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UNILATERAL MISTAKE IN CONTRACT: FIVE DEGREES OF FUSION OF COMMON LAW AND EQUITY

Chwee Kin Keong v. Digilandmall.com Pte. Ltd.

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I. INTRODUCTION

The decision of V.K. Rajah J.C. in the Singapore High Court in *Chwee Kin Keong v. Digilandmall.com Pte. Ltd.*[1] has the makings of a student's classic for several reasons: it presents a textbook example of offer and acceptance; it is set in the context of internet contracting; it involves the use in evidence of email, instantaneous messaging, and short messaging system (SMS); and it leaves a trail of tantalising dicta providing much fodder for classroom discussions.[2] This comment focuses on the effect of a unilateral mistake on a contract, particularly on the potential paths of developments following from the case.

The salient facts found by the court can be shortly stated. A mistake of the defendant's employee caused the defendant's website to indicate that it was selling a certain model of colour laser printer, normally retailing for just under S$4,000, for the price of S$66. In all, the six plaintiffs had purported to purchase 1,606 units in several separate orders, at a price of just over S$100,000 for goods worth more than S$6m in the market. The plaintiffs wanted to enforce the contract. The defendants resisted enforcement on several grounds, the most important being that the contract had been entered into as a result of a unilateral mistake. The defendant had originally relied on the effect of the mistake in the common law, but felt compelled by the strategy of the plaintiffs to plead the effect of the mistake in equity in the alternative.

The court found that the plaintiffs knew or had a real belief,[3] or ought to have known,[4] that the defendant was acting under a mistake that was fundamental and related to an essential term of the contract, and the contract was therefore void under the common law. The court went on to consider the alternative case of unilateral

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1 [2004] 2 S.L.R. 594, [2004] S.G.H.C. 71 (appeal pending). References to paragraph numbers are to this judgment unless otherwise indicated.

2 Including an invitation to reconsider the doctrine of consideration in the common law (at para. 139), which will not be discussed here.

3 See the summary of relevant findings at para. 140. Barring any metaphysical discussion, knowledge is assumed to be synonymous with real belief for the purpose of this comment.

4 See para. 144.

mistake in equity. Agreeing with the recent English Court of Appeal decision in *Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd.*,[5] which denied the existence of an equitable jurisdiction to rescind agreements for common mistake,[6] Rajah J.C. went further to state that he was also not in favour of a separate equitable jurisdiction to rescind agreements for unilateral mistakes. However, he was sympathetic to the rationalisation of the law under a unified doctrine incorporating elements of both the common law and equity, but thought that this step should be left to legislation.

II. Unilateral Mistake at Common Law

The decision on the effect at common law of a unilateral mistake as to the content of an essential term in a contract known to the non-mistaken party would have been quite unremarkable but for the excursus on the justification for the common law rule. Under the common law rule, where a non-mistaken party actually knows of the mistaken party's error, the non-mistaken party cannot hold the mistaken party to an agreement on the literal terms under the normal objective test for the determination of the formation of a contract, because there is no reason to apply the objective test in this situation. The objective test of agreement is not founded on high theory, but on the pragmatic reason so familiar to the common law: the need to grease the wheels of commerce.[7] Furthermore, it does no injustice to apply this subjective exception to the objective test because a party who knows that the other party was mistaken as to the terms of the agreement has no legitimate expectations that the court would enforce such an agreement on the literal terms of the bargain.[8] All this is trite law, and is accepted by Rajah J.C.[9]

Less certain is the justification for extending the rule to cases where the non-mistaken party did not have actual knowledge, but ought to have known about the other party's mistake.[10] It could be argued that if a reasonable non-mistaken party would have known that the subjective intention of the mistaken party did not coincide with his objective intention, it is not possible for the parties to reach an agreement on the objective theory. The difficulty with this explanation is that it is one-sided in its application of the test of reasonableness. Conversely, if a reasonable person in the position of the mistaken party would have known of the mistake in the offer (*i.e.*, he was careless in making the mistake), then the mistaken party cannot deny the objective interpretation of the literal meaning of the terms of the offer if the

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5 [2003] Q.B. 679, [2002] E.W.C.A. Civ. 1407 [*Great Peace*].

6 *Cf. Ho Seng Lee Construction Pte. Ltd. v. Nian Chuan Construction Pte. Ltd.* [2001] 4 S.L.R. 407, decided before *Great Peace*, where Judith Prakash J. had approved of passages in *Associated Japanese Bank (International) Ltd. v. Crédit du Nord S.A.* [1989] 1 W.L.R. 255 accepting the existence of the equitable jurisdiction to set aside agreements for common mistake.

7 G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003) 1, 8-9.

8 *Ibid.* at 1.

9 See paras. 105, 113 and 153.

10 On the alternative finding of the court: see note 4 above.

non-mistaken party did not know and did not contribute to the error.[11] But the common law test focuses only on the perception of the non-mistaken party.[12]

A more convincing argument may be that the non-mistaken party, in failing to meet a certain standard of conduct in pre-contractual negotiations, is disentitled from relying on the objective theory to hold the mistaken party to the literal meaning of the terms of the contract. He cannot take advantage of the mistaken party's misfortune. This justification can also explain the case of actual knowledge of the mistake: a contracting party who knows for a fact that the other is acting under a relevant mistake is clearly acting shabbily in asking the court to uphold the contract on terms which he knew were not intended by the mistaken party. This explanation has been hinted at in English authorities,[13] and is embraced by Rajah J.C. as the justification of the common law rule without distinction as to actual or presumed knowledge.[14]

This could also explain why a contract affected by an operative unilateral mistake under the common law is not always void *ab initio*. It may be possible for the mistaken party to hold the non-mistaken party to the literal terms of the contract, should he wish to do so because of an abrupt change in market conditions.[15] Although Rajah J.C. held that the effect of an operative unilateral mistake under the common law is to render the contract void *ab initio*,[16] this is clearly qualified by another statement that in unusual circumstances the law can find a contract on terms intended by the mistaken party.[17]

However, while using the improper conduct of the non-mistaken party to justify the common law rule, Rajah J.C. also stated that all that had been said about the behaviour and expectations of reasonable and honest persons "ought not to be viewed as supporting the existence of a general test of commercial morality [in the common law] tantamount to the test of unconscionability invoked by equity."[18] Thus, the

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11 *Scriven Brothers & Co. v. Hindley & Co.* [1913] 3 K.B. 564. This could also explain why in the present case the carelessness of the mistaken party was irrelevant (see para. 149), even though it could be argued that the cost of discovering the error was probably lower for the defendant than for the plaintiffs; the defendant in maintaining the website could presumably have executed boundary-checking algorithms as part of routine error-checking.

12 *O.T. Africa Line Ltd. v. Vickers plc.* [1996] 1 Lloyd's Rep. 700 at 703 [*O.T. Africa Line*]. See also para. 149 of Rajah J.C.'s judgment.

13 *Laceys Footwear (Wholesale) Ltd. v. Bowler International Freight Ltd.* [1997] 2 Lloyd's Rep. 369 (C.A.) at 384-5. The reference by Lord Phillips in *Shogun Finance Ltd. v. Hudson* [2004] 1 A.C. 919 at [123], [2003] U.K.H.L. 62 to estoppel-like principles suggests that the non-mistaken party's conduct is relevant: see also text to note 11 above and text to note 37 below.

14 See paras. 105, 116, 149.

15 Treitel, *supra* note 7 at 309.

16 See paras. 149-150.

17 See para. 107. See also *Ho Seng Lee Construction Pte. Ltd. v. Nian Chuan Construction Pte. Ltd.*, *supra* note 6 at [84]. The mistaken party may be able to enforce the contract according to his subjective intention under common law rules relying on estoppel by representation or conduct where applicable (*cf. Hector v. Lyons* (1989) 58 P. & C.R. 156 at 159). Where there is a written contract, the mistaken party could ask for rectification in the court's equitable jurisdiction so that it will reflect his subjective intention which was known or at least apparent to the non-mistaken party (*Commission for the New Towns v. Cooper (Great Britain) Ltd.* [1995] Ch. 259 (C.A.) [*Cooper*]; *Chai Chung Ching Chester v. Diversey (Far East) Pte. Ltd.* [1993] 1 S.L.R. 535 (C.A.) 540). This presupposes that there is a valid agreement at common law to be rectified in equity.

18 See para. 153.

justification for the common law rule may be similar to unconscionability in equity, but it is not a rule of unconscionability.

At the same time, it is not clear what the common law test is beyond the case of actual knowledge. Where the non-mistaken party has actual knowledge of the mistake, then on any view it is improper for him to take advantage of the situation. In the judgment, it appears that the common law rule is operative where the non-mistaken party actually knows,[19] or is deemed[20] or presumed[21] to know, or has constructive knowledge,[22] or where a reasonable person in the same position would have known,[23] that the other party was mistaken as to something which is fundamental and which relates to an essential term in the contract.[24]

While the court would apply the observation in *Commission for New Towns v. Cooper (Great Britain) Ltd.*,[25] that deemed knowledge includes the concept of Nelsonian knowledge,[26] to the common law rule of unilateral mistake,[27] it is not clear that the court had drawn the line there. The court endorsed the view of Mance J. in *O.T. Africa Line Ltd. v. Vickers plc.*[28] that the common law rule extended to a situation where the non-mistaken party failed or refrained from making enquiries for which the situation reasonably calls and which would have led to the discovery of the other's mistake. Mance J. said, however, that there must be a real reason to suppose the existence of the mistake before the law would impose a burden of inquiry.

It is not clear, however, whether this real reason must be subjectively known to the non-mistaken party, or whether it is enough that a reasonable person in the position of the non-mistaken party would have appreciated that there was cause for investigation.[29] Rajah J.C. appeared to consider it sufficient that the mistake would have put a reasonable person on notice,[30] though this is not inconsistent with a standard of good faith if the notice itself is merely a guide used by the court to determine the actual state of mind of the party.[31]

It is perhaps unwise to focus excessively on the minutiae of the different levels of knowledge.[32] The fundamental question is whether the standard is one of reasonableness or something higher, somewhat akin to the idea of good faith that the court

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19 See paras. 109, 149.
20 See paras. 109, 111, 113, 146.
21 See para. 149.
22 See paras. 109, 114.
23 See paras. 110-112, 144.
24 See para. 107.
25 *Cooper*, *supra* note 17, a case on the rectification of a written contract for unilateral mistake in equity, even though, curiously, it was apparently characterised by the court as a case of common mistake in the common law: see para. 113.
26 *I.e.*, wilful blindness, or shutting one's eyes to the obvious.
27 See para. 113.
28 *O.T. Africa Line*, *supra* note 12 at 703.
29 These correspond roughly to levels 4 and 5 of the hierarchy of constructive knowledge in equity stated in *Baden v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France S.A.* (Note) [1993] 1 W.L.R. 509 and discussed in *Cooper*, *supra* note 17.
30 See para. 144.
31 It can be used as a guide to determine dishonesty: *Agip (Africa) Ltd. v. Jackson* [1990] Ch. 265 at 293.
32 *Cf.* Lord Nicholls in *Royal Brunei Airlines Sdn. Bhd. v. Tan Kok Ming Philip* [1995] 2 A.C. 378 (P.C. Brunei), in the context of liability for assistance in a breach of trust, deprecated the use of levels of knowledge in legal analysis, and stated that the focus should be on the standard of conduct of the defendant.

rejected as the test. Yet, it is not clear that the courts can actually avoid addressing the question of good faith within the test of reasonableness, given that the justification for the rule as endorsed by the court, the notion of the prevention of the "taking advantage"[33] of another's mistake, suggests the imposition of some kind of good faith duty[34] on contracting parties beyond negligence, even if it is not articulated as a test in itself.[35] It is difficult to justify a pure negligence rule: if mere negligence in failing to discover the other party's error prevents[36] the non-mistaken party from pleading an agreement on the literal terms, it is hard to see why negligence in making the error does not prevent the mistaken party from denying the agreement on the literal terms.[37]

III. Unilateral Mistake in Equity

On the other hand, the taking advantage of another's mistake in the procuring of an agreement is more clearly a basis of the equitable jurisdiction to set aside contracts for unilateral mistakes. The jurisdiction of equity to deal with unconscionable behaviour is a long-standing one. An early eminent writer, Joseph Story, stated:

> The fact may be unknown to both parties, or it may be known to one party and unknown to the other. *If it is known to one party, and unknown to the other, that will in some cases afford a solid ground for relief, as for instance where it operates as a surprise, or a fraud, upon the ignorant party*. But in all such cases the ground of relief is, not the mistake or ignorance of material facts alone, but the *unconscientious advantage* taken of the party by the concealment of them. For if the parties act fairly, and it is not a case where one is bound to communicate the facts to the other, upon the ground of confidence, or otherwise, there the court will not interfere.[38]

The court in its equitable jurisdiction has the "ordinary jurisdiction . . . to deal with . . . transactions, in which the Court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained."[39] Some kind of fraud, sharp practice or unfair dealing on the part of the non-mistaken party has to be shown.[40]

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33 See paras. 105, 116, 149, and 155.

34 More accurately a disability rather than a duty, as the only consequence is the inability to hold the mistaken party to the bargain; there is no action for breach of duty as such.

35 *Cf.* good faith as a test, if only as a non-decisive consideration, is not alien to the common law. See the express acknowledgement of good faith as a consideration in the common law test for duress: *Sharon Global Solutions Pte. Ltd. v. L.G. International (Singapore) Pte. Ltd.* [2001] 3 S.L.R. 368. See also *Laceys Footwear (Wholesale) Ltd. v. Bowler International Freight Ltd.*, *supra* note 13 at 384-5.

36 This is akin to but short of estoppel: see *Shogun Finance Ltd. v. Hudson*, *supra* note 13.

37 See text to note 11 above.

38 Emphasis added. J Story, *Commentaries on Equity Jurisprudence* (3rd edn by AE Randall, Sweet & Maxwell London 1920) at para. 147 (footnotes omitted).

39 *Torrance v. Bolton* (1872) L.R 8 Ch. App. 118 at 124. *Chong Sze Pak v. Har Meng Wo* [1998] 1 S.L.R. 472 at [26].

40 *Riverlate Properties Ltd. v. Paul* [1975] 1 Ch. 133 (C.A.) at 140-5, citing numerous authorities from the Chancery jurisdiction.

If the jurisdiction is thus defined, it appears to be untouched by the English Court of Appeal decision in *Great Peace*.[41] Although the Court of Appeal denied the existence of the equitable jurisdiction to rescind agreements merely for common mistake, it did not doubt that such residual jurisdiction existed if there had been fraud or surprise in a case involving a common or unilateral mistake.[42] The High Court of Australia, in affirming the equitable jurisdiction to set aside contracts for unilateral mistakes, appeared to be relying on this unconscionability jurisdiction.[43] The exercise of this jurisdiction requires the demonstration of some unconscionable conduct in the procuring of the contract. It is unlikely to be enough to show that the non-mistaken party had merely been negligent in failing to appreciate the error of the mistaken party as a reasonable person would have done.[44]

However, in *Solle v. Butcher*,[45] Lord Denning (in *dictum* as far as unilateral mistake was concerned) purported to extend this jurisdiction to cases where, though there may not have been any improper conduct at the time of the formation of the contract, there is some equitable ground for the contract to be rescinded.[46] This broader statement of the law has been doubted by academics[47] and now probably judicially expunged from English law even in respect of unilateral mistakes,[48] but it has enjoyed a certain measure of judicial support in Canada[49] and also Singapore.[50]

What does follow from the *Great Peace* decision is that Lord Denning's statements on the wide jurisdiction of equity to set aside contracts for common or unilateral

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41 The Court of Appeal did not expressly dissent from *Riverlate Properties Ltd. v. Paul*, *ibid.*, which recognised the rescission jurisdiction in respect of unilateral mistakes. In *Huyton S.A. v. Distribuidora Internacional de Productos Agricolas S.A. de C.V.* [2003] 2 Lloyd's Rep. 780 (C.A.) at [6], [2003] E.W.C.A. Civ. 1104, the English Court of Appeal appeared to assume that the equitable jurisdiction to rescind for unilateral mistake survived the *Great Peace* decision, at least where there is something like misrepresentation involved. See also [2003] 2 Lloyd's Rep. 780 at [414] and [455], [2002] E.W.H.C. Comm. 2088.

42 At para. 110, citing Lord Chelmsford in *Earl Beauchamp v. Winn* (1873) L.R. 6 H.L. 223 at 233.

43 *Taylor v. Johnson* (1983) 151 C.L.R. 422 at 432; R.P. Meagher, J.D. Heydon and M.J. Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed. (New South Wales: Butterworths, 2002) at para. 14-045.

44 The suggestion by Shaw J. in *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1995) 21 C.L.R. (2d.) 39, (B.C.S.C.) at 69-70 that constructive knowledge of the mistake alone would be sufficient to invoke the jurisdiction of equity to deal with unilateral mistakes, cited in the judgment at para. 118, was overruled on appeal in 74 B.C.L.R. (3d.) 30, 2000 B.C.C.A. 105, Southin J.A. stating: "In my opinion, questions of unconscionability are not matters to be determined on what someone ought to have known, but what he did know". The case involved rectification for unilateral mistake. However, Shaw J.'s statement was cited with approval (as noted by Rajah J.C. at para. 118) by a differently constituted Court of Appeal in *25659 B.C. Ltd. v. 45695 B.C. Ltd.* (1999) 171 D.L.R. 4th 470 (paras. 25-26) in respect of rescission for unilateral mistakes. The Canadian position thus appears to be that while unconscionable conduct by the non-mistaken party in the procuring of the contract is required for rectification for unilateral mistake, the unconscionability needed to invoke the equitable jurisdiction for rescission need not be found in the improper conduct of the non-mistaken party in procuring the contract.

45 [1950] 1 K.B. 671 (C.A.).

46 *Ibid.*, at 691.

47 See, *e.g.*, C. Slade, "The Myth of Mistake in the English Law of Contract" (1954) 70 L.Q.R. 385. J. Cartwright, "*Solle v. Bucher* and the Doctrine of Mistake in Contract" (1987) 103 L.Q.R. 594.

48 *Great Peace*, *supra* 5. At least until the House of Lords rules otherwise on the matter.

49 *McMaster University v. Wilchar Construction Ltd.* [1971] 3 O.R. 801 at 810-1, 22 D.L.R. (3d.) 9: the court may rescind the contract if "it considers that it would be unfair, unjust or unconscionable not to correct [the mistake]": affirmed: (1973) 69 D.L.R. (3d.) 400 (note) (Ont. C.A.).

50 *Chong Sze Pak v. Har Meng Wo*, *supra* note 39 at [26], especially sub-para. (c).

mistake merely because it would be inequitable to enforce the contract no longer represent English law. It does not follow that there is no equitable jurisdiction at all to deal with unconscionable taking advantage of another's mistake in procuring the contract.[51] However, Rajah J.C. thought that *Great Peace* is highly persuasive in Singapore law, and that it should follow that there is no jurisdiction to set aside contracts for unilateral mistake.[52] Although Rajah J.C.'s reservations about the use of the equitable jurisdiction were made in the context of a case found to involve the conscious taking advantage of another's mistake in the formation of the contract, no distinction was drawn between the narrower jurisdiction requiring unconscionable conduct in the procuring of the contract and the wider jurisdiction espoused by Lord Denning based on a broader notion of inequity in enforcing the agreement. Nevertheless, it could be argued that the narrower unconscionability jurisdiction is not a doctrine in unilateral mistake as such, but properly characterised as unconscionable dealing,[53] so that a rejection of an equitable doctrine of unilateral mistake as such leaves this narrower unconscionability jurisdiction unscathed. Thus, the observations of the Singapore High Court have left the existence and scope of the equitable jurisdiction to deal with unilateral mistakes under Singapore law in doubt.

IV. Five Degrees of Fusion

In coming to the conclusion on its preference in the use of the common law at the expense of equity to deal with unilateral mistakes in contract law, the court touched upon the difficult relationship between the common law and equity. The judgment ranges over the different terrains in Australia, Canada and New Zealand, and concludes that the best way forward for Singapore law, judicially, is for unilateral mistakes to be dealt with by the common law alone. As seen in the previous section, it is not clear whether this leaves room for the narrower unconscionability jurisdiction in Singapore. Nevertheless, Rajah J.C. also opined that the better solution may be the integration of the common law and equitable rules through legislative reform, much like what has been done in New Zealand.[54]

As far as judicial development of the law of unilateral mistakes is concerned, the *dicta* in the judgment raise important questions of the appropriate relationship between common law and equity for the law of Singapore. The starting point for analysis is that the fusion of law and equity[55] was only a fusion of administration. The doctrines and principles of common law and equity were still distinct. Thereafter, different countries have taken different views on the fusion of the substantive rules. The wide-ranging discussion of the court provides some guidance on the possible judicial attitudes in Singapore to five overlapping degrees of fusion of common law and equity in respect of unilateral mistakes.

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51 See above, text to and following note 14.

52 See paras. 120, 128-30.

53 *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, *supra* note 43 at para. 14-045.

54 See para. 130, referring to the *Contractual Mistakes Act 1977* (New Zealand).

55 *Civil Law Act* (Cap. 43, 1999 Rev. Ed. Sing.), s. 3.

A. *The First Degree: Separate Regimes at Common Law and in Equity*

The first model of the relationship between common law and equity is represented by the present law in England[56] and Singapore,[57] and probably in Australia[58] and Canada[59] also. Common law rules and equitable principles exist side by side as if they were still administered by different courts. Unilateral mistakes can have effect at common law or in equity. But if the contract is void at law, there is nothing left for equity to act upon. The most important consequence of the common law approach appears in cases involving third parties: *bona fide* purchasers of property purportedly passing under a void contract receive no protection under the common law and very limited statutory protection. Equitable intervention is relevant only when the contract is not void for unilateral mistake at common law. A contract is only voidable in equity, so that the intervention of *bona fide* third party rights can bar rescission, as can the impossibility of *restitutio in integrum*. A contract may be rescinded on terms imposed by the court.

The main advantage of this model is the maintenance of the *status quo*; thus, familiarity of judges and counsel. However, the proper functioning of this model presupposes a clear division of when a unilateral mistake will render a contract void, when it will render the contract merely voidable, and when it has no effect on the contract at all. Under the law in England and probably Singapore, operative unilateral mistake at common law is presently confined to mistakes as to identity[60] of a contracting party and mistake as to the existence or content of an important term in the contract.[61]

In equity, it is unnecessary for the unilateral mistake to be in respect of a term of a contract,[62] though it is probably necessary to show that the mistake was fundamental and affected an important term in the contract.[63] It may also be that what is regarded as fundamental in equity may be broader than under the common law, though this point may be in doubt after *Great Peace*.[64] Further, as discussed above,

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56 Unilateral mistake at common law: *Smith v. Hughes* (1871) L.R. 6 Q.B. 597; *Hartog v. Colin and Shields* [1939] 3 All E.R. 566. Unilateral mistake in equity: *Riverlate Properties Ltd. v. Paul*, *supra* note 40; *Huyton S.A. v. Distribuidora Internacional de Productos Agricolas S.A. de C.V.* [2003] 2 Lloyd's Rep. 780 at [455], [2002] E.W.H.C. Comm. 2088 [*Huyton*].

57 Unilateral mistake at common law: *Ho Seng Lee Construction Pte. Ltd. v. Nian Chuan Construction Pte. Ltd.*, *supra* note 6. Unilateral mistake in equity: *Chong Sze Pak v. Har Meng Wo*, *supra* note 39; *United Overseas Bank Ltd. v. Malaysia Electric (Geylang) Co. Pte. Ltd.* [1992] S.G.H.C. 177.

58 *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, *supra* note 43, ch. 14.

59 *McMaster University v. Wilchar Construction Ltd.*, *supra* note 49.

60 *Shogun Finance Ltd. v. Hudson*, *supra* note 13; *Tribune Investment Trust Inc. v. Soosan Trading Co. Ltd.* [2000] 3 S.L.R. 405 (C.A.) at paras. 46-47, [2000] S.G.C.A. 33.

61 *Smith v. Hughes*, *supra* note 56; *Hartog v. Colin and Shields*, *supra* note 56. Although Rajah J.C.'s articulation of this aspect of the common law rule is closer to the formulation in equity in looking at whether the mistake was fundamental and *relates* to an essential term or an essential aspect of the contractual relationship (see paras. 107 and 133), it was formulated in the negative, the mistake in question was as to the content of an essential term, and there was no indication that the court was extending English common law in this respect.

62 See *United Overseas Bank Ltd. v. Malaysia Electric (Geylang) Co. Pte. Ltd.*, *supra* note 56; *Huyton*, *supra* note 56 at [455].

63 *Huyton*, *ibid*.

64 Although there is no such thing as a "fundamental" common mistake in equity in English law in the light of *Great Peace*, technically it did not deal with the narrower unconscionability jurisdiction. See, however, *Huyton*, *supra* note 56 at [455], especially sub-para. (ii).

the equitable jurisdiction (what is left after the rejection of Lord Denning's expanded equitable jurisdiction) probably requires unconscionable conduct on the part of the non-mistaken party prior to the formation of the contract in taking advantage of the other party's mistake of which he had actual or constructive knowledge. It is not clear to what extent this unconscionability differs from the common law rule based on the taking advantage of a mistake which a reasonable person in the position of the non-mistaken party would have known about.

However, three general criticisms may be levelled at this approach. Firstly, the law is using different techniques, with different consequences for the contracting parties themselves as well as third parties, to resolve what is essentially a single problem of risk allocation between the parties. Secondly, there is (especially now) uncertainty as to where the line is drawn between unilateral mistakes taking effect at common law and those taking effect in equity. Thirdly, there is uncertainty about the scope of the jurisdiction in equity, especially after the doubts expressed by Rajah J.C.

B. *The Second Degree: Borrowing Concepts across Common Law and Equity*

A minor but important form of fusion takes the form of the borrowing of concepts across the jurisdictions. This is not uncommon. For example, the common law borrowed the concept of relief against forfeiture from equity and developed it into its rule against penalties. Conversely, chancery judges not infrequently took an idea from the common law and developed it with greater sophistication, *e.g.*, in the law of contribution among co-sureties. In the area of unilateral mistake, we have seen that the common law has borrowed the idea of constructive or deemed knowledge from equity. There is nothing wrong with this approach, provided it is done rationally. For example, to the extent that dishonesty has a common meaning and function in the common law and equity, the same test should be applied.[65] Thus, if actual knowledge has a common meaning at common law and in equity, then it would be appropriate to consider the authorities in equity to determine actual knowledge in the common law.[66] So a person with actual knowledge of the other party's mistake will fall foul of both common law and equitable prohibitions against the taking advantage of another's mistake. Caution has to be exercised insofar as the common law is testing for carelessness and equity is looking for unconscionability. However, if, as it seems from the discussion above, the common law is looking beyond carelessness to some impropriety, equity is an appropriate analogy to look to for the standard of conduct.

What appears to be of greater concern is the use of the common law standard of carelessness as a proxy for unconscionability in equity.[67] Rajah J.C.

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[65] See, *e.g.*, the applicability of the equitable test of dishonesty in the dishonest assistance of breach of trust cases (*Twinsectra Ltd. v. Yardley* [2002] 2 A.C. 164, [2002] U.K.H.L. 12) to common law deceit (*Niru Battery Manufacturing Co. v. Milestone Trading Ltd.* [2004] 1 Lloyd's Rep. 344, [2003] E.W.C.A. Civ. 1446). It is questionable, however, whether the most appropriate test was used in equity in the first place: T.M. Yeo & H. Tjio, "Knowing What is Dishonesty" (2002) 118 L.Q.R. 502.

[66] See para. 113.

[67] As appears to be the case in *25659 B.C. Ltd. v. 456795 B.C. Ltd.* (1999) 171 D.L.R. (4th) 470, cited in para. 118 of Rajah J.C.'s judgment. See note 44 above.

cautioned against following the Canadian authorities,[68] which appear to have taken that step.[69]

C. *The Third Degree: Unilateral Mistake at Common Law Only*

Rajah J.C.'s preferred approach, at least in respect of judicial development, is that unilateral mistakes should be dealt with only at common law. Three principal reasons can be discerned. Firstly, he agreed with the Court of Appeal in *Great Peace* that Lord Denning's statements on the scope of the equitable jurisdiction in *Solle v. Butcher*[70] were unsupported by authority.[71] Secondly, adapting the reasoning in *Great Peace*, he opined that the common law authorities on unilateral mistakes should not be trifled with unless they are very obviously anachronistic and incompatible with commercial and legal pragmatism.[72] At the same time, the court expressed confidence in the use of the common law alone to deal with the "reasonable expectations of honest men".[73] Thirdly, the existence of a malleable jurisdiction encourages uncertainty and litigation.[74]

However, as seen in section III above, rejection of Lord Denning's view of the broad scope of the equitable jurisdiction need not entail the total rejection of the residual equitable jurisdiction to deal with unconscionable conduct, a jurisdiction in fact preserved by the Court of Appeal in *Great Peace*.[75] While it is possible to do necessary justice to the parties within the common law, two further points should be noted. Firstly, it is not so clear that the common law will be substantially less uncertain than equity. While cases of actual knowledge are easy to deal with, it is less clear how the common law will deal with cases beyond actual knowledge. Techniques will probably be borrowed from equity to determine the standard of improper conduct. In any event, Rajah J.C. was not totally against discretion, since it was in favour of legislatively conferred discretion.[76] Secondly, the structural problem in the common law, of using a contract technique to resolve a property question, seen in the cases involving property transferred under the purported contract ending up in the hands of a third party, will be given undue emphasis if unilateral mistakes are dealt with purely by the common law.

D. *The Fourth Degree: Unilateral Mistake in Equity Only (or Mostly)*

One approach is to deal with unilateral mistakes in equity only. This clearly did not find favour with Rajah J.C.[77] In terms of legal technique, it is not clear how this is actually achieved.

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68 See paras. 119-120.
69 See note 67 above.
70 See note 45 above.
71 See para. 129.
72 See para. 130.
73 See paras. 151-152.
74 See paras. 120, 129.
75 See above, text to notes 41 and 42.
76 See para. 130.
77 See the reservations expressed in para. 120.

One view is suggested by Lord Denning in *Solle v. Butcher*.[78] By using an extreme version of the objective theory of contract formation based on the observation by an objective bystander of the negotiations between the two contracting parties, a contract would be formed where it would appear so to this bystander. All unilateral mistakes[79] would not affect the validity of the contract at common law, and the issue is dealt with entirely in equity. This view is clearly inconsistent with the law in England and Singapore, where unilateral mistakes clearly have effect under the common law.[80]

Another approach is to confine the operation of unilateral mistakes at common law to as narrow a compass as possible.[81] Thus the High Court of Australia in *Taylor v. Johnson* has opined that unilateral mistakes at common law only has effect in relation to mistakes as to identity, and possibly mistakes as to the nature of the contract, but not, however, mistakes as to the existence or meaning of a term of the contract. This position is also inconsistent with the law of England and Singapore.[82]

A third approach is to say that since equity prevails over the common law,[83] the equitable principles of mistake have superseded the common law rules.[84] However, this approach is untenable without engaging the fusion fallacy. The fallacy arises if a substantive result occurs in the application of common law and equity which could not have occurred if they were applied by different courts. On the orthodox view, there is nothing left for equity to do once a contract is void at common law. If fusion of substantive rules is the correct approach, it cannot be done by relying on the merger of the courts alone.

A fourth approach is to ignore the common law. This appears to be the situation in Canada, where the arguments are more commonly raised in equity. However, this is merely a reflection of the growing scope of the equitable jurisdiction in Canada; it does not prevent unilateral mistake at common law from being pleaded, as it is still part of Canadian law.[85] Thus this is not a theoretical approach, but simply a factual phenomenon.

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78 See note 45 above.

79 And indeed common mistakes as well.

80 Lord Denning conceded subsequently that mistake of identity could lead to a void contract at common law (*Gallie v. Lee* [1969] 2 Ch. 17(C.A.) 33), at least where it would be evident to the objective bystander that the mistaken party had not made the offer to the non-mistaken party (as in *Cundy v. Lindsay* (1878) 3 App. Cas. 459 where the identity of the non-mistaken party appeared in writing in documents that were exchanged and did not coincide).

81 It is suggested that this is the sense in which Rajah J.C.'s use of the term "fused" at para. 126 must be understood. It is otherwise a serious charge that Australian jurisprudence, which prides itself on the continued segregation of common law and equitable doctrines, has "purportedly applied a fused concept of law and equity to the law on mistake." The statement that the effect of the unilateral mistake in Australian law is to render the contract "unenforceable rather than void" (*ibid.*) must be read with caution. The language of unenforceability of common law rights in *Taylor v. Johnson* (*supra* note 43 at 431-2) is a throwback to the days when chancery judges issued the common injunction to prevent the respondent from seeking the enforcement of legal rights in the common law courts, which in modern thinking is understood to be the process of rescission of the contract in equity.

82 *Supra* 43 at 430. Thus, doubts have been expressed as to the applicability of decisions like *Hartog v. Colin and Shields*, *supra* note 56, in Australian law: *Tlais v. Tlais* [2003] N.S.W.S.C. 1143 at para. 5.

83 See note 55 above.

84 See, *e.g.*, C. Grunfeld, "A Study in the Relationship Between Common Law and Equity in Contractual Mistake" (1952) 15 M.L.R. 297.

85 *McMaster University v. Wilchar Construction Ltd.*, *supra* note 49 at 809-10; *Marwood v. Charter Credit Corp.* (1971) 2 N.S.R. (2d.) 743, 747, 20 D.L.R. (3d.) 563; *Belle River Community Arena Inc. v. W.J.C. Kaufmann Co.* (1978) 20 O.R. (2d.) 447, 87 D.L.R. (3d.) 761 (C.A.).

On the last approach, the courts would gradually cut down on the scope of common law mistake while incrementally widen the equitable jurisdiction. To different degrees, this is probably happening in Canada and Australia. The main advantages of this approach are that the minimising the effect of the common law increases the protection of third party property interests where this issue is relevant, and the gradual development of what would practically be a single set of principles to deal with unilateral mistakes. The main shortcoming is probably the uncertainty of the scope and content of the equitable jurisdiction, but this is probably no more serious a problem than, say, a discretion conferred by legislation as in the case of New Zealand.

E. *The Fifth Degree: Fusion of Substantive Rules*

Recognising the pitfalls of rigid and mechanical rules, Rajah J.C. was in favour of "rationalising the law of mistake under a single doctrine incorporating the best elements of common law and equity".[86] However, he thought that this was a matter best left to legislative law reform. That judicial restraint was demonstrated by a Judicial Commissioner sitting at first instance is perhaps not surprising. But it is surely open to the Court of Appeal in an appropriate case to take a bolder approach.[87] It would be a bold and unhistorical step, and will definitely attract some criticisms of fusion fallacy. But there is nothing inherently wrong with fusion, provided the historical context for the division and the reasons for the different content of common law rules and equitable principles are understood.[88] Fusion of substantive rules is only a fallacy if it is assumed to follow from the fusion of administration alone. It is not a fallacy if it is the conscious and rational choice of the legal system selectively to merge substantive rules, and the consequences are fully appreciated. On the other hand, it is axiomatic that legislative reform can take a more comprehensive approach than case-law development.

V. Conclusion

Chwee Kin Keong v. Digilandmall.com Pte. Ltd. has confirmed for the common law of Singapore that actual or deemed knowledge of another's mistake as to the content of an essential term of a contract prevents the non-mistaken party from upholding the contract on its literal terms; the contract is at least void as far as the non-mistaken party is concerned. In clarifying that the justification for the common law rule is the improper taking advantage of another's error, the court exposed the ethical foundation of the rule. Indeed, the court went further to borrow some aspects of

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[86] See para. 130. See also the analogous arguments in respect of common mistake in A. Phang, "Common Mistake in English Law: the Proposed Merger of Common Law and Equity" (1989) 9 L.S. 291 and P.M. Perrell, *The Fusion of Law and Equity* (Ontario: Butterworths, 1990) ch. 8.

[87] The Singapore Court of Appeal has, on a previous occasion, not been deterred by the common law-equity distinction in considering that the equitable doctrine of laches was applicable to a claim based purely on the common law and where no equitable remedy was sought: *Management Corp. Strata Title No. 473 v. De Beers Jewellery Pte. Ltd.* [2001] 4 S.L.R. 90 (C.A.). While the court merely assumed its applicability without discussion, this fusion could be arguably be justified on policy grounds (no statutory limitation being applicable) as a narrow stop-gap measure with no wider application.

[88] See generally: S. Worthington, *Equity* (Oxford: Clarendon, 2003).

the notion of unconscionability in stating the common law test. However, the court took pains to point out that general notions of good faith and commercial morality merely informed but did not define the specific common law rule, which stands apart from the equitable notion of unconscionability.[89] The correct legal test for deemed knowledge probably needs to be hammered out in subsequent cases where the facts are not so extreme, but this commentator has suggested that it has to go beyond negligence.

More significantly, the court expressed doubts and reservations about the existence of an equitable jurisdiction to deal with situations involving unilateral mistakes in the formation of contracts. This is contentious. The jurisdiction has been acknowledged in previous High Court decisions in Singapore. It is not clear whether the court intended its dictum to go beyond restraining Lord Denning's expansionist aspirations. The fear that the use of "elastic"[90] equitable principles will lead to uncertainty and encourage litigation is arguably exaggerated. The Singapore courts have been prepared to apply equitable doctrines of undue influence and unconscionable bargains to contract law where appropriate, without fear of unnecessarily stoking litigation. Reducing the uncertainty in the content of equitable principles is an exercise that is familiar to the courts, and is indeed not so much different from the exercise undertaken in the present case to define when unilateral mistake is operative at common law.

Between the court's suggested judicial path of development exclusively along common law lines, and its suggested legislative route of statutory discretion, lies a spectrum of other possible avenues for judicial development, reflecting two fundamental tensions in the legal system: the appropriate degree of fusion of or relationship between the substantive rules of common law and equity;[91] and the appropriate balance between certainty and flexibility in the pursuit of justice. The court's opinion that any discretion and flexibility in this area ought to be conferred through legislation and not through judicial decision reflects an unarticulated assumption about judicial restraint, which is unsurprising coming from a court at first instance, but should not constrain the Court of Appeal in an appropriate case.

The proposal of the court to deal with unilateral mistakes using the common law alone has left the existence of the corresponding equitable jurisdiction in doubt. Legal systems based on the common law can only be properly understood in terms of the balance between common law, equity and statutory laws. In any situation, laws from any three of these institutional sources may interact. Often, judges, conscious of the pervasive influence of equity, can afford to allow the common law to remain hard-edged.[92] At face value, the court has called for the abolition of the equitable jurisdiction to be replaced by a wider and more flexible statutory regime combining the best elements of common law and equity. But until that regime is installed, either legislatively or judicially, judicial abrogation of the equitable jurisdiction risks

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89 See para. 153.

90 See para. 123.

91 No clear preference can be discerned: compare the expansion of common law consideration rather than equitable promissory estoppel to deal with renegotiated contracts (*Williams v. Roffey Bros. and Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1 (C.A.)) but the use of the account of profits jurisdiction in equity rather than restitutionary damages at law for the restitution of profits made by breach of contract (*A-G v. Blake* [2001] 1 A.C. 268).

92 *E.g.*, the limited rules of rescission for misrepresentation at common law.

disturbing the equilibrium in the legal system. The risk of imbalance is addressed to some extent by bringing the approach of the common law closer to equity, in adopting as its rationale the taking advantage of the mistake of another, but it may not go quite far enough.[93]

[93] One outstanding problem is the structural problem that the contract is void at common law. Thus, any expansion of the common law to protect contracting parties will have the unnecessary side effect of increasing the risk of prejudice to third party *bona fide* purchasers of property. Other cases which may deserve intervention may involve mistakes which are fundamental but which affect but is not in respect of the existence or content of an essential term in the contract. But *cf.* note 61 above.