LAW, FAIRNESS AND ECONOMICS – UNILATERAL MISTAKE IN *DIGILANDMALL*

To the extent that sanctity and freedom of contract have been regarded as the cornerstone of English contract law, the stated role of fairness in contract law has been minimised. The principle of sanctity of contract preserves commercial certainty, and allows for commercial transactions to proceed smoothly. This is in contrast to the vagaries brought about by arguments of fairness. This article examines the doctrine of unilateral mistake as considered in *Chwee Kin Keong v Digilandmall.com Pte Ltd*. It argues that the result there is both fair and economically grounded. It then explores and proposes an alternative view of contract – one that sees fairness intertwined comfortably with and supporting commerce, in contrast to the positivist approach which draws a sharp distinction between law and seemingly extra-legal factors.

KWEK Mean Luck*
MA (Cambridge), LLM (Harvard);
Advocate & Solicitor (Singapore);
Senior Assistant Registrar, Supreme Court of Singapore.

I. Introduction

1 The strength of English contract law is that it promotes commercial certainty and predictability, which in turn allow commerce to go on smoothly. However, contract law is not only about the certainty and smooth progression of commercial transactions. It is also about fairness. The role of fairness, however, is generally understated, largely because it is hard to articulate a sense of fairness with a degree of rigour. As a result, the sanctity of contract has often been treated as *the* root foundation of classical contract law.

2 In the height of the *laissez-faire* philosophy of classical contract law in the 19th century, judges took the view that the object of the law was to allow people to conduct their commercial affairs as they thought best, with as little interference from the government as possible. This meant upholding the sanctity of contract, often to the exclusion of other

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considerations. In general, contract law was not concerned with the fairness or justice of the outcome. It was not that the judges were indifferent to public interest. Rather, they thought that in nearly all cases, it was in the public interest to enforce private contracts, and indeed, it was widely thought that this was proved by fundamental economic principles.

3 The *lasissez-faire* philosophy of classical contract law weakened in the late 19th to the late 20th century. This was due to the emergence of standard-form contracts, the growth of consumer protection and a declining importance attached to free choice. The last two decades, however, have seen a resurgence of classical contract law. Free-market principles have dominated economic thinking, and economic arguments increasingly influence political decisions on whether to interfere with the market place.[1]

4 This paper examines the doctrine of unilateral mistake as applied in the High Court decision of *Chwee Kin Keong v Digilandmall.com Pte Ltd*,[2] from the perspective of economics. It argues that the decision is both fair and economically grounded, and proposes an alternative view to that offered by classical contract law – one that sees fairness intertwined comfortably with and supporting commerce, in contrast to the positivist approach which draws a sharp distinction between law and seemingly extra-legal factors.

II. The facts in *Digilandmall*

5 In the early hours of Monday morning on 13 January 2003, six friends (the plaintiffs) placed orders on the website of Digilandmall.com Pte Ltd (the defendant) for 1,606 Hewlett Packard HPC 9660A Colour LaserJet printers ("the laser printers"). The posted price was $66 each. The defendant had, on 8 January 2003, mistakenly posted this price. Prior to the mistake, the posted price was $3,854.

1 See P S Atiyah, *An Introduction to the Law of Contract* (Clarendon Press, 5th Ed, 1995) at pp 7–34, and P S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1985), for a discussion of the political, economic and societal changes that affected the philosophical underpinnings of contract law from the classical times to the modern ages. For a treatment of the free-market revolution that affected the world economy over the last half century, see Daniel Yergin & Joseph Stanislaw, *The Commanding Heights*: *The Battle for the World Economy* (Touchstone, 1998).

2 [2004] 2 SLR 594 ("*Digilandmall*").

6 The defendant is a company that sells information technology ("IT") products over the Internet to consumers. As part of its business, it operates a website owned by Hewlett Packard ("HP") at <http://www.buyhp.com.sg> ("HP website"), where only HP products are sold. The defendant also sells HP products on its own website at <http://www.digiland.com> ("Digilandmall website"). A related website ("the Digiland commerce website") for corporate clients and re-sellers is owned and operated by a related entity, Digiland International Limited ("DIL").

7 The mistake arose from a training session conducted by DIL employees at the defendant's premises between 3.00pm to 4.00pm on Wednesday, 8 January 2003. The training included hands-on training with a new template for a "Price Mass Upload" function. This new template allowed instantaneous price changes to be reflected in the relevant Internet web pages. A real product number "HPC 9660A" was inserted into the template as the prototype for which fictional prices were inserted. At 3.36pm, one of DIL's employees accidentally uploaded the contents of the training template onto the Digiland commerce website operated by DIL, instead of the test website allocated for the training. The programme trigger on that website automatically and instantaneously inserted similar content onto all three websites.

8 As a result of the accident, the description of the laser printers on the websites was replaced by the numeral "55". The numerals "66" replaced the original price of the laser printer of "$3,584", and the numeral "77" replaced the original corporate price of the laser printer of "$3,448".

9 Between 8 and 13 January 2003, 784 individuals placed orders for 4,086 printers. The six plaintiffs accounted for orders for 1,606 printers. The plaintiffs' orders were processed by the defendant's automated system and confirmation notes were automatically despatched to the plaintiffs within a few minutes. Each of the automated confirmatory e-mail responses carried, under the caption of "Availability [of the product]", the notation "call to enquire".

10 When the defendant learnt of the error, it immediately removed the advertisement and informed all who placed orders that the price posting was an unfortunate error and it would therefore not be meeting those orders. The plaintiffs sought to enforce the transaction. They asserted that they did not think that the website prices were mistakenly posted and maintained that if the defendant were allowed to renege on the posted price, uncertainty would prevail in the commercial world and

particularly in Internet transactions. If they succeeded in their action, they would have spent only $105,996 to acquire laser printers with a market value of about $6,189,524. These were the facts in the High Court case of *Digilandmall*.

III. The decision of the High Court in *Digilandmall*

11 The learned judge, V K Rajah JC (as he then was), ruled that contracts had been concluded between the plaintiffs and defendant. These contracts were, however, voided by the doctrine of unilateral mistake. In coming to this conclusion, the learned judge addressed several contract law issues, of which five holdings in particular will be highlighted here.

12 First, the basic principles of contract law continue to prevail in contracts made on the Internet. However, not all principles will or can apply in the same manner that they apply to traditional paper-based and oral contracts. It was noted by the learned judge that while the Electronics Transaction Act (Cap 88, 1999 Rev Ed) ("ETA") places Internet contractual dealings on a firmer footing, it is essentially permissive. The law of agency and that pertaining to the formation of contracts are expressly recognised in s 13(8) of the ETA as continuing to apply to electronic transactions. Thus, principles of contract formation, consideration, terms and conditions, choice of law and jurisdictional issues need to be examined.[3]

13 Second, on the facts, contracts were concluded. The learned judge rejected the defendant's suggestion that no contracts had been formed since there was a notation "call to enquire" in the e-mail response of the defendant. The defendant contended that this notation created a condition precedent. The learned judge held that the e-mail replies from the defendant had all the characteristics of an unequivocal acceptance. The caption "Successful Purchase Confirmation from HP online" in each of the e-mails said it all. The text of the e-mail further reinforced the point. The fact that the acceptance was automatically generated by computer software could not in any manner exonerate the defendant from responsibility. It was, after all, the defendant's computer system and the defendant had programmed that software. Furthermore, from the evidence, it was clear that the defendant had intentionally put in the

3 *Ibid* at [91] and [92].

words "call to enquire" instead of the phrase "subject to availability", and that it had done so to solicit more business.[4]

14 Third, the learned judge held that constructive knowledge of the mistake was sufficient for unilateral mistake to be operative. While the learned judge observed that *Chitty on Contracts* noted that it was not clear whether actual knowledge was required to found unilateral mistake, or if constructive knowledge sufficed,[5] he agreed with the approach of the English Court of Appeal in *Commission for the New Towns v Cooper (Great Britain) Ltd*,[6] in so far as it dealt with deemed knowledge. He held that it stood to reason that if a party shut its eyes to the obvious, the party was neither being honest nor reasonable, and ought to be affixed with knowledge. It would be fair to say that such a person should not have any legitimate expectation that the contract in question would be either respected or sanctioned by the court.[7]

15 Fourth, having found that contracts had been formed between the plaintiffs and the defendant, the learned judge went on to hold that the contracts were vitiated by the doctrine of unilateral mistake. It was found that the plaintiffs had at all material times, knowledge of, or at the very least, a real belief that an error had been made by the defendant in the price posting. The plaintiffs were all well-educated professionals. They were articulate, entrepreneurial, streetwise and savvy individuals. By their own admission, they made Internet searches through various search engines to ascertain the profits they could make. In the learned judge's view, the stark, gaping difference between the price posting and the market price of the laser printer would have made it obvious to any objective person that something was seriously amiss. The unusual product description of "55" would have been a red light signal that an error had occurred.[8]

16 Fifth, the learned judge held that the fact that the defendant might have been negligent was not a relevant factor. While commercial entities ought not to be given a licence to relax their vigilance, undue weight should not be attached to the carelessness involved in the mistake. The rationale for this is that a court will not sanction a contract where there is no *consensus ad idem*. Furthermore, it will not allow a non-

4 *Id* at [136] and [137].
5 *Chitty on Contracts* (Sweet & Maxwell, 28th Ed, 1999) vol 1 at para 5-035.
6 [1995] Ch 259.
7 *Supra* n 2, at [113].
8 *Id* at [140], [142]–[143].

mistaken party to take advantage of an error which he is or ought to be conscious of. These considerations take precedence over the culpability associated with causing the mistake.[9]

IV. Fairness

17 The result in *Digilandmall* accords with an intuitive sense of justice. The learned judge took pains to emphasise the importance of achieving fairness in this commercial transaction and his views on where fairness lay on the facts were set out strongly in his judgment. He noted that it was improper for a party who knew, believed or ought, objectively speaking, to have known of a manifest error to seek commercial benefit from such an error. In his words, "It is unequivocally unethical conduct tantamount to sharp practice".[10] This point was further emphasised in the conclusion of the judgment, when reference was made to Lord Steyn's statement that "[a] thread runs through our contract law that effect must be given to the *reasonable* expectations of *honest* men",[11] and to Yong Pung How CJ's similar point made in *Tribune Investment Trust Inc v Soosan Trading Co Ltd*.[12]

V. Economics

18 The decision in *Digilandmall* is also right when assessed through economic perspectives.

A. Information

19 That this is so may not be readily apparent, given the seeming breadth of the learned judge's *dicta*:[13]

> The stark gaping difference between the price posting and the market price of the laser printer would have made it obvious to any objective person that something was seriously amiss.

9 *Supra* n 2, at [149].
10 *Id* at [147].
11 Lord Steyn, "Contract Law: Fulfilling the Reasonable Expectation of Honest Men" (1997) 113 LQR 433 at 433 (emphasis in original).
12 [2000] 3 SLR 405 at [40]: "[T]he function of the court is to try as far as practical experience allows, to ensure that the reasonable expectation of honest men are not disappointed."
13 *Supra* n 2, at [143] and [145] (emphasis in original).

> 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.

20 It does happen in the course of commerce, that one party is mistaken, to some extent, about the actual market value of the good. It is generally accepted that these contracts are enforceable. That this is so is the expectation of commercial parties, and some would say it is the harsh reality of the marketplace. In a commercial transaction, each party takes the risk that his own evaluation of the value of the product is wrong, and that the party with the superior intelligence should be rewarded for it. As was said by Wilcox J in *Deputy Commissioner of Taxation (NSW) v Chamberlain*:[14]

> No-one would deny the right of a businessman, for instance, to take advantage of another businessman's error in judgment, and so obtain a "bargain" for himself. It is the nature of our society for parties to put into competition their expertise and informational resources.

21 In the light of the decision in *Digilandmall*, should commercial expectations be modified? Should the fact that there is a stark difference between the offered price and market value of a product automatically taint the buyer with knowledge that would vitiate the contract for unilateral mistake? Take the following example:

> S sells B a violin. S prices it at $1,000. B, an expert, realises that the violin is an original Stradivarius, worth $1,000,000. They enter into a contract which is executed. A subsequently realises his mistake after the sale.

22 Given that the price of the violin is absurdly low in relation to its known market value, should A be allowed to void the contract on the basis of unilateral mistake? If so, it would suggest that *Digilandmall* could serve as a precedent that undermines commercial activity.

23 Factually, there are clear differences between the violin example and the transactions in *Digilandmall*. In the violin example, S did agree to the price. His mistake was in respect of the actual market value of the violin. In contrast, in *Digilandmall*, both parties were of the view that the laser printers had a market value of around $3,584. The first plaintiff's

14 (1990) 93 ALR 729 at 741.

purchase took place soon after an Internet Chatlink conversation with a friend who pitched, in no uncertain terms, the price of the laser printer at between $3,000 to $4,000.[15] The second plaintiff said that he had discovered from his Internet searches that the price of the laser printer was in the region of $3,000.[16] The third and fourth plaintiffs affirmed through their Internet searches that the usual price was in the region of US$2,000.[17] The sixth plaintiff was informed by his brother, the third plaintiff, that the laser printers could be sold at "about a thousand plus" each.[18] The fifth plaintiff denied knowledge of the market value of the laser printer. The learned judge found, however, that it was inconceivable that he would have placed an order for 100 laser printers without the conviction that it was in fact a current market model with a real and substantial market value.[19]

24 The defendant's mistake was not in respect of the underlying market value of the product, but as to the price posted on the website. This mistake would have been clear to the plaintiffs, especially since the description of the laser printers did not contain any description of the product at all, but instead contained the numeral "55". In *Digilandmall*, there was no *consensus ad idem* as to the price.

25 Economically, there are substantial differences in the type of information possessed by the buyers.[20] In the violin example, the buyer's information is *productive*, in that it increases the overall benefit enjoyed by society. It is likely that the purchase of the Stradivarius by the buyer will aid the violin in finding its way into the hands of users, who value it more highly, for example, a concert violinist or violin students in a conservatory who can practise with it. If the violin had stayed with the original seller, who did not recognise its value, society would have lost the benefit from this Stradivarius. By bringing the true value of the violin into light, the buyer helps society to make more efficient allocation of its scarce resources.

15 *Supra* n 2, at [27].
16 *Id* at [33].
17 *Id* at [43] and [51].
18 *Id* at [69].
19 *Id* at [63].
20 See George J Stigler, "The Economics of Information", (1961) 69 Journal of Political Economy 213, reprinted in George J Stigler, *The Organization of Industry* (University of Chicago Press, 1968) at p 171; F A Hayek, "The Use of Knowledge in Society", (1945) 35 Am Econ Rev 519 at 522; and Anthony T Kronman, "Mistake, Disclosure, Information and the Law of Contracts" (1978) 7 Journal of Legal Studies 1.

26 In contrast, the buyers' information in *Digilandmall* brings benefit only to the buyers. The information is purely *redistributive*. It redistributes wealth in favour of the buyers. As between the parties, it makes no difference to society who does the selling to the end-users. Such information does not enhance the total level of benefit enjoyed by society. Either way, the laser printers would end up in the hands of individuals who would need a commercial printer.

27 There is also substantial difference in the process by which the relevant market information is acquired by the buyers. In the example of the violin, the buyer would not have acquired knowledge pertaining to the violin overnight. He must certainly have expended considerable cost and time in building up his knowledge, in order to identify a Stradivarius when he sees one. His base expertise would have been acquired through initial costs, whether through formal education or years spent in the relevant field. He probably would also have had to carry out targeted checks on the Stradivarius in question. It could be said that the information was acquired through a process requiring substantial investment.

28 In contrast, the information acquired by the buyers in *Digilandmall* was, literally, acquired overnight, through a few searches made through Internet search engines. The first and fifth plaintiffs conducted some searches using the "Google" search engine. The second and fourth plaintiffs carried out checks using the "Yahoo" search engine. The third plaintiff undertook searches on "Yahoo.com" and "Ebay.com". The sixth plaintiff did not conduct any Internet searches. He was awakened by his brother, the third plaintiff, at about 3.00am. On being told of the posted price of the laser printers, he told his brother to order some for him, without specifying any amount.

29 The information possessed by the buyer in the violin example thus comprised *productive information* acquired through a *process requiring substantial investment*. A corporate example of such information would be that of financial analysts who study the corporate performance of a company to ascertain its true market value. Another example would be information on the likelihood of the presence of oil in a particular site, which is the fruit of geological surveys, research and exploration.

30 Society recognises the benefit of such information and encourages its acquisition. One non-contractual example which illustrates the encouragement of the pursuit of such knowledge is the provision of a limited monopoly for information acquired through

research and development, which is protected through patent law. Within contract law, whilst property rights are not assigned to such information, the information is protected in that those who possess such information are allowed to contract freely without disclosing their knowledge. This is encapsulated in the maxim *caveat emptor*.

31 In the example of the violin transaction, there is benefit to society in protecting the sanctity of the transaction which was in the buyer's favour. If the buyer knew that the legal rule was that any contract he concluded with the seller would be vitiated by the doctrine of unilateral mistake, simply because of the stark difference in the posted price and the actual market value of the violin, there would have been little incentive for him to invest his resources and acquire such material knowledge, and certainly there would be no incentive for him to enter into the transaction and bring the existence of the Stradivarius into light.

32 The information possessed by the buyers in *Digilandmall*, on the other hand, was purely redistributive information. It benefited only the holders of the information. Not only is there no reason to provide an incentive to discover purely redistributive information, but in some situations, society punishes those who seek to profit from purely redistributive information. For example, the law punishes those who engage in insider trading. The information possessed by the buyers was also acquired overnight through a simple process involving Internet searches. It might be argued that since the goods involved were generic, in contrast to the Stradivarius in the violin example, less effort in information acquisition should be expected. This may be so, but allowing the seller in *Digilandmall*, who had made a unilateral mistake in the price posting, to be excused from the contract would not result in a sharp reduction in the production of such information. Such information is easily retrieved from the Internet, and buyers will still find value in conducting such searches to ascertain the actual market value of a product before they enter into transactions.

33 The above analysis from economic perspectives may help to cast a different light on the classic case of unilateral mistake, *Hartog v Colin & Shields*.[21] There, the parties had engaged in negotiations for the sale and purchase of Argentine hare skins. The negotiations proceeded on the understanding that the skins would be transacted at a certain price per piece. The final offer of Colin & Shields, the seller, however, was at a

21 [1939] 3 All ER 566.

certain price per pound. This was accepted by Hartog, the buyer, who on the same day, resold the same skins at 10% profit to a third party. Evidence at trial showed the existence of a trade custom to fix the price per piece, and not per pound. The value of a piece was approximately one-third of the value per pound. The seller refused to honour the contract. Singleton J found that the offer made by the seller contained a mistake, which the buyer realised and took advantage of. He gave judgment for the seller.

34 The information economics analysis here is similar to that of *Digilandmall*. The information held by the buyer about the actual market value of the skins was purely redistributive. As between him and another buyer, it made no difference to society who was the purchaser. Any value derived was purely private in nature. Neither was the information used acquired as a result of substantial investment. The decision in *Hartog v Colin & Shields* is consistent with a rule that in a contractual transaction, where there is a unilateral mistake known by a party, society should not enforce the contract which is entered into based purely on redistributive information acquired without substantial investment.

B. Risk allocation

35 An economic argument might be raised against the decision in *Digilandmall* on the ground of efficient risk allocation. It might be said that an error arising from a mistake should be borne by the party in the best position to prevent the mistake from occurring. It might be then argued that website owners are in the best position to avoid price posting mistakes. Allowing them to escape from their errors through the doctrine of unilateral mistake would allow website owners to avoid having to take responsibility for the accuracy of their postings. In the long run, it might even obstruct Internet retailers' serious attempts at promoting products through price differentiation.

36 While it is true that website owners, as the system operators and owners, are in the best position to prevent errors, mistakes do happen, perhaps even more so in the online environment. The probability of mistakes is higher because many online retailers change their prices more often than brick and mortar stores. Moreover, while websites are efficient because of automation, which speeds up the pace of transactions, the use of virtual agents also isolates the transactions from human intervention and removes this layer of safeguards that would quickly detect and remove wrongly-priced items. The use of complex information systems

and software programs designed to reflect price changes and handle orders in different currencies introduce new opportunities for errors.[22]

37 The question is, where there is an error, is it less costly to society to require that vendors pay for their mistakes, or, as the learned judge did in *Digilandmall*, to hold that the transaction is vitiated by unilateral mistake? It is worth recalling that in *Digilandmall*, if the plaintiffs had succeeded in their action, they would have spent only $105,996 to acquire laser printers with an actual market value of $6,189,524. Given the speed of Internet transactions, an error could result in losses of substantial magnitude. In late 2001, Kodak offered a £329 digital camera for £100. It was argued that Kodak's automatic confirmation e-mail formed legally-binding contracts. In the end, Kodak decided to honour the sales, and suffered a loss of more than £2m in the process. In another incident, Buy.com agreed to a US$575,000 settlement after 7,000 customers sued the company for failure to honour their orders for a US$164 Hitachi monitor, which had been mistakenly marked down from US$588.[23]

38 No matter how much investment is made in creating an error-free online website, there is no guarantee that errors will not occur. No vendor is likely to have the risk appetite or capacity to absorb the potentially high costs of such errors. In such a situation, where contractual or technical solutions are deemed insufficient, insurance may surface as the only effective means of risk containment. This would only lead to increased costs in the Internet retail environment. On the balance, the decision of the learned judge in *Digilandmall* leads to a more efficient allocation of risk.

VI. Fairness and commercial certainty

39 In his judgment, the learned judge emphasised the importance of finding the just equilibrium between commercial certainty and justice in

22 See Benjamin Groebner, "Oops! The Legal Consequences of and Solutions to Online Pricing Errors", 1 Shidler Journal for Law, Commerce & Technology 2 (May 26, 2004), at <http"//www.lctjournal.washington.edu/vol1/a002Groebner.html>

23 See Lawrence H Hertz, "*Don't Get Trapped into Honoring Online Pricing Errors!*" (2002) 4 No 7 E-Com L Rep 6. The perceived discount in the Kodak case was 30.4%, while the perceived discount in the Hitachi case was 27.9%. This may have affected the companies' decision to honour the contracts. The customers could arguably have put forth a strong argument that the pricing appeared to be genuine promotional offer prices. In contrast, the perceived discount in *Digilandmall* would be 98.3%. In determining whether a buyer knows or ought to know of whether there is a mistake, the extent of discount could be one factor taken into consideration by the courts.

a particular case.[24] The importance of preserving commercial certainty was emphasised at various points of the judgment:[25]

> It is essential that the law be perceived as embodying rationality and fairness while respecting the commercial imperative of certainty.
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> …
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> [T]his exception [*ie*, 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 transactions will almost invariably be honoured when all the objective contractual indicia are satisfied. … Certainty in commercial transactions should not be trifled with, as this will inevitably affect how commercial and business exchanges are respected and effected.

40 It is submitted that any commercial uncertainty arising from the decision of the High Court in *Digilandmall* is very limited. It is clear from the judgment that where there is a mistake as to the posting of the price on the Internet, and the buyer knows or ought to have known of this mistake, the contract would not be upheld.

41 It might be argued that the ascertainment of the state of knowledge of the buyer would require a trial process, and in that sense introduce uncertainty to such transactions. Furthermore, given the ability of the Internet as a medium for commercial transactions to keep prices down through lower costs structures, situations where prices posted online are lower compared to prices offered by brick and mortar retailers may be quite common. The experience of the market since the Internet boom of the 1990s suggests, however, that while online prices can be lower than those offered by brick and mortar retailers, they hardly ever are "absurdly lower". Moreover, with many retailers moving online, the competition is no longer just between online retailers and brick and mortars retailers, but among online retailers themselves. This further diminishes the opportunities for substantially under-pricing competitors.

42 What happens then in those situations where prices are absurdly low relative to the known market value? Would the ascertainment of the state of knowledge of the buyer necessitate a trial process, and thus introduce commercial uncertainty to such transactions? Before going

24 *Supra* n 2, at [132].
25 *Id* at [103] and [105].

further into this, it is worthwhile considering whether the learned judge's decision, that constructive, as compared to actual, knowledge of a mistake suffices, introduces a further element of uncertainty.

43 It would seem that at the very least, basing the operation of the doctrine of unilateral mistake on constructive knowledge does not make commerce any less certain. In fact, it would appear that there is a greater degree of certainty, since in the determination of whether there is unilateral mistake, the focus would not be on the subjective element of what the buyer actually knew, which is open to greater dispute between parties, but on the objective element of what the buyer ought to have known, which is relatively easier for lawyers to advise on.

44 Moreover, to the extent that there is any residue of uncertainty, it is suggested that the above economic analysis of *Digilandmall*, drawing the distinction in terms of the type of information held and the process by which the information is acquired by the buyer, would mitigate this. Where the information used is purely redistributive, and is not acquired as a result of substantial investment of time and resources, there is little economic reason to enforce the contract in favour of the buyer. Conversely, the greater the extent that the information used is productive, and acquired as a result of substantial investment of time and resources, the more likely it is that the contract will be enforced to preserve the incentive of such buyers.[26]

26 In a written decision delivered by Chao Hick Tin JA on 13 January 2005 (see [2005] 1 SLR 502), the Court of Appeal dismissed the plaintiff's appeal against the decision of the High Court, except in relation to the order for costs for the trial. Notably, the court held that it is only where the court finds that there is actual knowledge by the non-mistaken party of the mistaken party's error that the case comes within the ambit of the common law doctrine of unilateral mistake. The state of a person's mind has to be proved like any other fact. In the absence of an admission or incontrovertible evidence, the fact of knowledge would invariably have to be inferred from all the surrounding circumstances. In the court's view, phrases such as "must have known" and "could not have reasonably have supposed" are really evidential factors or reasoning processes used by the courts in finding that the non-mistaken party did, in fact, know of the error made by the mistaken party. The court went on to state however, that there exists an equitable jurisdiction in the area of unilateral mistake. Constructive notice is a doctrine of equity, and whether constructive notice by a non-mistaken party of the mistake should lead to equitable intervention must depend on the presence of other factors which could invoke the conscience of the court, such as "sharp practices" or "unconscionable conduct". There must be an additional element of impropriety. The conduct of deliberately not bringing the suspicion of a possible mistake to the attention of the mistaken party, as in *Digilandmall*, could constitute such impropriety. On the facts, the court found that each of the appellants had actual knowledge of the respondent's mistake. Even if there were no finding of actual knowledge, equity would have intervened to set aside the purchases as what transpired clearly constituted "sharp practices".

VII. Conclusion

45 From *Digilandmall*, it can be seen that what resonates with our intuitive sense of fairness is also supported by economic analysis. When what is fair is also what is better for society economically and commercially, fairness acquires a different gleam. It is no longer an occasional idealistic handmaiden to commerce. Fairness and the support of commerce become intertwined. That this is so should not be hard to see. After all, the very objective of contract law is to keep an agreement which is a notion that is both fair and supports commerce. Fairness and the support of commerce are not exclusive concepts. Rather, together, they form the foundation of contract law.