judge did offer some very practical advice in the light of the fact that the "[a]pplication of such a rule may … result in contracts being formed outside the jurisdiction if not properly drafted",[41] as follows:[42]

> 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

38 *Supra* n 2, at [101].
39 *Ibid*.
40 Contrast this with the learned judge's apparent views in the context of transactions via e-mail: see main text accompanying *infra*, n 43 *ff*.
41 *Supra* n 2, at [101].
42 *Ibid*.

result in calamitous repercussions. Merchants may find their contracts formed in foreign jurisdictions and therefore subject to foreign laws.

23 It should, nevertheless, be noted that the adoption of the receipt (or general) rule with respect to transactions over the worldwide web does not – in and of itself – resolve the issue as to whether or not the website advertisement concerned is an offer or an invitation to treat: an issue which I have dealt with in some detail in this Section itself.

C. Transactions via e-mail

24 As Rajah JC points out in the present case, different rules may be applicable with regard to transactions via e-mail.[43] However, this is by no means an easy issue to resolve. In particular, it is by no means clear whether the general rule, that a contract is only concluded when acceptance of the offer (here, via the offeree's e-mail) is communicated to the offeror, or the postal acceptance rule applies (that a contract is concluded when the letter is posted (here, when the offeree's e-mail is sent)).

25 It could, for example, be argued that e-mail is not really a form of instantaneous communication since the information contained therein literally travels in packets across the vast expanse of the Internet. Further, it could be argued that e-mail is akin to a paper letter, albeit in electronic form. On the other hand, many users do treat e-mail as being, in effect, instantaneous, although this particular argument would appear to be somewhat the weaker, being based, as it is, on mere perception and nothing more. A stronger argument along similar lines, however, is that since faxes and telexes are considered to be forms of instantaneous communication,[44] then e-mail ought to fall into the same category (on balance) as well.

26 If, of course, e-mail is considered a mode of instantaneous communication, then the general rule (as opposed to the postal acceptance rule) would apply instead. Unfortunately, the Electronic Transactions Act[45] does not furnish a definitive answer, although the Act does provide for the mechanics of ascertainment, as it were.[46] This was acknowledged by Rajah JC himself in the present case where, referring to

43 *Ibid* at [97].
44 *Contra per* Rajah JC, *infra* n 55.
45 *Supra* n 1.
46 See, especially, s 15.

s 15 of the Electronic Transactions Act,[47] the learned judge observed thus:[48]

> It can be noted, however, that while s 15 of the [Electronic Transactions Act] 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.

27 In an excellent article that canvasses the various views in an even-handed manner,[49] the learned author does in fact suggest that:[50]

> [T]he general principle of acceptance upon communication should be applied in the first instance and only where the parties have provided otherwise should another time of acceptance be adopted.

28 Another author has also expressed a similar approach, as follows:[51]

> [G]iven the complexities of individual e-mail systems, it would seem preferable to apply an actual communication (or 'receipt' rule), especially because the sender will know if the message has not been sent and can resend it. … [T]hat ought to mean that responsibility for getting the message through to its destination should lie with the sender.

The learned author does, however, point to possible difficulties with such an approach as well: for example, that "if the customer makes the offer and the supplier accepts, the contract will be formed in the customer's jurisdiction …, which may suit the customer but will be too risky for suppliers".[52]

29 In the *Digilandmall* case itself, Rajah JC affirmed (albeit *obiter*[53]) that "[a]n e-mail, while bearing some similarity to a postal

47 *Supra* n 1. See also the preceding note.
48 *Supra* n 2, at [99].
49 See Christensen, *supra* n 31.
50 *Ibid* at 38. See also generally Simone W B Hill, "Flogging A Dead Horse – The Postal Acceptance Rule and Email" (2001) 17 JCL 151.
51 See Jill Poole, *Textbook on Contract Law* (Oxford University Press, 7th Ed, 2004) at para 2.6.5.4.
52 *Ibid*.
53 *Supra* n 2, at [99]. No issue was taken with respect to the finding of a valid contract with respect to the sixth plaintiff even though he did not receive a response from the defendant as his e-mail inbox was full. In the event, the learned judge observed (*ibid*) that "[i]n 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".

communication, is in some aspects fundamentally different".[54] The learned judge then proceeded to observe thus:[55]

> 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.

30 Rajah JC further elaborated thus:[56]

> 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.

31 *Notwithstanding* the views set out above, the learned judge nevertheless appeared to lean in favour of the *general* (as opposed to the postal acceptance) rule:[57]

> There are, however, other sound reasons to argue … 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 [recipient rule] 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.

32 Demonstrating, once again, a comparative approach towards the law (which is presently needful in the light of increased – and increasing – globalisation and internationalisation), the learned judge also referred to Art 24 of the Vienna Sales Convention,[58] and opined that "[i]t appears that in Convention transactions, the *receipt rule* applies unless there is a

54 *Id* at [97].
55 *Ibid*.
56 *Id* at [98].
57 *Ibid*.
58 The Convention is applicable in Singapore by virtue of the Sale of Goods (United Nations Convention) Act (Cap 283A, 1996 Rev Ed).

contrary intention".[59] Rajah JC then proceeded to pose the following question: "If this [the receipt] rule applies to international sales, is it sensible to have a different rule for domestic sales?"[60]

33 Notwithstanding the finely-balanced arguments on either side, it is submitted that the more popular view – on balance – on the part of both academic writers[61] and the judge in the present case[62] appears to be that the *general* (or *recipient*) rule ought to apply instead of the postal acceptance rule. This is not an unpersuasive approach to adopt. Whilst it may be argued that the emphasis by Rajah JC on the civil law position[63] (and even the position under the Vienna Sales Convention[64]) are by no means conclusive of the present common law position, it is submitted that his reference to the *practical position* (centring on the "relatively short time frame"[65] with respect to e-mail communications) appeals not only to reason and logic but also to one's experience and intuition as well. In this we find the desired confluence between – and integration of – universalistic reason on the one hand and specific experience on the other. I would submit that there is *yet another* category of reasons that buttresses the view that the general rule ought to apply in the context of e-mail transactions. And it is a category that strikes – even at traditional law – at the very pith and marrow of the rationale of the postal acceptance rule itself. Quite obviously and logically, if the postal acceptance rule is weak or even unpersuasive in the context of *traditional physical* transactions, it would, *a fortiori*, be inappropriate in the context of e-mail transactions. In this regard, Prof Treitel has levelled a number of very cogent criticisms against the postal acceptance rule itself, which bear repeating (albeit briefly), as follows.

34 One reason given in *The Household Fire and Carriage Accident Insurance Company (Limited) v Grant*[66] for the postal acceptance rule is that the post office is the agent for both parties. However, Prof Treitel has

59 *Supra* n 2, at [100] (emphasis added).
60 *Ibid*.
61 See *eg*, Christensen, *supra*, n 50; Poole, *supra*, n 51; and Jane K Winn & Benjamin Wright, *Law of Electronic Commerce* (Aspen Law & Business, 4th Ed, 2002) at para 5.03[C]. And *cf* F Lawrence Street and Mark P Grant, *Law of the Internet* (Lexis Law Publishing, 2004) at para 1.04[2][d].
62 See *supra* nn 57–60.
63 See *supra* n 57.
64 See *supra* nn 58–59.
65 See *supra* n 2, at [98].
66 (1879) 4 Ex D 216 ("*Household Fire*") *per* Thesiger LJ at 221.

argued that this is a highly artificial argument and that, in any event, the post office is (at most) an agent to transmit, not to receive.[67]

35 Another reason proffered in support of the postal acceptance rule is that the offeror could always require actual communication of acceptance.[68] However, one possible critique of this reason is that it begs the question since the issue is whether or not the offeror should be relieved of having to make the above stipulation in the first instance.

36 Thirdly, it has been observed in *Household Fire* that there would otherwise be "considerable delay in commercial transactions … for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination".[69] However, the dissenting judge in the same case adopted a quite contrary view: It would be *equally hard* on the *offeror* who might have made *his or her own* arrangements on the footing that his or her offer had somehow *not* been accepted, particularly given the delay in the offeree's response (which response might even be permanent if the letter of acceptance had in fact been lost in the post).[70]

37 Finally, Prof Treitel considers the argument to the effect that the offeror ought to be the one "prejudiced" because he or she had initiated the negotiations by post. However, the learned author is of the view that the negotiations may have in fact been initiated by the *offeree* instead and that the offer may have been made on a form provided by the *offeree* who would have control over the transaction generally.[71]

38 In the specifically *local* context, it is submitted that arguments against the postal acceptance rule are *supported further* by the *small size* of Singapore itself as well as the related point that there is unlikely to be delay or theft in the context of an efficiency of the postal service that was not present in England at the time when the rule was formulated and where the post was a slow and ponderous service that was also given (on occasion at least) to the bane of coach or mail robberies. However, such arguments, whilst not unpersuasive, may need to be confirmed by *more empirical research* on the nature of the postal service in the Singapore context. This reservation, notwithstanding, it is submitted that the

67 See Treitel, *supra* n 27, at p 25.
68 See *per* Thesiger LJ, *supra* n 66, at 223.
69 See *per* Thesiger LJ, *id* at 224.
70 See *per* Bramwell LJ, *id* at 235.
71 See Treitel, *supra* n 27, at p 25.

various criticisms of the postal acceptance rule raised by Prof Treitel constitute – in and of themselves – a simultaneous reason why that rule ought to be reconsidered with a view even to its possible abolition. In any event the criticisms just referred to are certainly, in the present writer's view, persuasive reasons that buttress the view that the *general (or recipient) rule* ought to govern e-mail transactions.

39 If the view just proffered in the preceding paragraph is accepted, the question remains as to whether or not it ought to constitute the default rule – preferably (in the Singapore context at least) by way of statutory amendment to the Electronic Transactions Act.[72] It is submitted that this is indeed the best way forward.[73] Although there have been arguments that suggest that a default rule is undesirable,[74] it is submitted that having a default rule with respect to this particular issue conduces towards certainty – which, as already mentioned, is especially valued in the commercial context. In any event, the default rule is not one writ in stone and is itself subject to exceptions.[75] Such exceptions furnish the necessary flexibility to ensure that injustice does not result as a result of the otherwise dogmatic application of rules of law.

40 The argument in favour of the establishment of a default rule in the first instance is in fact supported by the following observations by Rajah JC:[76]

> 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*. [emphasis added]

D. The doctrine of consideration

41 In the *Digilandmall* case, the defendant argued that the plaintiffs had not furnished consideration for the contracts – there having been no processing of the plaintiffs' credit card payments or receipt of cash from

72 *Supra* n 1.
73 See also Phang & Yeo, *supra* n 3, at pp 44 and pp 52–53.
74 *Cf* Pang Khang Chua & Phua Wee Chuan, "Response to: 'The Impact of Cyberspace on Contract Law'" in *The Impact of the Regulatory Framework on E-Commerce in Singapore*, *supra* n 3, pp 59–64, at p 61. *Contra* Phang & Yeo, *supra*, n 73.
75 See, in particular, the observations by Lord Wilberforce in the House of Lords decision of *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34 at 42.
76 *Supra* n 2, at [99].

the plaintiffs.[77] Rajah JC rejected this argument as being "wholly untenable".[78] Citing the leading English Court of Appeal decision of *Williams v Roffey Bros & Nicholls (Contractors) Ltd*,[79] the learned judge was of the view that "[t]he modern approach in contract law requires very little to find the existence of consideration" and that, "[i]ndeed, in difficult cases, the courts in several common law jurisdictions have gone to extraordinary lengths to conjure up consideration".[80] He then proceeded to add:[81]

> No modern authority was cited to me suggesting an intended *commercial transaction of this nature* could ever fail for want of consideration. [emphasis in original]

42 Even more significant were the learned judge's following remarks, which immediately followed:[82]

> 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. [emphasis added]

43 It is clear from the above quotation that Rajah JC's observations on the possible reform of the law relating to consideration are *obiter dicta*, as he had found that there had nevertheless been sufficient consideration under the present law as applied to the facts of the case itself.[83] However, these observations give much food for legal thought. Since the decision of the English Court of Appeal in the *Williams* case[84] was handed down, there has been much controversy and – not surprisingly, therefore, a veritable plethora of literature.[85] This decision has traditionally been held to have endorsed the concept of "factual benefit or detriment", as opposed

77 *Id* at [139].
78 *Ibid*.
79 [1991] 1 QB 1 ("the *Williams* case").
80 *Supra* n 2, at [139].
81 *Ibid*.
82 *Ibid*.
83 As the learned judge clearly points out, this was a classic instance of *executory* consideration (involving *promises*, as opposed to actual acts).
84 *Supra* n 79.
85 See, in particular, J W Carter, A Phang and J Poole, "Reactions to *Williams v Roffey*" (1995) 8 JCL 248, and the literature cited therein.

to "legal benefit or detriment", as constituting sufficient consideration in law. What this means is that, having regard to any (even minor) factual benefit or detriment constituting sufficient consideration in law, it would be almost always possible to locate consideration within a given transaction. The present writer has sought to argue that this will be the case simply because the combination of this much relaxed requirement, coupled with the established rule that consideration must be sufficient but need not be adequate, means that the merest technical consideration would be sufficient in the eyes of the law.[86] If so, then abolition of the doctrine is but a step away. This might have led to the apparent "retreat" by the English Court of Appeal in its subsequent decision in *In re Selectmove Ltd*[87] – one which is, as the same writer has subsequently argued, indefensible in logic and which leaves it open to the House of Lords to clarify the position either one way or the other.[88] Regardless of the English position, I would submit, however, that the way is nevertheless open for the Singapore Court of Appeal to effectively abolish consideration altogether by taking the logic in the *Williams* case to its logical – and practical – conclusion, as briefly mentioned above in the present paragraph. And Rajah JC's observations (albeit *obiter*) do pave the way for such a development (and not, I suggest, just in the context of commercial contracts as the learned judge suggests). In point of fact, the doctrine of consideration is seldom an issue today. More importantly, there are other legal doctrines that provide at least possible – if not preferable – alternatives. These include the doctrine of economic duress and promissory estoppel.[89] Nor is the call for abolition at all new. The UK Law Revision Committee first mooted this almost seven decades ago.[90] Indeed, this particular Committee also advocated other alternatives, which included adopting the requirement of *writing* instead.[91] I would suggest that this is one area of the common law of contract where the Singapore Legislature – or any other Commonwealth legislature, for that matter – could effect reform with very minimal risks indeed. Indeed, such reform could even be effected by the relevant *courts* themselves.

86 See A Phang, "Consideration at the Crossroads" (1991) 107 LQR 21 at 23.
87 [1995] 1 WLR 474.
88 See generally A Phang, "Acceptance by Silence and Consideration Reined In" [1994] LMCLQ 336.
89 See *eg*, Phang, *supra* n 86.
90 See their Report of 1937 (Cmd 5449).
91 And *cf* Phang, *supra* n 86, at 23.

IV. Unilateral mistake in cyberspace

A. Introduction

44 In the *Digilandmall* case, Rajah JC generally adopted an approach that attempted to integrate both theoretical law with practical considerations. This is evident, for instance, in his frank acknowledgment that "[i]nevitably mistakes will occur in the course of electronic transmissions".[92] The learned judge then proceeded to outline the possible ways in which such mistakes could occur:[93]

> [Mistakes] 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 communications 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. [emphasis added]

45 Rajah JC also helpfully observed that:[94]

> The fact that [the defendant] 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 have been 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.

92 *Supra* n 2, at [102].
93 *Ibid*.
94 *Supra* n 2, at [149].

46 On the facts of the present case, the learned judge held (as we have seen) that the doctrine of unilateral mistake operated (based on an objective basis) to vitiate all the contracts and that the defendant thus succeeded on this particular issue. He held 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".[95] Indeed, as we shall see, Rajah JC would hold (in so far as the criterion of notice was concerned) that even *constructive* knowledge was sufficient to invoke successfully the doctrine of unilateral mistake.[96] The other criterion of fundamentality was also clearly satisfied on the facts of the present case.[97] What is of immense assistance from a normative perspective is the learned judge's careful analysis of the various specific issues – to which our attention must now turn.

B. The importance of objectivity

47 The concept of objectivity is central to the law; indeed, any refutation of it is itself self-defeating.[98] And that concept was reiterated in the present case. Rajah JC refers, in fact, to the concept of objectivity throughout his judgment.[99]

48 In the present case, Rajah JC emphasised right at the outset of his judgment that the evidence and credibility of each of the plaintiffs was crucial to the issue as to whether or not (as they claimed) the thought that a mistake had occurred had never crossed their minds.[100] There is scope here to argue that a consideration of the facts in such a manner would tend towards subjectivity rather than objectivity. The learned judge, however, avoided both extremes by drawing upon *categories* of facts that would assist the court either one way or the other.

95 *Id* at [140].
96 See generally Section C below, entitled "The Criteria of Fundamentality and Knowledge".
97 See generally Section C below.
98 See generally *eg*, A Phang, "Security of Contract and the Pursuit of Fairness" (2000) 16 JCL 158 at 166–168.
99 See generally *eg*, *supra* n 2, at [94], [96] and, especially, [104]–[105] as well as [109]–[113] (these last-mentioned paragraphs focusing on the issue of constructive knowledge). And see, in particular, the *application* of this principle to the *facts*: see *eg*, *id* at [12], [29], [36]–[38], [40], [47], [62]–[63], [65]–[66], [138] and [147].
100 *Supra* n 2, at [12].

49 One clear category pertained to the *general acumen* of the plaintiffs. Again, almost right at the outset of his judgment, Rajah JC observed thus:[101]

> 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".

Indeed, this set the stage, as it were, for the learned judge's very detailed analysis of each of the plaintiffs in this as well as other aspects. And the above observation was borne out with respect to each of the plaintiffs.[102]

50 Another closely related category of facts was the use of Internet search engines. On one view, in fact, this particular category is but a sub-category of the first (relating to the plaintiffs' general acumen). However, it is a sufficiently distinct and significant category to merit separate mention. Indeed, throughout his judgment, Rajah JC points to the use, by the plaintiffs, of such search engines, which use contradicted their claims to the effect that they were not – and ought not to have been – aware of the mistake on the defendant's part.[103]

51 A third (again, closely related) category related to "[t]he stark gaping difference between the price posting and the market price of the laser printer [which] would have made it obvious to any objective person that something was seriously amiss".[104] Indeed, Rajah JC was of the view that:[105]

> 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 inquiries as to

101 *Id* at [3].

102 See especially *id* at paras [28], [29], [37], [38], [40], [55], [57], [62], [65], [66] and [142].

103 See especially *id* at paras [27], [33], [45], [47], [59], [63] and [146].

104 *Id* at [143]. See also at [145], where the learned judge observed (in a similar vein) thus:

> 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. [emphasis in original]

105 *Ibid*.

> pricing.[106] In the context of its true market value the absurd price of $66 was almost the commercial equivalent of 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. … 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.

52 The categories briefly discussed above were inextricably linked to the legal issues themselves – in particular, that of *constructive knowledge*, which was one of the vital issues in the case itself (I discuss this specific issue in Section C below). Indeed, the whole issue of notice (whether actual or constructive) is one of the vital elements in the doctrine of unilateral mistake. And both require an objective ascertainment on the facts of the case itself, with the latter (constructive knowledge) focusing even more on the inferences to be drawn from the relevant factual matrix. The plaintiffs' business acumen, their (related) utilisation of Internet search engines, as well as the great disparity between the price posted and the market price of the printer were therefore crucial in this regard.

53 At this juncture, a more general drawing together, as it were, of the threads would be both necessary and appropriate. Although logically necessary, the concept of objectivity does not operate in the abstract. Abstract universals without more do not help in deciding concrete cases based on specific facts. On the other hand, even the most brilliant rendition of the facts of a particular case is ultimately unhelpful to the court without the *normative guidance* which can only come from an objective theory. In many ways, this apparent dichotomy is also manifested in the tension often drawn between the subjective and the objective – especially in the law of mistake. The truth of the matter is that every determination by every court is based on the *integration* of the subjective and the objective as well as of the universal and the particular. It is submitted that this is why the copious literature on objectivity in

106 Which the plaintiffs, in fact, apparently did – *inter alia*, via search engines (see the main text accompanying *supra* n 103).

contract[107] does not, with respect, help us because such integration is not susceptible, in the final analysis, of a purely logical denouement. Nevertheless, the apparent extremes serve as useful "ideal types" for the purpose of analysis and (ultimate) integration into a final decision by the court itself. It is also submitted that one indication of this process of integration at work (especially in the law of mistake) is the ability of the court to *objectively marshall facts* which *demonstrate* the *subjective* intentions of the contracting parties and which *simultaneously* aid the court in *applying* the *(also objective) law to these facts*. An excellent illustration of the attempted integration of the objective and the subjective (as well as the universal and the particular) may be found in a decision which Rajah JC himself placed great emphasis on: *Hartog v Colin & Shields*.[108] Similarly, in the *Digilandmall* case itself, we have already seen that Rajah JC not only emphasised right at the outset of his judgment that the evidence and credibility of each of the plaintiffs were crucial to the issue as to whether or not (as they claimed) the thought that a mistake had occurred had never crossed their minds, but he also eschewed, in the process of assessing such credibility which aided him in applying the relevant law, merely speculating on the contracting parties' intentions (in particular that of the plaintiffs). To recapitulate, the learned judge utilised, instead, *categories* of facts that would assist the court either one way or the other, thus also minimising the chaos that would otherwise have resulted from a *random* selection of facts. Most importantly, these categories of facts aided the court in deciding the most crucial *legal* issue at hand – that pertaining to *constructive knowledge*.

107 See *eg*, William Howarth, "The Meaning of Objectivity in Contract" (1984) 100 LQR 265; D Goddard, "The myth of subjectivity" (1987) 7 Legal Studies 263; J P Vorster, "A Comment on the Meaning of Objectivity in Contract" (1987) 103 LQR 274; William Howarth, "A Note on the Objective of Objectivity in Contract" (1987) 103 LQR 527; Anne De Moor, "Intention in the Law of Contract: Elusive or Illusory?" (1990) 106 LQR 632; B Langille & A Ripstein, "Strictly Speaking – It Went Without Saying" (1996) 2 Legal Theory 63; and Timothy A O Endicott, "Objectivity, Subjectivity, and Incomplete Agreements" in *Oxford Essays in Jurisprudence* (Jeremy Horder ed) (Oxford University Press, 2000), pp 151–171. With respect, the end result appears to be the generation of yet more controversy – invariably on a *theoretical* level, which (ironically) takes us further away from the needful integration (with the *specific or particular*), which must surely be the *raison d'être* of such pieces in the first instance.

108 [1939] 3 All ER 566. *Cf*, in particular, the court's utilisation of the *objective* facts of prior negotiations as well as trade practice in aiding it to ascertain what the *subjective* intentions of the contracting parties were – all with a view to ascertaining the *legal* issue at hand. Reference may also be made to Endicott, *supra* n 107, especially at 157. *Cf* also Langille & Ripstein, *supra* n 107, at 76–77 (where there is an interesting analysis of the oft-cited decision of *Smith v Hughes* (1871) LR 6 QB 597). See also *infra* n 124 and, especially, n 133.

C. The criteria of fundamentality and knowledge

54 Two criteria, that are crucial to a finding as to whether or not a unilateral mistake in law has been established, are that of fundamentality and knowledge, respectively. On an even broader level, however, Rajah JC in the present case set out "[t]he amalgam of factors that a court will have to consider in risk allocation",[109] which he saw as including:[110]

> (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.

55 The learned judge then proceeded to observe that:[111]

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

56 Returning to the criterion of fundamentality, Rajah JC did, in the present case, observe thus:[112]

> 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.

57 The factor of fundamentality is of course crucial, for without it, there is no reason in principle why a given contract ought to be vitiated on the ground of mistake. However, the perennial difficulty relates to how and where the line is to be drawn in any given fact situation between what is fundamental and what is not. There was obviously no difficulty generated on the facts of the *Digilandmall* case simply because they were rather extreme.

58 The second criterion – of knowledge – is of especial importance in so far as the doctrine of unilateral mistake is concerned. By its very

109 *Supra* n 2, at [103].
110 *Ibid*.
111 *Ibid*.
112 *Id* at [107].

nature, there can be a mistaken assumption on the part of only one of the parties to the contract (here, the defendant). This mistake must also be *known* to the other party (here, the plaintiffs). There is of course no problem whatsoever if it can be proved that the non-mistaken party *actually knew* of the mistaken party's mistake. The more difficult issue that arises concerns the situation where the non-mistaken party did not have actual knowledge as such and whether *constructive* knowledge would then suffice. In other words, ought the non-mistaken party to have *reasonably known* of the other party's mistake, *having regard to the objective facts and context* of the case itself? Given the court's emphasis on the concept of objectivity as detailed in the preceding Section B, it comes perhaps as no surprise that Rajah JC endorsed the concept of constructive knowledge as well. The learned judge commences this part of his judgment by emphasising the objective theory discussed earlier.[113] He then proceeds to lay down a *moral basis*[114] as to why knowledge, generally, of the mistake concerned should disentitle the non-mistaken party from success in his or her claim:[115]

> 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.

59 However, there is nevertheless a sense of balance (especially in so far as the maintenance of commercial certainty is concerned), which is so necessary in the practical sphere of application:[116]

> Having said that, this exception [relating to the doctrine of unilateral mistake] must always be prudently invoked and judiciously applied; the exiguous scope of this exception is necessary to give the commercial community confidence that commercial community 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

113 *Id* at [104]. See also the text accompanying *supra* n 98 *ff*.
114 See also generally the concluding Part of this article, *infra*. Reference may also be made to Daniel Friedmann, "The Objective Principle and Mistake and Involuntariness in Contract and Restitution" (2003) 119 LQR 68 at 78–79.
115 *Supra* n 2, at [105].
116 *Ibid*.

> 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. [emphasis in original]

60 Rajah JC later endorses, in no uncertain terms, the more specific proposition to the effect that *constructive knowledge* would also suffice to fulfil the requirement of knowledge and, in the process, rejects the "cautious statement" in a leading English practitioners' text on the law of contract.[117] He instead observed thus:[118]

> A steady stream of decisions from common law courts[119] indicate a measured but nevertheless distinctly incremental willingness to extend the scope of the exception [relating to the doctrine of unilateral mistake] to not just actual knowledge, but deemed or constructive knowledge as well.

61 It is worthwhile to pause at this juncture and comment briefly on the commendable approach adopted by the learned judge in not slavishly adhering to English law, notwithstanding that it is the foundation of Singapore law.[120] This is particularly important, given the increased – and increasing – connectedness of legal jurisdictions worldwide. More importantly, however, courts should always endeavour to adopt the *most*

117 *Viz*, *Chitty on Contracts* (Sweet & Maxwell 28th Ed, 1999), vol 1, para 5-035: see *supra* n 2, at [108]–[109]. See, now, the very recently published *Chitty on Contracts* (Sweet & Maxwell, 29th Ed, 2004), vol 1, para 5-064. But *cf per* Mance J in the English High Court decision of *OT Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep 700 at 703; *per* Judith Prakash J in the Singapore High Court decision of *Ho Seng Lee Construction Pte Ltd v Nian Chuan Construction Pte Ltd* [2001] 4 SLR 407 at [84]; the English Court of Appeal decision of *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259; and *Baden v Société Générale Pour Favoriser Le Developpement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509 – all of which were cited by the learned judge in the present case: see *supra* n 2, at [110], [111], [113], and [113], respectively. Reference may also be made to the Singapore Court of Appeal decision of *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 3 SLR 405 at [47].

118 *Supra* n 2, at [109].

119 And see, generally, *id* at [110]–[113].

120 At least as it is perceived in a leading English commentary. And see *infra* n 137. It should also be noted that the Singapore courts always had the power to either reject or modify a given English rule if it was, respectively, either unsuitable or required modification (see now s 3(1) of the Application of English Law Act (Cap 396, 1994 Rev Ed). However, such departures were extremely rare and created at least the perception that English law was extremely dominant (see also generally, in this last-mentioned regard, A Phang, *The Development of Singapore Law – Historical and Socio-Legal Perspectives* (Butterworths, 1990) at ch 3).

just and principled proposition, *regardless* of the jurisdiction from which it emanates. Indeed, it is submitted that the learned judge's endorsement of constructive knowledge is both principled and fair: Where, as in the present case, the non-mistaken parties could not reasonably have believed – on the clear facts and context of the case itself – that the other party had not made a mistake, it is only just and fair that they not be allowed to take advantage of that other party's mistake.

62 Finally, it is interesting to note that Rajah JC noted that the plaintiffs had, in any event, *conceded* in their own written submissions that constructive knowledge would suffice.[121]

D. The importance of unconscionability – Rationale or doctrine?

63 An interesting thread that runs throughout the judgment in the *Digilandmall* case is that of unconscionability. It is clear that the learned judge was concerned with the fact that the plaintiffs had taken advantage of the defendant's mistake in an unconscionable manner. In particular, Rajah JC placed much emphasis on the "snapping up" cases, where one party, knowing of the other party's mistake, acts (*inter alia*) with astonishing (even shocking) haste[122] – something which he characterised as having happened in the present case.[123] More generally, as the learned judge aptly put it:[124]

> 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.

121 *Supra* n 2, at [114].
122 See, generally, *id* at [115]–[120].
123 *Id* at [145] and [148].
124 *Id* at [116], and referring to the well-known English decisions of *Hartog v Colin & Shields*, *supra* n 108 and *Tamplin v James* (1880) 15 Ch D 215 at 221.

64 Rajah JC significantly proceeded immediately to observe thus:[125]

> It should be emphasised that this stream of authority is consistently recognised by all the major common law jurisdictions.

65 Later on in his judgment, the learned judge also observed that:[126]

> 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.

66 At this juncture, it might be asked, having regard (in particular) to the description of "snapping up" set out above,[127] whether the approach adopted in the instant case, whilst characterised under the rubric of unilateral mistake, could equally well be characterised as a substantive action under the rubric of unconscionability. It is clear that Rajah JC utilised the *rationale* of unconscionability to buttress his application of the law relating to unilateral mistake. However, I would argue that his approach goes, in effect, much further – that a *substantive doctrine* of unconscionability was (in substance) being applied to the facts at hand.[128] In other words, the plaintiffs, knowing or (as we have seen) having ought to have known that the defendant had clearly made a mistake and was in a disadvantageous position, nevertheless clearly – and with undue haste – took advantage of that mistake in an unconscionable manner. Hence, the court was, on this basis, justified in giving relief to the defendant. This constitutes, in effect, a clear application of a substantive doctrine of unconscionability. The fact that it overlaps – and is, indeed, wholly consistent – with the doctrine of unilateral mistake does not detract from the proposition just made. Indeed, I would go further and suggest that there is, strictly speaking, no critical need for the requirement of unconscionability when applying the doctrine of unilateral mistake itself. Where a party (as in the present case) knows (or ought to have known) that the other party was mistaken as to a fundamental element in the purported transaction, it ought not to be allowed to enforce the contract since there is no *consensus ad idem* in the first instance. Such reasoning does raise a further issue as to whether or not the entire process is best dealt with, instead, as a matter of the construction of the contract. I will,

125 *Supra* n 2, at [117].
126 *Id* at [145].
127 See *supra* n 124.
128 See also A Phang, "Commercial Certainty, Mistake, Unconscionability and Implied Terms" (2002) 1 Journal of Obligations and Remedies 21.

in fact, deal with this further issue below.[129] For our present purposes, however, I would suggest that there is no real need for superimposing, as it were, the added element of unconscionability as a rationale in a situation which is being dealt with strictly under the rubric of unilateral mistake. Nevertheless, I would admit that the presence of unconscionable conduct might be helpful, even in a situation of unilateral mistake for a number of reasons. Firstly, it might be argued that unconscionable conduct buttresses the finding that there is no contract owing to a unilateral mistake. Secondly, and as a stronger (as well as related) point, it might be argued that the presence of unconscionable conduct ought to be *mandatory* inasmuch as it provides the *underlying justification or rationale* for the successful invocation of the doctrine of unilateral mistake. This second argument is not unattractive, especially for those who believe that the law of contract is undergirded by objective moral values.[130] If, however, this argument is accepted, it is submitted that there will be no real difference – in substance and effect – between the doctrine of unilateral mistake on the one hand and the (substantive) doctrine of unconscionability on the other. Both doctrines become, in other words, two sides of what is effectively the same coin.

67 However, my advocating of an at least alternative argument centred on a substantive doctrine of unconscionability faces obstacles in the *Digilandmall* case itself. In particular, Rajah JC reviewed the relevant Canadian decisions[131] and was of the following view:[132]

> 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.

68 Such "a broad and elastic jurisdiction" was not attractive to the learned judge, who then proceeded to observe thus:[133]

> 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

129 See Part V below, entitled "Mistake or Construction?".

130 And *cf* Phang, *supra* n 98.

131 *Supra* n 2, at [118]; and see, in particular, the British Columbia Court of Appeal decision of *256593 BC Ltd v 456795 BC Ltd* (1999) 171 DLR (4th) 470.

132 *Supra* n 2, at [119].

133 *Id* at [120].

> of the law. This is in contrast to the English position where after several decades *Hartog v Colin & Shields* still remains the *locus classicus*.

69 Indeed, the learned judge proceeded to reiterate the dangers of encouraging litigious behaviour as well as uncertainty in the law. He was also of the view that the broad equitable jurisdiction had its source in the views of Lord Denning MR,[134] which he disagreed with. I deal with this last-mentioned point in Section E of this article when considering Rajah JC's views on the relationship between common law and equity. For our present purposes, I would reiterate that the *entire process* adopted in *this very case* is wholly consistent with the application of a *substantive* doctrine of unconscionability. If so, then any arguments from unnecessary litigation as well as uncertainty would apply equally to the application of the more ostensibly traditional doctrine of unilateral mistake. I suggest, however, that these fears are unfounded, regardless of which doctrine is in fact preferred. Judges must *necessarily* exercise discretion with the view to arriving at a fair and just result.[135] Should litigants attempt to exploit specific doctrines, it is my view that a *stricter application* of such doctrines would quickly curb any abuse. More specifically, the doctrine of unconscionability is, in essence, no different from more established doctrines such as economic duress and undue influence. Indeed, the present writer has suggested that there is a strong case for unifying all these doctrines under a broader umbrella doctrine of unconscionability.[136] I view the problem of adopting a substantive

134 *Ibid*.

135 See also, in a similar vein, Michael Bryan, "Unjust Enrichment and Unconscionability in Australia: A False Dichotomy?" in *Understanding Unjust Enrichment* (Jason W Nyers, Mitchell McInnes & Stephen G A Pitel eds), (Hart Publishing, 2004), ch 4, at p 60, where the learned writer observes thus:

> But contextual inquiries are unavoidable even in jurisdictions where the doctrine of unconscionable transactions is confined to discrete categories such as "catching bargains", poverty or ignorance, or to overreaching and oppressive conduct. In all these categories complex factual inquiries will also be required in order to assess the impact of personal circumstances upon entry into an improvident transaction. Uncertainty in the application of the unconscionable dealing doctrine derives from the nature of *any* doctrine which proscribes exploitative conduct, whether that doctrine is narrowly or widely drawn, and not because the concept of special disadvantage is particularly unstable. [emphasis in original]

Reference may also be made to A F Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 LQR 66 at 89.

136 See generally A Phang, "Undue Influence Methodology, Sources and Linkages" [1995] JBL 552. Surprisingly, perhaps, subsequent articles which have explored a similar approach have tended, with respect, to be much more conservative: see *eg*, David Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 LQR 479; and *cf* Ross McKeand, "Economic Duress – Wearing the Clothes of Unconscionable Conduct" (2001) 17 JCL 1.

doctrine of unconscionability as being especially difficult in the English (and, possibly, Singapore[137]) context because of the generally more positivistic approach that prevails.[138] Perhaps this was a subconscious consideration that resulted in the more traditional approach adopted by the learned judge towards this particular issue in the present case, notwithstanding the overall boldness of approach with regard to many other issues (such as that pertaining to constructive notice). Indeed, the doctrine of unconscionability has – unfortunately in the present writer's view – been confined to a very narrow compass under English law. As Rajah JC himself acknowledged, this is not the case in Canada.[139] It is reiterated[140] that, with increasing globalisation and internationalisation (and the consequent increasing interconnectedness of legal jurisdictions), the Singapore courts (indeed, any common law court for that matter) ought to integrate the best in the common law, regardless of jurisdiction. The key focus should, in the final analysis, be on whether or not adoption of a particular doctrine or rule or principle will conduce towards a fair and just result. To this extent, it is hoped that the (substantive) doctrine of unconscionability would be accorded more positive consideration in

137 English law being the foundation of Singapore law, Singapore law having formerly been under British rule; and see generally A Phang, "Cementing the Foundations: The Singapore Application of English Law Act 1993" (1994) 28 UBC Law Rev 205.

138 See generally A Phang, "Positivism in the English Law of Contract" (1992) 55 MLR 102.

139 And, I would argue, in Australia as well: see *eg*, the High Court decisions of *Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447 and *Bridgewater v Leahy* (1998) 158 ALR 66 (and see generally R P Meagher, J D Heydon & M J Leeming, *Meagher, Gummow and Lehane's Equity – Doctrines and Remedies* (Butterworths, 4th Ed, 2002) at ch 16). It is admitted, though, that there has apparently been a more cautious approach towards the doctrine of unconscionability in the Australian context of late and, indeed, in the recent Australian High Court decision of *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 201 ALR 359 (which concerned the issue of relief against forfeiture and which has been noted by G J Tolhurst & J W Carter, "Relief Against Forfeiture in the High Court of Australia" (2004) 20 JCL 74), members of the court emphasised the importance of not endorsing a wholly abstract concept of unconscionability (see *eg*, *per* Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ at [20] *ff*, and *per* Kirby J at [83] *ff*); indeed, Kirby J was especially concerned with the dangers of uncertainty: particularly in the context of commercial transactions and real property (see at [83]) (reference may also be made to the (also) Australian High Court decision of *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 197 ALR 153). However, it is submitted, with respect, that an independent doctrine of unconscionability is by no means unrealistic and that the dangers of both abstraction and uncertainty have been overstated. There is also some recent case law that appears to support the development of an independent doctrine of unconscionability: see the New Zealand Privy Council decision of *Attorney-General for England and Wales v R* [2003] UKPC 22, [2004] 2 NZLR 577; noted by A Phang & H Tjio, "Drawing Lines in the Sand? Duress, Undue Influence and Unconscionability Revisited" [2003] RLR 110.

140 See also the discussion in Section C above.

the future. As I have sought to point out, the actual process of reasoning (as well as the final decision) in the present case *indirectly* supports a substantive doctrine of unconscionability.[141]

E. Common law and equity – Are the jurisdictions compatible?

70 Rajah JC's response to the question posed in the above heading to this Section, although seemingly negative in so far as the equitable jurisdiction is concerned, ultimately adopted a balanced approach that sought to draw the best from both common law as well as the equitable jurisdictions.[142]

71 The learned judge was of the view that a mistaken party could, with the availability of the doctrine of mistake at both common law as well as in equity, "have two bites at the cherry",[143] which bites he thought "may taste quite different and cause different sensations".[144] Rajah JC was also of the view that the main "culprit" for the view that equity ought to dominate was Lord Denning MR.[145] The learned judge also noted that Australian courts "appear to have relied on the views of Lord Denning MR in *Solle v Butcher*[146] 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".[147] In the event, the learned judge was of the view that "[t]he attempt to conflate the concept of common law mistake

141 The doctrine of good faith is, it is submitted, too fledgling a doctrine to constitute a viable alternative to the doctrine of unconscionability (see *eg*, Phang, *supra* n 98, at 186–188 (and the literature cited therein), as well as Howard O Hunter, "The Growing Uncertainty about Good Faith in American Contract Law" (2004) 20 JCL 50). And, for a general view to the effect that good faith is inherent in all common law contract principles and that it is therefore inappropriate and unnecessary to imply independent terms requiring good faith, see J W Carter & Elisabeth Peden, "Good Faith in Australian Contract Law" (2003) 19 JCL 155 and Elisabeth Peden, *Good Faith in the Performance of Contracts* (Butterworths, Australia, 2003). *Cf* also generally P Y Woo, "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001) 1 OUCLJ 195. For a more optimistic perspective, see *eg*, Roger Brownsword, "Two Concepts of Good Faith" (1994) 7 JCL 197 and J Stapleton, "Good Faith in Private Law" (1999) 52 Current Legal Problems 1; and *cf* Lord Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433 at 438–439.

142 See generally *supra* n 2, at [120]–[133]. *Cf* also *id* at [118] and [120].

143 *Id* at [122].

144 *Ibid*.

145 *Id* at [125].

146 [1950] 1 KB 671.

147 *Supra* n 2, at [126]. The learned judge cited the Australian High Court decision of *Taylor v Johnson* (1982) 45 ALR 265, and observed (at [126]) that that decision "seems to indicate that the effect of a unilateral mistake is only to render a contract unenforceable rather than void".

and the equitable jurisdiction over mistake is understandable but highly controversial".[148] Citing extensively from the judgment of Lord Phillips of Worth Matravers MR in the English Court of Appeal decision of *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*,[149] Rajah JC proceeded to observe that:[150]

> 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 Brothers, Limited*][151] in a naked attempt to achieve equitable justice in the face of the poverty of the common law.

In his (further) view, however:[152]

> 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.

72 However, although apparently leaning against the equitable jurisdiction, the learned judge did not in fact dismiss it out of hand. He appeared to be more concerned about *conflation* of the common law and equitable jurisdictions instead.[153] That having been said, Rajah JC was nevertheless open to a completely new jurisdiction that would, in effect, be a *merger* of the common law and equitable jurisdictions:[154]

> 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.

73 However, it should be noted that having expressed this possible way forward, the learned judge nevertheless still leant against the equitable jurisdiction:[155]

> 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

148 *Supra* n 2, at [127].
149 [2003] QB 679 ("the *Great Peace Shipping* case"); noted A Phang, "Controversy in Common Mistake" [2003] 67 Conv 247. And see *supra* n 2, at [128].
150 *Supra* n 2, at [129]. But *cf infra* n 154.
151 [1932] AC 161.
152 *Ibid*. See also *supra* n 133.
153 *Id* at [130].
154 *Ibid*.
155 *Ibid*.

> the arena of mistake, ought not to be trifled with unless they are so obviously anachronistic and ill-suited to commercial and legal pragmatism. This is a matter 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.

74 There is much that is contained in Rajah JC's views as just set out above. Firstly, there appears to be both a rejection of the conflation of the common law and equitable jurisdictions as well as an at least possible advocating of the merger of those jurisdictions. Is this a contradiction? I would suggest that what the learned judge is concerned with is the haziness inherent within the present position, where the relationship of both jurisdictions is unclear. With a proper merger of the jurisdictions, such haziness would disappear. However, it is submitted that such merger would necessitate at least the favouring of one jurisdiction over the other. Whilst it is, as Rajah JC suggests, possible to draw the best elements from both jurisdictions, this is easier said than done. The practical effect would be that, depending on which elements were ultimately drawn, there would be a leaning towards one jurisdiction rather than the other. To cite (briefly) an illustration, the present writer has argued – in the context of *common* mistake – that the common law and equitable doctrines are so similar that they ought to be merged into one coherent doctrine.[156] However, notwithstanding the fact that the *elements* of both doctrines are so similar as to be identical, the *remedial consequences* are quite different: the common law doctrine rendering the contract concerned *void*, whilst the equitable doctrine would render the contract only *voidable*. Hence, a decision would have to be made to adopt one legal effect or the other.[157] Further, the present writer has also pointed to the weaknesses in the *Great Peace Shipping* case itself in so far as it rejected the doctrine of common mistake in equity.[158]

156 See generally A Phang, "Common mistake in English law: the proposed merger of common law and equity" (1989) 9 Legal Studies 291.

157 The suggestion in the article just cited was to adopt the equitable remedy of voidability, but with provision that enables the court concerned to apply it with flexibility: see Phang, *ibid*, especially at 303–304.

158 See Phang, *supra* n 149. See also Adrian Chandler, James Devenney & Jill Poole, "Common Mistake: Theoretical Justification and Remedial Inflexibility" [2004] JBL 34; John D McCamus, "Mistaken Assumptions in Equity: Sound Doctrine or Chimera?" (2004) 40 Can Bus LJ 46; F M B Reynolds, "Reconsider the Contract Textbooks" (2003) 119 LQR 177; and Paul M Perell, *The Fusion of Law and Equity* (Butterworths Canada Ltd, 1990) especially pp 67–73 and 136 (and *cf* Christopher Hare, "Inequitable Mistake" [2003] CLJ 29). See further, now, with regard to the point that *Bell v Lever Brothers, Limited*, *supra* n 151, is not – contrary to the view

75 Secondly, it is submitted, with respect, that the danger of uncertainty which the learned judge views as being inherent in the equitable jurisdiction has been overstated. As a not altogether irrelevant aside, perhaps the fact that Lord Denning MR was involved in the essential genesis of the equitable doctrine contributed to this perception. As the present writer has sought to point out elsewhere, however, it is at least arguable that Lord Denning MR's seemingly "maverick attitude" was in fact undergirded by an objective natural law theory.[159] More importantly, perhaps, it is important to bear in mind that the original purpose of equity generally was to ensure that justice was done when the common law rules became ossified.[160] Indeed, as already alluded to above, the ultimate aim of the law is a simple – yet profound – one: to achieve justice in the case at hand. And justice must, by its very nature and definition, if nothing else, be *universal* in nature. What this means, it is suggested, is that the focus should not be on the jurisdictions *per se* as such but, rather, on whether or not either or both doctrines presently considered enable the courts to achieve justice in both present as well as future cases. It is interesting to note, at this juncture, that Rajah JC himself constantly referred to the rationale of *unconscionability*,[161] which is not only a reference to the concept of justice just referred to but which is also *equitable* in nature. On a related note, I have also suggested above that the best way forward might – in situations of unilateral mistake at least – be to adopt an *alternative* doctrine of (substantive) unconscionability instead.[162] Perhaps, most importantly, judges do have to exercise their discretion in virtually every case that comes before them. Hence, the presence of an equitable jurisdiction is not likely to result in rampant arbitrariness. On the contrary, even the common law doctrine of unilateral mistake requires the exercise of discretion. This brings us to the next point.

adopted in the *Great Peace* shipping case – itself a strong authority at common law, the thorough historical analysis by Catherine MacMillan, "How Temptation Led to Mistake: An Explanation of *Bell v Lever Brothers, Ltd*" (2003) 119 LQR 625 (see also Meagher, Heydon & Leeming, *supra* n 139, especially at para 14-065).

159 See A Phang, "The Natural Law Foundations of Lord Denning's Thought and Work" [1999] Denning LJ 159 (a modified version of a paper delivered at a Symposium celebrating Lord Denning's 100th birthday at Buckingham Law School on 23 January 1999). However, and reflecting the controversy generated by arguments from objectivity and, *a fortiori*, natural law mentioned above, see M Kirby, "Judicial Activist and Moral Fundamentalist" (1999) 149 New LJ 382 at 383, where the author (a Justice of the Australian High Court) summarises the substance as well as (more importantly) the less than enthusiastic responses to this particular paper.

160 See *eg*, Perell, *supra* n 158, at ch 2.

161 See generally the main text accompanying *supra* n 122 *ff*.

162 See generally the main text accompanying *supra* n 127 *ff*.

76 Thirdly, there is – in the more specific context of unilateral mistake – in effect very little (if any) difference between the common law and equitable doctrines.[163] Indeed, I would suggest that the *elements* of each are *virtually identical*. It is clear that the mistaken party would need to establish the presence of both fundamentality and knowledge.[164] As is the case with common mistake,[165] the key difference lies in the ensuing legal *consequences*: the contract is rendered *void* if the common law doctrine applies, whereas it is only rendered *voidable* if the equitable doctrine applies instead. As is the case with common mistake,[166] it is submitted that the crucial issue is whether or not the *merger* of the common law and equitable jurisdictions is the better way forward. In this regard, the crucial difference in terms of legal impact would be the effect that reform would have on *third party rights*. Where, in other words, no third party rights are involved, it is immaterial whether the common law doctrine or the equitable doctrine applies. Indeed, this point was acknowledged by Rajah JC himself in the *Digilandmall* case.[167] If both jurisdictions are merged, one consequence or the other will necessarily have to be adopted. If the equitable effect of voidability is preferred, this would lean wholly in favour of third party rights. On the other hand, if the common law effect of voidness is preferred, this would lean wholly in the other direction – effectively effacing third party rights without more. In the circumstances, I would suggest that the best way forward is to allow for *apportionment*, not unlike the approach embodied within the Frustrated Contracts Act.[168] Indeed, the best way forward might be a *legislative* one, as acknowledged by Rajah JC himself.[169] I would suggest that the legislative vehicle is more one of form rather than substance. It is outside the purview of the present article to speculate on why this is so, although the idea that discretion is most acceptable when conferred by the legislature is deeply ingrained in the English judicial psyche. Perhaps herein lies a clue: legislative supremacy is a deeply established element of the English legal landscape and, hence, the *perceived legitimacy* that arises when discretion is conferred through this means rather than developed by the courts. However, in point of fact, once such legislative power is

163 See also Perell, *supra* n 158, at pp 63–64. Though *cf* the approach of the defendant in the English High Court decision of *Clarion Ltd v National Provident Institution* [2000] 2 All ER 265 (noted, Phang, *supra*, n 128).

164 And see the discussion in Section C above.

165 See the main text accompanying *supra* nn 156–157.

166 And see generally Phang, *supra* n 156.

167 *Supra* n 2, at [131].

168 Cap 115, 1985 Rev Ed. The Singapore Act is in fact based on the English Law Reform (Frustrated Contracts) Act 1943 (c 40).

169 See *supra* n 155.

conferred, the courts will still have to develop guidance through case law, as has been the situation in the New Zealand context with respect to the Contractual Mistakes Act 1977.[170] It remains to be observed that the present writer has also broached (in a joint note) the possibility of similar legislative reform in the context of yet another branch of the law relating to mistake – that relating to mistaken identity.[171] Clearly, though, the time appears ripe for consideration of legislative reform in the law relating to mistake across all the various categories – both in Singapore as well as other Commonwealth jurisdictions (apart, of course, from New Zealand).

77 The legislative way forward may also be advisable for another reason: there is still rather stiff opposition from at least certain quarters towards the merger of the common law and equitable jurisdictions, despite clear pronouncements to the contrary.[172] I have dealt with many of the proposed objections in an earlier article,[173] but resistance continues and there is still not a small amount of controversy.[174]

78 How should the courts proceed in the meantime? It is suggested, contrary to what Rajah JC suggests, that it would be preferable to retain both the common law and equitable jurisdictions in so far as the law relating to unilateral mistake is concerned. Indeed, as I have already

170 And see generally J Burrows, J Finn & S Todd, *Law of Contract in New Zealand* (LexisNexis, 2nd Ed, 2002) at ch 10 (and the literature cited therein).

171 See A Phang, P W Lee & P Koh, "Mistaken Identity in the House of Lords" [2004] CLJ 24.

172 The leading decision in this regard is, of course, that of the House of Lords in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904. This decision has not escaped criticism by those who argue against fusion: see *eg*, Meagher, Heydon & Leeming, *supra* n 139, at para 2-100; as well as Perell, *supra* n 158, especially at pp 30–31.

173 See Phang, *supra* n 156, especially at 302–306.

174 See, in particular, Meagher, Heydon & Leeming, *supra* n 139, at para 2-100 *ff* (but *cf* Phang, *supra* n 156), although it should also be noted that, despite the authors' views, the relevant Commonwealth authorities to the contrary are also helpfully set out. The New Zealand and (to some extent at least) Canadian positions are generally the strongest in so far as fusion is concerned. Although the Australian position stands in somewhat of a contrast, the powerful dissenting judgment by Mason P in the New South Wales Court of Appeal decision in *Harris v Digital Pulse Pty Ltd* (2003) 197 ALR 626 may be noted (and for a perceptive comment on this case, see James Edelman, "A 'Fusion Fallacy' Fallacy?" (2003) 119 LQR 375). The predominant academic view appears to be one that acknowledges the reality of fusion but which acknowledges that complete fusion is neither practical nor desirable (see *eg*, Perell, *supra* n 158, especially at ch 13, Andrew Burrows, Hochelaga Lectures 2001: *Fusing Common Law and Equity: Remedies, Restitution and Reform* (Sweet & Maxwell Asia, 2002) and (by the same writer), "We Do This At Common Law But That In Equity" (2002) 22 OJLS 1. And for an excellent historical analysis, see Joshua Getzler, "Patterns of Fusion" in *The Classification of Obligations* (Peter Birks ed) (Oxford University Press, 1997) at ch 7.

pointed out, there is no real difference, in effect, between the elements which constitute both jurisdictions and therefore no reason in principle why the jurisdictions ought not to be merged. If, however, this is thought to be too radical a proposal for reform, legislation along the lines mentioned in the preceding paragraph might be a more viable alternative. I would nevertheless argue that the main concern of Rajah JC, centring around the danger of excessive uncertainty, is probably exaggerated for the reasons stated above. In view of the need for the courts to achieve justice in the case at hand, maximum flexibility ought to be conferred and, hence, there is no reason in principle why the common law and equitable jurisdictions ought not to be retained, especially since the latter allows the court to add a further legal string to its bow – a point that was itself acknowledged by Rajah JC himself.[175]

V. Mistake or construction?

79 This is a perennial issue that is applicable to the whole law of mistake. Put simply, can it be argued that there is no separate or independent doctrine of mistake but that what all the courts are engaging in, in the final analysis, is an exercise in the *construction* of the contract concerned? Not surprisingly, perhaps, the *Digilandmall* case raises this issue yet again. Leaving aside for the moment the proposed alternative (and substantive) doctrine of unconscionability,[176] could it, in other words, be argued that the present case was, in effect, resolved through a process of construction rather than the application of an independent doctrine of (here, unilateral) mistake? At this juncture, it is suggested that we need to define, in more precise terms, what we mean by "construction". At its broadest level, the concept of construction is necessarily involved in the process of the application of the doctrine of unilateral mistake to the facts of the case itself. I would therefore suggest that a more helpful – and precise – approach would be to argue that such an alternative approach would more accurately fall within the purview of *offer and acceptance*, which necessarily involves the process of objective construction. This is not at all surprising, perhaps, because both the doctrines of mistake (in its various forms) as well as offer and acceptance are concerned with the *formation* of the contract. The alternative approach now considered merely states that all situations of apparent mistake could be resolved, instead, by way of the application of the basic

175 *Supra* n 2, at [124].
176 See the main text accompanying *supra* n 127 *ff*.

principles of offer and acceptance; hence, there is no real need for an independent doctrine of mistake. Such an approach would clearly apply to situations of both *unilateral* as well as *mutual* mistake. In the former situation, one party knows of the other party's mistake and yet proceeds to take advantage of that other party's mistake. In the latter situation, the result is even clearer: one party is offering item X but the other party thinks he or she is accepting item Y. There is, in the circumstances, clearly no coincidence of offer and acceptance between the parties. However, it is admitted that in so far as *common* mistake is concerned, the rubric of construction is not centred around the doctrine of offer and acceptance as such inasmuch as *both* parties are (*apparently*) *ad idem*, thinking that they are transacting with respect to item X when *both* are unaware that what they are *actually* transacting for is item Y. In such a situation, the issue is not so much one of offer and acceptance as that of what the *terms of the contract* are, as *objectively construed* by the court. What, in other words, was the *common intention* of the parties as ascertained on an *objective basis*? If this approach is accepted, then there is a contract, but not embodying the specific intention with respect to the specific subject matter which the parties had thought they were contracting for.[177]

80 It is certainly the case that in situations of unilateral mistake, the fact that one party is aware of the other party's mistake demonstrates, *ipso facto*, that there has been no agreement (or *consensus ad idem*) between the parties themselves. So, on the facts of the *Digilandmall* case, the plaintiffs, knowing or having reasonably to have known, that the defendant had made a mistake, were purporting to *accept* the defendant's offer and to purchase the printers at a price which was clearly *not what* the defendant was *offering*. Although it might be argued that this is viewing the defendant's offer only from the *plaintiffs'* perspective, it is submitted that this is sufficient for our present purposes, given that this particular perspective is both relevant and crucial, having regard to the context considered. Indeed, it is suggested that this case could therefore have been decided based on the fact that there had been no coincidence of offer and acceptance between the plaintiffs and the defendant. However, as we have seen, the present case proceeded on the basis that there had been concluded contracts but that such contracts were, however, vitiated by the doctrine of unilateral mistake. Rajah JC was of the opinion that the phrase "call to inquire" in the alleged contracts

177 The learned judge actually deals with these three various categories of mistake, citing A Phang, *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths Asia, 2nd Singapore and Malaysian Ed, 1998) at p 386: see *supra* n 2, at [106].

themselves did not detract from the fact that there had been concluded agreements.[178] In the learned judge's view, "[t]he caption in each of the [defendant's] e-mails 'Successful Purchase Confirmation from HP online' says it all".[179] Further, Rajah JC observed that:[180]

> The fact that the acceptance [by the defendant] 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.

81 As to the argument by the defendant that the phrase "call to enquire" was in effect a condition precedent akin to the phrase "subject to availability", the learned judge was of the view that:[181]

> [F]rom 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.

82 Whilst Rajah JC's analysis of the facts is persuasive, it is clear that the result in the instant case is at variance with the more general proposition proffered earlier in this Section to the effect that where there is an operative unilateral mistake, there should also necessarily be the absence of a valid agreement or contract between the parties themselves – it being assumed that the court concerned has analysed the facts on an objective basis throughout. It could, admittedly, be argued that there could be a valid offer and acceptance viewed at one level but that, at a deeper level, the presence of a unilateral mistake serves to vitiate a contract otherwise validly formed at a "surface level" – an approach that appears to have been adopted by Rajah JC in the present case.[182] It is submitted, with respect, however, that given that the material facts are precisely the same and that the objective approach is presumably being adopted throughout, if there is a unilateral mistake, this would appear to strongly suggest that there was no valid contract concluded between the parties from an objective perspective to begin with – if nothing else,

178 See generally *supra* n 2, at [136]–[138].
179 *Id* at [136].
180 *Ibid*.
181 *Id* at [137].
182 See *supra* n 94.

because there had certainly been no *consensus ad idem* between the parties, regardless of whether this is viewed from the non-mistaken or mistaken party's perspective. From the non-mistaken party's perspective, there is clearly no contract because he or she knows that the other party is mistaken and therefore would not have contracted on the terms he or she presently asserts. Similar reasoning applies with regard to the party who is mistaken. Finally, it is submitted that the adoption of the approach proffered here would also make for a neater solution. Under Rajah JC's approach, the court found that there had been a valid contract entered into by the parties and then proceeded nevertheless to hold that that contract had been vitiated by (unilateral) mistake. Based on the approach suggested here, however, the court could simply have declared the contract void because it had been procured under a situation of unilateral mistake, which *simultaneously* ensured that no possible agreement could have been entered into in the first instance.

83 However, if the learned judge's analysis in the present case is accepted, this would support the proposition to the effect that – in so far at least as the doctrine of unilateral mistake is concerned – the doctrines of offer and acceptance on the one hand and the doctrine of (here, unilateral) mistake on the other are *two separate and independent* doctrines. This is consistent with my argument below to the effect that there is no reason in principle why both these doctrines should not be retained – albeit on somewhat different grounds and, indeed, approaches.

84 As just mentioned, it might be preferable, on balance, to retain the doctrine of mistake in its various forms. It is true that there is often an overlap – on occasion, even a total coincidence – between and amongst mistake and various other doctrines (such as offer and acceptance). There is, however, still no small measure of ambiguity as well as generality in the concept of construction and, hence, it is submitted that it cannot serve as an adequate umbrella doctrine. On the other hand, whilst the doctrine of offer and acceptance appears more promising, it does not (as we have seen) apply across the board – especially where situations of common mistake are concerned and/or where construction of the terms of the contract is a more appropriate device. In the circumstances, it might be preferable to retain the doctrine of mistake in

its various forms.[183] I would also argue that where no unifying simplification is clearly necessary and/or practical,[184] *and* where the retention of any one or more or all doctrines would not lead to unjust results, it is all to the good for the courts to have a more varied and flexible "legal armoury". This leads us neatly into the conclusion to this article, which focuses, *inter alia*, on what I suggest is the datum purpose of the law in general and contract law in particular – the attainment of fairness and justice.[185] There is, admittedly, a possible – and significant – impact with respect to third party rights. The courts may nevertheless, under the equitable jurisdiction, adjust the parties' rights on terms.[186] Looked at in this light, it might (as canvassed earlier in this article) be preferable for the Legislature to confer explicitly such powers to the courts for the reasons mentioned above.

VI. Conclusion – On achieving justice and other things

85 Throughout his judgment, Rajah JC emphasises the importance of achieving justice. Many passages impacting on this have already been referred to above.[187] However, the learned judge constantly bore in mind the necessity for refraining from going to the other extreme, with courts meting out "palm tree justice".[188] And he refers, towards the latter part of his judgment, to "the eternal tension faced by courts and judges alike in seeking a just equilibrium between commercial certainty and justice in a particular case".[189] A few comments may be appropriate at this juncture.

183 *Contra*, in the context of common mistake in equity, both the *Great Peace Shipping* case, *supra* n 149 (discussed in para 71 of the main text above) and John Cartwright, "*Solle v Butcher* and the Doctrine of Mistake in Contract" (1987) 103 LQR 594. See also the note on *Solle v Butcher*, *supra* n 146, itself by Prof Goodhart, "Rescission of Lease on the Ground of Mistake" (1950) 66 LQR 169); C J Slade "The Myth of Mistake in the English Law of Contract" (1954) 70 LQR 385 at 403–407; C Grunfeld "A Study in Relationship between Common Law and Equity in Contractual Mistake" (1952) 15 MLR 297 at 306–307; L B McTurnan "An Approach to Common Mistake in English Law" (1963) 41 Can Bar Rev 1, especially at 46–47; J C Smith "Contracts – Mistake, Frustration and Implied Terms" (1994) 110 LQR 400 at 418; and Meagher, Heydon and Leeming, *supra* n 139, at paras 14-100 to 14-125. But *contra*, in turn, Phang, *supra* n 149, as well as the literature cited at *supra* n 158.

184 Contrast this with the situation with respect to the doctrines of economic duress, undue influence and unconscionability: see generally, *supra* n 136.

185 *Cf* also generally Phang, *supra* n 98 and, by the same writer, *infra* n 192.

186 *Cf* the parallel in so far as common mistake is concerned: see, in particular, *Solle v Butcher*, *supra* n 146.

187 See *eg*, nn 76, 111 and 115.

188 And see *supra* n 116.

189 *Supra* n 2, at [132].

86 Firstly, it is refreshing to find that the learned judge is concerned with the justice of the case at virtually every stage of the case. This is borne out, as we have seen, by his constant reference to it throughout his judgment.[190] This is clearly not merely lip service but is, it is submitted, an attempt to integrate both the universal and the particular – to ensure that the universal idea of justice is somehow "captured" within the particular facts of the case itself – without mere assertion but with full reference (as far as it is possible) to the existing law. And his more than occasional references to the possibility of reform[191] also demonstrate a desire to see the rules and principles of the law – the "architecture" without which the spirit of justice would not be able to operate[192] – being improved in order that this might facilitate the attainment of justice as a result.

87 Secondly, I would point out that "palm tree justice" is, in effect, the very *antithesis* of true justice. The former implies arbitrariness on the part of the courts and judges, which is borne out of a belief that there are no true standards, except those which strike the fancy of the court or judge concerned at a particular point in time. True standards of justice, on the other hand, are universal and absolute standards which, by definition, *ought*[193] to command the respect of everyone. The most difficult issue probably admits (unfortunately) of no definitive answer – how are such universal standards to be ascertained, especially if recourse is had only to logic, and logic alone?[194] This is a large issue, to say the least, and clearly outside the purview of the present article. What I would, however, venture to suggest is that the learned judge did in fact achieve justice in the case at hand because whilst it might be argued that the defendant had made a mistake, the plaintiffs had – as Rajah JC took pains to point out – attempted to take advantage of this mistake out of all proportion to the actual mistake made.[195] Had each only attempted to

190 And even with respect to his order as to costs: see *supra* n 5.

191 See nn 154 and 155.

192 And see generally A Phang, "On Architecture and Justice in Twentieth Century Contract Law" (2003) 19 JCL 229.

193 The *fact* that such standards do not command everyone's respect does *not* necessarily entail the conclusion that these standards are not *objectively* true.

194 And *cf* generally Phang, *supra* n 98.

195 And see, in particular, the learned judge's characterisation (*supra* n 2, at [151]) of the plaintiff's claims as "audacious, opportunistic and contrived"; he further observed (*ibid*) that "[t]his is a case about predatory pack hunting" (and citing Lord Steyn, *supra* n 141, at 433, with regard to the need to give effect to the reasonable expectations of honest men (see also *supra* n 2, at [152] where Rajah JC also referred to the concept as embodied judicially in the Singapore Court of Appeal decision of *Tribune Investment Trust Inc v Soosan Trading Co Ltd*, *supra* n 117, at [40]). Though *cf* Catherine Mitchell, "Leading a Life of its Own? The Roles of Reasonable Expectation in Contract Law" (2003) 23 OJLS 639.

purchase one printer for his or her own use, it is highly unlikely that the defendant would have resisted the claims of the plaintiffs – out of goodwill, if nothing else.[196] There are two further related points. The first is that a substantive doctrine of unconscionability would be preferable in resolving similar fact situations. The element of unconscionability aids the court in distinguishing between a commercial advantage on the one hand and an illegitimate advantage on the other. It is true that Rajah JC utilised unconscionability as a *rationale*. However, as I have argued, since the elements between a substantive doctrine of unconscionability and the doctrine of unilateral mistake are virtually identical,[197] there is no reason in principle why the former ought not to be endorsed – if only as a possible alternative doctrine. It is nevertheless admitted that the line between mere commercial advantage and unconscionability is not an easy one to draw and raises difficulties similar to[198] those which exist in the law relating to economic duress (where a line is drawn between mere commercial pressure and illegitimate pressure[199]). However, courts do not have the luxury of searching for the perfect answer; they must arrive at a decision as best they can. However, for the reasons already mentioned, any inclination towards "palm tree justice" must be steadfastly eschewed – if, for no other reason, than that the law as well as judges and courts would otherwise lose their legitimacy in the eyes of the general public.

88 Thirdly, whilst I acknowledge that there is a perennial tension between certainty on the one hand and justice on the other, such a tension is a serious difficulty only because of the influence of positivism[200] which not only holds that there is no necessary connection between law and morality but also embraces the underlying assumption that values are subjective and that the focus ought therefore only be on the rules of law which are (so it is assumed) stable. The problem with such an approach is one that I have already canvassed in the preceding paragraph – that the legitimacy of the law would be eroded or even lost in the eyes

196 It is interesting that Rajah JC observed, in the present case, thus (*supra* n 2, at [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.

197 See the main text accompanying *supra* n 127 *ff*.

198 This is not surprising since, on one view at least, there are many similarities amongst the doctrines of economic duress, undue influence and unconscionability: see *supra* n 136.

199 See generally A Phang, "Whither Economic Duress? Reflections on Two Recent Cases" (1990) 53 MLR 107 and, by the same writer, "Economic Duress – Uncertainty Confirmed" (1992) 5 JCL 147 and "Economic Duress: Recent Difficulties and Possible Alternatives" [1997] RLR 53.

200 And see *supra* n 138.

of the general public. In many ways, therefore, the difficulties raised here are closely related to those raised in the preceding paragraph. It would therefore suffice for our present purposes to acknowledge that while objective values and justice are by no means easy to state, let alone achieve, we give up our quest at not only our own peril but also that of society generally as well.

89 It might be appropriate to conclude this article with a recapitulation of the various issues raised and/or points made in the *Digilandmall* case, as follows:

(a) The case supports the proposition made to the effect that the basic principles of contract law continue to apply, even in the context of cyberspace. The issues raised are hence more ones of *application* rather than of fundamental principle.

(b) A general issue is also raised – perhaps more indirectly than directly – whether the Singapore Electronic Transactions Act ought to be amended with respect to the substantive law of contract as well: if not across the board then, certainly, with respect to one or more issues in the context of formation of contract (as well as, possibly, the doctrine of mistake which also impacts on the formation of contract).

(c) The legal status of website advertisements is not entirely clear and there could be a possible case made for the inclusion – within the Singapore Electronic Transactions Act – of a statutory default rule that such advertisements are (presumptively at least) *either* invitations to treat *or* offers. If so, however, a flexible approach will have to be taken and the Legislature will also have to consider the feasibility of such a rule in the context of digital products whose stocks are (theoretically at least) limitless.

(d) The case raised all the salient issues relevant to whether or not either the general rule or the postal acceptance rule ought to apply to transactions via e-mail. It has been suggested that, on balance, it might be preferable to include – again, within the Singapore Electronic Transactions Act – a statutory default rule that incorporates the general (as opposed to the postal acceptance) rule.

(e) The case also raises, once again, the important question as to whether or not the doctrine of consideration ought to be abolished and, if so, what are the possible alternatives that fulfil the same (or similar) functions.

(f) The importance of objectivity is underscored throughout the case, which is itself an excellent illustration of how such a concept is applied in the context of the specific facts of a specific case.

(g) The case not only reaffirms the importance of the criterion of fundamentality with regard to the doctrine of unilateral mistake but also affirms – in no uncertain terms – that the criterion of knowledge includes not only actual knowledge but also deemed or constructive knowledge as well. This last-mentioned proposition is of course consistent with the court's emphasis on the concept of objectivity (referred to in the preceding point, above).

(h) It was argued that a substantive doctrine of unconscionabilty was a viable alternative to the doctrine of unilateral mistake – not least because of the commonality of the elements involved in each of the two aforementioned doctrines. The doctrine is in fact no different from established doctrines such as economic duress and undue influence and the judgment in the present case itself *indirectly* supports a substantive doctrine of unconscionability.

(i) Whilst the court leant towards the abolition of the equitable jurisdiction in the context of unilateral mistake, it left open the possibility of merger of the common law and equitable jurisdictions by way of *legislative reform*. It was submitted that such legislative merger is indeed the best way forward, although, in the interim period, it was argued that there was no good reason for abolishing the equitable jurisdiction of the court – not least because its elements (in so far as both common and unilateral mistake are concerned) were, in substance, no different from those constituting the common law doctrine, with the only material difference occurring where third party rights were concerned. Further, it was argued that the danger of excessive uncertainty was unfounded, although the problem of third party rights remained. In so far as difficulties engendered by third party rights are concerned, it was argued that these could be adjusted either judicially or (more appropriately) via the legislative reform mentioned above.

(j) The case also raised, albeit indirectly, the perennial issue as to whether or not the concept of construction can replace the doctrine of mistake in its various forms completely. The case

itself supports – at least in so far as the doctrine of unilateral mistake is concerned – an independent doctrine of mistake. Whilst it could be argued that situations of unilateral mistake may be resolved by the utilisation of the basic principles of offer and acceptance, it was argued that it was preferable, on balance, to retain an independent doctrine of mistake. It was further argued that the concept of construction, on the other hand, was too ambiguous and general to serve as an umbrella doctrine in its own right.

(k) Finally, it was noted that the court in the present case constantly bore in mind the need to arrive at a just result. I explored the difficulties inherent in the entire process but concluded that not only is the attainment of justice necessary but also that the courts must endeavour to persevere in this quest for justice, lest the law loses its legitimacy in the eyes of the general public.