# SOME THEMES AND THOUGHTS

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1 It has been a great pleasure, and indeed honour, to be asked to assist in the production of this special contract-based issue of the Singapore Academy of Law Journal. In the process some ideas have occurred to me which I would like to share with readers.

## I. Diversity and unity

2 It is clear that Singapore has now reached the stage which Australia and Canada reached some 40 years ago of wanting to decide for itself what the correct answer is. This desire is not inconsistent with wanting to know what the English answer is. In any case, within a common law system, courts are to a significant degree at the mercy of litigants. If a question does not come before the court, the court cannot decide it. So when the High Court of Australia decided *McRae v Commonwealth Disposals Commission*[1] it was still religiously following decisions of the House of Lords but there was no relevant decision of the House of Lords to follow. New, interesting and difficult questions may arise in any jurisdiction.

3 A striking example is the decision of the Court of Appeal in the *Digilandmall* case,[2] which presented an old problem in a dramatic 21st century setting. The facts are of a kind which teachers find difficult to resist – indeed I have already used them in a lecture in England. I dare to suggest that few common law courts would reach a different conclusion, particularly in the light of the Court of Appeal's robust views on the plaintiffs' state of mind.

4 It is tempting to consider what the position would (or indeed should) have been if the plaintiffs' protestations that they believed the prices stated on the Internet to be the real prices were to be believed. I shall say a little more about this later on. Let me pose instead a different

1 (1951) 84 CLR 377.
2 [2005] 1 SLR 502, affirming the decisioin of V K Rajah JC (as he then was) in the High Court, reported at [2004] 2 SLR 584.

question. What would the result have been if the sellers had accepted that there was a contract and sought rectification to the real price? The most recent English authority[3] holds that in an application for rectification, a combination of sharp practice and constructive knowledge of the mistake is sufficient. Of course for the plaintiffs to be forced to buy a thousand printers at over $3,000 each would have been a disaster for them. Presumably, rectification being an equitable remedy, the court must have some degree of discretion but this does not provide an entirely satisfactory answer.

5 In a system of independent common law jurisdictions, it is inevitable that over time, some questions will receive different answers in different jurisdictions. This is the situation within the US where contract law is primarily a matter for the states. There are undoubtedly issues on which different answers are given by different states though I doubt if there are any on which 50 different answers are given.[4] This does not prevent authors writing books which purport to set out the American law of contract or law schools from teaching a universal system. The Harvard Law School does not teach the Massachusetts law of contract.

6 Commonwealth common law countries have gone in a somewhat different direction. There are certainly books which set out the Australian or Canadian or New Zealand or Singapore and Malaysian law of contract, and courses taught in universities in these countries have a significant geographical focus.

7 Nevertheless – and this is why this section is headed diversity and unity – where different rules are adopted, it is hard to find geographically relevant reasons for the difference. It might be that English courts held that actual knowledge was essential for a contract to be void for unilateral mistake and that Singapore courts held that in some circumstances constructive knowledge would suffice, but this would be because different judges took different views of the best rule and not because of differences in the weather or the state of education or the business climate or whatever. As far as I can see, the underlying policy reasons which drive

3 *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259.

4 In his interesting article – "Liability of Accountants for Negligent Auditing: Doctrine, Policy and Ideology" (2003) 31 Florida State University Law Review 17, Prof Jay M Feinman identifies three general doctrinal positions on the question when a negligent auditor is liable to a third party who suffered loss with a number of variations within each position.

what their law of contract should be are exactly the same in Singapore, Australia, Canada or England and Wales. Of course this does not mean that we would all agree on exactly how these considerations should be formulated.

8 Perhaps I will be forgiven a personal reminiscence. For much of the last 20 years I have been a member of the Working Group which has provided the successive versions of the UNIDROIT Principles for International and Commercial Contracts (1st Ed, 1994; 2nd Ed, 2004). The Group was made up of contract lawyers from a number of countries both common law and civil law who worked together to agree on a set of rules designed, primarily, to be incorporated into international commercial contracts as a governing law in place of any system of national law. The common law lawyers did not operate as a group, sit together or discuss questions of approach in advance but I do not remember any instance of disagreement about the broad strategic approach to be taken. In other words, as far as the law of contract is concerned, I believe common law lawyers to share a common perception of the structure of the system.

9 There is a second lesson to be drawn from the UNIDROIT experience and from the parallel work of the Lando Group on the principles of European contract law which is that at the level of desirable results, there is very substantial agreement between common lawyers and civil law lawyers even though this is sometimes concealed by different conceptual arrangements.

10 This is of great practical importance. Contract is the essential tool of commerce and commerce is increasingly conducted across national boundaries. Traditional analyses under which the contract is governed by a proper law expose businesses to the need to inform themselves of scores, if not hundreds, of national laws. There are strong practical reasons for moving to reduce the number of sets of rules which have to be mastered towards one.

## II. Change by case law or by legislation?

11 There was a time when it was normal to pretend that judicial decisions did not change the law. No one believes this now but in modern systems there are often important questions as to whether the legal

position should be changed by judicial decision or by legislation. Was it wise of the US Supreme Court to decide in *Roe v Wade*[5] that the regulation of abortion raises constitutional questions or would this question have been better left to State legislatures?

12 Fortunately, the questions that arise in contract are not quite so difficult. There are certain types of change which only seem likely to be effectively carried through by legislation. It is hard, for instance, to imagine a coherent reform of the law of illegal contracts by case law. Though legislative change will not be easy, it seems the only way. On the other hand, one could have imagined the House of Lords overturning the privity rule[6] and both the High Court of Australia[7] and the Supreme Court of Canada[8] have got close to doing so. I would have preferred a judicial change because the working out of a regime which admits third party rights involves the sort of development which good common law judges do particularly well. Fortunately the 1999 English Act[9] has been drafted in a way which will inevitably involve a substantial amount of judicial development.

13 A good example of case law change working more easily can be found in the articles of Ewan McKendrick[10] and Chan Leng Sun.[11] English courts have found it easier to handle the evolution of the parol evidence rule and indeed to emasculate it because they never had to deal with a statutory statement of the rule.

## III. Nelsonian blindness – A digression

14 At a number of points in modern contract law, questions of constructive knowledge arise. There was discussion of whether such knowledge would suffice in the *Digilandmall* case;[12] certainly the modern authorities support the view that constructive knowledge plus sharp

5 410 US 113 (1973).
6 This might have happened in *Beswick v Beswick* [1968] AC 58 if the House had not been able to reach a satisfactory conclusion leaving the rule unscathed.
7 *Trident General Insurance Co Limited v McNiece Bros Proprietary Limited* (1988) 165 CLR 107.
8 *London Drugs Ltd v Kuehne & Nagel International Ltd* [1993] 1 WWR 1.
9 The Contracts (Rights of Third Parties) Act 1999 (c 31).
10 "Interpretation of Contracts and the Admissibility of Pre-Contractual Negotiations" (2005) 17 SAcLJ 248.
11 "Resolving Ambiguity through Extrinsic Evidence" (2005) 17 SAcLJ 277.
12 *Supra* n 2.

practice will suffice in the defendant to a rectification claim[13] and constructive notice is at the heart of the bank's liability in the three-party undue influence cases involving, typically, a loan to a husband against the security of a jointly-owned matrimonial home.[14]

15 In these discussions, reference is sometimes made to "Nelsonian blindness." An unscientific but quite widespread canvass both of students and colleagues revealed considerable vagueness as to what might be meant by this expression. It is perhaps worth exploring this, as points not only of naval history but of law may be involved.

16 The expression undoubtedly refers to the behaviour of Admiral Lord Nelson at Copenhagen in 1801.[15] By 1801, Nelson already had a great reputation. His dramatic destruction of the French fleet at the Battle of the Nile had summarily terminated Napoleon's invasion of Egypt. But Nelson was still a relatively junior admiral. The expedition to Northern Europe in 1801 was commanded by Admiral Sir Hyde Parker; Nelson was second in command.

17 The expedition was aimed against the League of the North (Denmark, Sweden and Russia) so as to discourage them from coming into the war on the side of the French. The first objective was the Danish fleet in the Danish capital, Copenhagen. The fleet did not come out to give battle but remained at anchor protected by shore batteries. Manoeuvring the whole British fleet was difficult because there were two deep channels off the port with a great shoal in between.

18 Nelson persuaded Parker to allow him to take rather more than half the fleet (ten ships of the line and assorted supporting vessels) into Copenhagen. The ensuing battle was very fierce and there were substantial casualties on both sides.

19 At some point in the battle, Parker, who was some miles out to sea, hoisted the signal no 39. This was in pursuance of the Royal Navy's new signals procedure adopted in 1799 and tested for the first time in a major action at Copenhagen. This system involved the use of a very extensive code of numerical signals and each ship would have a code

13 *Commission for the New Towns v Cooper (Great Britain) Ltd*, *supra* n 3.
14 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 3 WLR 1021.
15 I rely heavily on the account given by Terry Coleman in his recent biography of Nelson, *The Nelson Touch: The Life and Legend of Horatio Nelson* (Oxford University Press, 2002).

book with the meaning of the signal. The meaning of signal 39 was "discontinue the engagement".[16]

20 This was an order to all the ships engaged. Neither Nelson nor any of the ships of the line complied though it appears that some of the frigates (which would have been less well equipped to withstand the Danish shore batteries) did. It is widely believed that it would have been impossible to break off the engagement in the circumstances.

21 It is clear that Nelson did not obey the order. It would not of course have been his job in the heat of battle to watch the signals of his commander some miles away to his rear. This will have been the job of one of his staff who would have acknowledged the signal, recorded it and reported it to Nelson.

22 There is no doubt that Nelson did not obey Parker's order although contemporary professional opinion considered it impracticable to comply. Neither Parker nor Nelson mentioned the order in their official dispatches to the Admiralty. Parker did apparently complain privately but was thought unwise to do so. Since the Danish had accepted a truce and withdrawn from the Northern League, Nelson was the hero of the hour. A contemporary account by Colonel Stewart who was on Nelson's quarterdeck during the action makes it clear that Nelson deliberately disobeyed the order.

23 Later accounts introduce a story of Nelson affecting to put his telescope to his blind eye and to pretend not to see the signal. This appeared first in a biography published in 1806, by which time Nelson had died at Trafalgar and become immortal. Later accounts embellish the story, following the advice of the newspaper editor in the great John Ford movie "The Man Who Shot Liberty Valance" that when the truth conflicts with the legend, one should "print the legend".

24 The legend is false but even in the legend, Nelson's behaviour is clearly a case of actual and not of constructive knowledge. If things had gone badly it would have been impossible to deny knowledge of the signal, which has been acknowledged, but Nelson did not expect things to go badly and the inventors of the legend knew that they had not.

16 Brian Turnstall, *Naval Warfare in the Age of Sail: The Evolution of Fighting Tactics 1650–1815* (Nicholas Tracy ed) (Conway Maritime Press, 1990).

25 In the life of the law, constructive knowledge might exist because every reasonable person would know what the proponent did not know. In practice such cases will appear very unusual. There is very often strong suspicion that whatever the proponent says, he did know or at the very least would have known if he had not taken care not to make the most obvious enquiries. It would be useful to have a label for the man who carefully looks the other way. A modern example might be Bernie Ebbers, the disgraced Chief Executive Officer ("CEO") of WorldCom Inc, who told the jury that he did not understand the complex transactions which the Chief Financial Officer ("CFO") was carrying out. The jury did not believe him, preferring the evidence of the CFO. We can be sure that no one will remember Ebbers in 200 years' time. Nelson's fame will endure but he is not the appropriate paradigm for the morally obtuse CEO or the dim bank official.