**IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE**

**[2017] SGHC(I) 11**

Suit No 7 of 2017 (Summons No 31 of 2017)

Between

B2C2 Ltd

… *Plaintiff*

And

Quoine Pte Ltd

… *Defendant*

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# GROUNDS OF DECISION

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[Civil Procedure] — [Summary judgment]

# B2C2 Ltd
# v
# Quoine Pte Ltd

**[2017] SGHC(I) 11**

Singapore International Commercial Court — Suit No 7 of 2017 (Summons No 31 of 2017)
Simon Thorley IJ
5 December 2017

27 December 2017

**Simon Thorley IJ:**

## Introduction

1 This is an application for summary judgment pursuant to Order 14 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court") in an action for breach of contract and breach of trust. Following the hearing on 5 December 2017, I indicated that I would not be granting summary judgment and that I would give my reasons for refusing relief in writing. These are my reasons.

2 The Defendant is a Singapore registered company which operates a currency exchange platform (the "Platform") enabling third parties to trade virtual currencies for other virtual currencies or for fiat currencies such as the Singapore or US dollars. The two virtual currencies involved in this action are Bitcoin ("BTC") and Ethereum ("ETH").

3 The Plaintiff is company registered in England and Wales trading *inter alia* as an electronic market maker. As an electronic market maker, the Plaintiff provides liquidity on exchange platforms by actively buying or selling at the prices it quotes for virtual currency pairs, thereby generating trading revenue.

4 In recent years, there has been a significant growth in virtual currencies of which Bitcoin is perhaps the best known. They are not linked to any particular country, nor regulated by any central monetary authority. They are traded for other virtual currencies or traditional currencies on computer networks such as the Platform.

**Principles governing Order 14 applications**

5 There was no dispute as to the principles underlying the grant of summary judgment. The Plaintiff must establish a *prima facie* case for judgment. If so, it is then for the Defendant to establish "that there is a fair or reasonable probability that he has a real or *bona fide* defence" (*Associated Development Pte Ltd v Loong Sie Kiong Gerald (administrator of the estate of Chow Cho Poon, deceased) and other suits* [2009] 4 SLR(R) 389 at [22]). In so doing, the Defendant's position must be articulated with "sufficient particularity and supported by cogent evidence" (*Lau Hwee Beng and Another v Ong Teck Ghee* [2007] SGHC 90 at [33]). In the event that there are conflicts of cogent evidence, the evidence on behalf of the Defendant is to be assumed to be capable of being proved at trial.

6 The Plaintiff's counsel also reminded me that there was no reason to refuse summary judgment in an appropriate case simply because the papers might be voluminous and the facts many. This was, I anticipate, to seek to deflect any possible criticism from the Court as to the receipt of written

submissions running to over 80 pages from the Plaintiff and over 60 from the Defendant together with, in the final event, six bundles of authorities. I make no criticism of this. It enabled the hearing to be conducted expeditiously.

## The Agreement

7 Traders who wish to use the Platform must open an account. This can be done online, as was done by the Plaintiff on 28 June 2015. At the same time, the Plaintiff agreed to a set of Terms and Conditions ("the Agreement") available on the Defendant's website. On that date, the terms of the Agreement were stated to have been "Last updated April 2014".[1]

8 For present purposes, the relevant passages in the Agreement are as follows:

> TERMS AND CONDITIONS
>
> This Agreement (the "Agreement"), effective upon the date of electronic acceptance (the "Effective Date"), pertains to the use of Quoine (the "Platform"), an Internet application fully owned by Quoine Pte. Ltd. (The "Company"), a Singapore based corporation with registration number 201414068E. This agreement is entered into by and between Quoine Pte.Ltd., and the user of Quoine ("User" or "Member") (each herein referred to individually as a "Party", or collectively as the "Parties"). In consideration of the covenants and conditions contained herein, the Parties hereby agree to the following terms and conditions:
>
> General Terms
>
> Quoine is a platform that provides services that allow the exchange of virtual currencies such as Bitcoin for fiat currencies. If you wish register [*sic*], engage in transactions on

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[1] Maxime Boonen's ("MB's") affidavit dated 8 Sep 2017, Exhibit 3; Mario Antonio Gomez Lozada's ("MAGL's") affidavit dated 6 Oct 2017, Exhibit 1.

Quoine (The Platform), please fully read and understand the terms and conditions that follow.

This is a legal agreement ("Agreement") between you and Quoine Pte. Ltd., which will apply to you regarding any and all services offered by or acquired (the "Services") through the Platform.

This Agreement sets forth the terms and conditions governing the access and use of the Platform. This Agreement may be changed at any time by the Company. It is the responsibility of the User to keep himself/herself updated with the current version of the Agreement. Users and Members waive any claim regarding this issue. This Agreement may only be amended with the express consent of the Company. Unless otherwise explicitly stated, the Terms will continue to apply even after termination of your membership to the Platform. If any provision of this Agreement is held invalid, the remainder of this Agreement shall continue in full force and effect.

Legal Jurisdiction

You expressly agree that any claim or dispute arising from your use of our website and/or our services will be governed by the laws of Singapore without regard to the conflict of law provisions thereof. You further agree that any such claims or disputes shall be resolved in Singapore courts, and you agree to be subject to the personal jurisdiction in, and the exclusive venue of, such courts and waive any objection to such jurisdiction and venue for the purpose of litigating any such claim or dispute.

…

Trading & Order Execution

Only registered users or Members are allowed to buy, sell and use the services provided by the Platform. The exchange functions of The Platform will fill in orders at the best possible available market price. Note that as markets move continuously, the prices displayed on user interfaces, on our web app or on mobile apps are in no way guaranteed. The Platform, however, has been designed to allow members to fill at best possible prices and in a timely manner. Nevertheless the Company will not be liable under any circumstances for the consequences of any delay in order filling or failure to deliver or perform.

> Furthermore, *once an order is filled, you are notified via the Platform and such an action is irreversible.*
>
> …
>
> Representations and Warranties
>
> As a Member or User, you agree to the following:
>
> …
>
> h. *You agree that the Company reserves the right to change any of the terms, rights, obligations, privileges or institute new charges for access to or continued use of services at any time, with or without providing notice of such change. You are responsible for reviewing the information and terms of usage as may be posted from time to time.* Continued use of the services or non-termination of your membership after changes are posted or emailed constitutes your acceptance or deemed acceptance of the terms as modified.
>
> …
>
> [emphasis added]

## The Platform

9 Users of the Platform trade in a variety of ways. For present purposes, there are two types of orders that may be placed:

(a) *A Market Order*: This is an order which is to be executed immediately at the best available current market place. The buyer or seller (as the case may be) indicates what he wishes to trade and the Platform automatically identifies the best available trade in the opposite direction. At the time of order placement, the trader will not know precisely the exchange rate he will receive.

(b) *A Limit Order*: This gives the trader greater control over the prices of a given trade but does not enable him to know when it will be

executed. A limit order sets either the maximum price at which he is willing to buy or the minimum price at which he is willing to sell. If and when that price is reached, his order will be fulfilled.

10 The Platform uses order books to record orders from buyers and sellers for each pair of currencies being traded on the Platform. These are all displayed electronically on what is known as a "Trading Dashboard" which also contains a price chart indicating a current fair market price. It displays real time pricing data both for completed trades on the Platform and for trades on several other major virtual currency exchanges. This is achieved through a software program used by the Platform (the "Quoter Program").

11 The Platform has a "matching engine" which uses the order books to detect whether there is a buy or sell order which corresponds to available opposite orders or matches a limit order and so on.

12 Members of the Platform can, obviously, trade by using their own assets – for example, owners of US dollars can use them to purchase BTC or use BTC to buy ETH. In addition, a trader may trade using funds borrowed either from the Defendant or from other users of the Platform. In this case, there must be assets in the trader's account which are used as collateral for the loan. This is known as margin trading.

13 In the event that the margin trader's equity (calculated as a certain percentage of the total market value of his collateral) falls below a certain percentage of the value of his loans, the Platform will automatically respond by force closing all or part of the trader's positions to prevent further loss. This is achieved by making "Stop Loss" orders. The Platform relies on the data

provided by the Quoter Program to assess the margin trader's position at any given time.

14 As noted previously (see [7] above), the terms of the Agreement are displayed on the Defendant's website. Additionally, the Defendant asserts (and for present purposes the Plaintiff accepts) that a Risk Disclosure Statement was uploaded onto the website on 22 March 2017.[2] This document figures in one of the proposed Defences, and I shall revert to it later.

**Background facts**

15 On 19 April 2017, the Plaintiff sought to buy and sell ETH for BTC.[3] To that end, it placed 12,617 ETH/BTC orders of which only 15 were filled on that date, including seven orders which are the subject of this litigation. The orders were all limit orders. Save for the seven orders, the buy or sell orders were transacted at a price of around 0.04 BTC for 1 ETH.[4]

16 In particular, at 23:29:35 on 19 April 2017 the Plaintiff sold 46.8384 ETH for BTC at an exchange rate of 0.03969496 BTC for 1 ETH.[5]

17 According to the Defendant, sometime after 23:30 on that day, a "technical glitch" arose on the Platform. Changes had been made to the passwords and cryptographic keys to some of the Platform's critical systems. But by an oversight, the Defendant's operations team did not implement these changes to the login credentials for the ETH/BTC Quoter Program. This

2 MAGL's affidavit dated 6 Oct 2017, Exhibit 2.

3 MAGL's affidavit dated 6 Oct 2017, Exhibit 3.

4 MAGL's affidavit dated 6 Oct 2017, para 15(d).

5 MAGL's affidavit dated 6 Oct 2017, para 15(f).

apparently caused the ETH/BTC Quoter Program to cease working as it was unable to connect to a database necessary to perform its market price updates. In consequence, all the orders which were on the ETH/BTC order book ceased to be available and no true market price could be set.[6]

18 For reasons which have not been fully explained in the affidavits, between 23:52:52 and 23:54:33 (just over one and a half minutes), the Plaintiff placed seven orders for the sale of ETH for BTC at an exchange rate of between 9.99999 and 10 BTC for 1 ETH[7] – *ie*, at a rate approximately 250 times the rate of about 0.04 BTC for 1 ETH previously being quoted.

19 In normal circumstances, this would no doubt have resulted in the orders not being fulfilled as, being limit orders, it was unlikely that the market would fluctuate so violently that the exchange rate would reach this limit level.

20 However, there were some market traders (the "Force-closed Customers") involved in the ETH/BTC market at the time using ETH borrowed from the Defendant. Because the ETH/BTC Quoter Program could not access all the data necessary to establish a true market price, it sought to do so by reference to the only data available to it which were, in effect, only the data arising out of the Plaintiff's seven orders. These new data caused the Platform to reassess the Force-closed Customers' leveraged positions and detect that the Force-closed Customers' collateral had fallen below the maintenance margins. The Platform thus automatically placed Stop Loss orders to sell the Force-closed Customers' assets at the best available prices to repay the ETH loans.[8]

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6 MAGL's affidavit dated 6 Oct 2017, para 18.

7 MAGL's affidavit dated 6 Oct 2017, para 15(f).

8 MAGL's affidavit dated 6 Oct 2017, paras 19(d)–(e).

21 However, because of the technical glitch, the only available price on the Platform was the price offered by the Plaintiff. Hence, the computer matched the Plaintiff's seven orders with the BTC held by the Forced-closed Customers. In the event, an aggregate of 3092.517116 BTC was credited to the Plaintiff's account and 309.2518 ETH debited from that account with corresponding amounts being debited from and credited to the Force-closed Customers' accounts.

22 The following day, the Defendant became aware of the technical glitch and unilaterally reversed the trades, returning the BTC to the Force-closed Customers' accounts and the ETH to the Plaintiff's account.[9]

**The action**

23 The Plaintiff contends that this reversal, which denied them the fruits of the previous day's highly advantageous transactions, was in breach of the Agreement and in breach of trust. On 18 May 2017, it issued proceedings in the High Court seeking relief for those breaches. The action was transferred to the Singapore International Commercial Court on 24 August 2017. On 8 September 2017, the Plaintiff issued a Summons under Order 14 of the Rules of Court for summary judgment.

**The Plaintiff's *prima facie* case**

24 The Plaintiff's case is straightforward and short. The seven trades were executed, and the proceeds were allocated to the correct accounts for the sums indicated in the Plaintiff's limit orders. The parties were notified of this in the usual way. It was the Plaintiff which set the price and the Platform matched the

[9] MAGL's affidavit dated 6 Oct 2017, para 21.

Stop Loss orders to that price. The Agreement expressly provides that "once an order is filled, you are notified via the Platform and such an action is irreversible".

25 On that basis, the Plaintiff contends that the reversal of the orders on the following day was in breach of the express term that the filling of an order is "irreversible".

26 The Defendant contends however that "irreversible", properly interpreted, does not preclude the Defendant from reversing trades which were made in error. It says that the irreversibility of orders is a term that applies only to the individual parties to the transaction and not the Defendant. I am unable to accept this. The Agreement is between the Defendant and any given user of the Platform. The immediately preceding sentence expressly limits the Defendant's liability in relation to delays in execution and the following sentence again limits the Defendant's liability in terms of loss or damage incurred by the user of the Platform as a result of their "failure to understand the nature and mechanics of virtual currencies or the markets under which such virtual currencies operate".[10] However, the word "irreversible" is not qualified in any way and when it is read in the context of the passage as a whole, the proper inference to be drawn is that the provision was included to ensure certainty for all parties including the Defendant as soon as the transaction was notified as being filled. To interpret "irreversible" in a manner such that "errors" (whatever they may be) could subsequently be corrected in the future runs contrary to this.

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[10] MAGL's affidavit dated 6 Oct 2017, p 43.

27 As an alternative, the Plaintiff contends that unilaterally deducting the proceeds from its account constituted a breach of trust since all assets belonging to the Plaintiff and held by the Defendant were held by the Defendant as trustee. Whilst if this contention were to be successful the relief available might be different to the relief available for breach of contract, the contention is founded on the same argument on interpretation and it adds nothing further to the establishment of the necessary *prima facie* case.

**The potential defences**

28 I am accordingly satisfied that the Plaintiff has a *prima facie* case and that it is therefore for the Defendant to identify issues meriting a trial. It proposes the following as defences entitling it to reverse the trades:[11]

> (a) that a term should be implied into the Agreement to permit reversal or correction where there has been (i) a technical and/or system failure and/or error; (ii) an error with respect to price, quantity or other parameters; or (iii) an order, contract or trade executed at any abnormal rate, all of which are alleged to have occurred in this case;
>
> (b) that certain terms of the Risk Disclosure Statement (see [14] above) had been incorporated into the Agreement which gave the Defendant the right to reverse the trades;
>
> (c) that the trades were void because of a unilateral mistake at common law;
>
> (d) that the trades were void for common mistake;

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[11] MAGL's affidavit dated 6 Oct 2017, para 27.

(e) that, had the trades not been reversed, relief would have been available under the doctrine of unjust enrichment; and

(f) that certain exemption clauses in the Agreement prevent the Plaintiff from recovering the proceeds of the trades.

29 I indicated at the end of the hearing that I had concluded that issues (b) and (c) raised appropriately arguable defences and I shall therefore briefly give my reasons for so concluding. Since the matter is to go to trial, I shall not give any reasoning in relation to the other issues. However, as I indicated, based on the material before me at present, I am not persuaded that any of the other defences could succeed if both issues (b) and (c) did not. It is however a matter for the Defendant and its advisers, having heard the arguments during this hearing, to decide whether they would like the trial judge to rule on those defences.

**Issue (b): The Risk Disclosure Statement argument**

30 Clause (h) of the "Representation and Warranties" section of the Agreement ("clause (h)") is a somewhat unusual clause. It provides that the Defendant can change "any of the terms, rights, obligations, privileges… with or without providing notice of such change". The user accepts responsibility for "reviewing the information and terms of usage as may be posted from time to time".

31 The Agreement thus permits the Defendant unilaterally to alter the Agreement without notice but arguably goes further than this by the use of the expression "rights, obligations, privileges" to refer to possible things (not

mentioned in the Agreement) that can be added as well as referring not merely to the *terms of usage* but also to *the information* which may be posted.

32 The Risk Disclosure Statement does precisely what its name suggests. It is entitled "Risks in Virtual Currency Transactions" and the introduction states:

> There are many risks associated with virtual currency transactions. Please read the following to gain a sufficient understanding of the features, mechanisms, and risks in virtual currency transactions. *Please execute your transaction with understanding such features, mechanisms and risks without objection* and based on your own judgment and responsibility.
>
> [emphasis added]

33 Ten separate risks are described, two of which (*ie*, "7. Risks due to Stop-Out" and "8. System Risks") are material in this case:

> **7. Risks due to Stop-Out**
>
> <Characteristics of margin trading>
>
> The stop-out system allows the Company to cancel non-executed new orders and forcibly execute a reversing trade, and settle all, of a customer's positions to protect the customer from escalating losses when the customer's margin falls short of the Company's prescribed ratio of the margin to required margin (the "stop-out," which the Company may change at its discretion).
>
> The amount of a loss will not be determined until the settlement is completed because the final settlement price in the case of a stop-out is determined by market prices.
>
> If market circumstances shift dramatically or something else happens, the final settlement price may significantly differ from the one at the time the transaction was initiated, and it is possible that a customer's loss may exceed the amount that the customer has deposited with the Company. Customers must promptly deposit any shortfall in funds with the Company.
>
> **8. System Risks**
>
> <For both spot and margin trading>
>
> …

> There is the risk that a system failure may occur due to changes to the external environment, etc., and this may disrupt a customer's ability to execute transactions. A "system failure" is when the Company finds that a malfunction (not including the obstructed network lines or problems with a customer's computer, etc.) has clearly arisen in the system required to provide the Company's services, and customers are no longer able to place orders over the Internet (the Company's website, mobile site, or applications) or customers' orders arrive late or cannot be placed.
>
> Please be aware that in the event that a customer loses any opportunity (e.g., the Company is unable to receive a customer's order and the customer therefore loses the opportunity to place the order, losing profits that he or she ordinarily would have earned) due to emergency system maintenance or a system failure, the Company will not be able to execute a process to fix the error because it will be unable to identify the order details that the customer intended to place (the original order). *The system may produce an aberrant value for the buy or sell price of the virtual currency calculated by the system. Please be aware that if the Company finds that a transaction took effect based on an aberrant value, the Company may cancel the transaction. Your understanding is appreciated.*
>
> [emphasis added]

34 Relying on the italicised words, the Defendant contends that when (as they assert) the Risk Disclosure Statement was uploaded onto the website on 22 March 2017, it had the effect, *inter alia*, of introducing a new term into the Agreement expressly permitting the Defendant to cancel a transaction if it had taken place based on an aberrant value (the "aberrant value clause").

35 It is plain from the language used that the Defendant intended to give itself the right to cancel such a transaction. The pertinent question is therefore whether it did so in a way which was effective to give them that right.

36 The Defendant contends that on its true construction, the effect of clause (h) was that once the Risk Disclosure Statement was uploaded, it automatically came into effect without notice to the users of the Platform and regardless of

whether they had seen it or not. The Risk Disclosure Statement constitutes "information" and/or "terms of usage" within the meaning of clause (h) because it changed the terms on which users could trade on the Platform and altered their rights. Finally, it contends that the seven trades on 19 April 2017 were based on an aberrant value so it was contractually entitled to reverse the trades.

37 The Plaintiff disputes these contentions. It asserts:

(a) that the Defendant cannot unilaterally upload documents onto its website and then assert that they are incorporated into the Agreement;

(b) that any change in the terms could not be effective without notice to the Plaintiff;

(c) that the Risk Disclosure Statement was a mere summary of risks and was not a document which a reasonable reader would expect to contain contractual terms;

(d) that since the Risk Disclosure Statement and the Agreement were accessible via different links on the website, the two could not be read together;

(e) that the aberrant value clause was inconsistent with the underlying basis of the Agreement which was that trades were irreversible once notified with the *users* rather than the Plaintiff bearing the risk of errors; and

(f) that the aberrant value clause, if incorporated into the Agreement, would be contrary to the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed). However, the Plaintiff's counsel accepted that he

could not rely on this for the purposes of the summary judgment application.

38 The Defendant responded to [37(a)] and [37(b)] above by referring to clause (h) and contended that it expressly permitted the uploading of documents onto the website as a means of amending the contract and that this could be done without notice. Whilst it was accepted that notice would be required to form a contract in the first place, the position here was different because the contract was already in place and the parties had expressly agreed that changes could be made without notice.

39 As to [37(c)], it was contended that it was not legally necessary for a document, parts of which contained terms which were said to be incorporated into a contract, itself to have contractual force so long as the particular terms sought to be incorporated were capable of having contractual effect. The aberrant value clause was plainly such a clause. Reliance was placed on passages in Sir Kim Lewison's *The Interpretation of Contracts* (Sweet & Maxwell, 6th Ed, 2015) ("*Lewison*") at pp 127–128:

> *(c) Incorporation of other documentary material*
>
> It is not necessary for the incorporated document itself to have any contractual force or indeed any legal effect; it may be merely a printed form. The terms of the incorporated document must, however, be capable of having contractual force. In *Keeley v Fosroc International Ltd*, Auld L.J. said:
>
> > "On the question of construction… where a contract of employment expressly incorporates an instrument such as a collective agreement or staff handbook, it does not necessarily follow that all the provisions in that instrument or document are apt to be terms of the contract. For example, some provisions, read in their context, may be declarations of an aspiration or policy falling short of a contractual undertaking; see e.g. *Alexander and others v Standard Telephones and Cables*

> *Ltd. (No.2)* [1991] I.R.L.R. 286, per Hobhouse J, as he then was, at paragraph 31; and *Kaur v MG Rover Group Ltd* [2005] I.R.L.R. 40, CA, per Keene L.J., with whom Brooke and Jonathan Parker L.J.J. agreed, at paragraphs 9, 31 and 32. It is necessary to consider in their respective contexts the incorporating words and the provision in question incorporated by them."

Likewise in *Martland v Co-operative Insurance Society Ltd*, Elias P. said:

> "Not all terms typically found in a collective agreement will be incorporated. That is so, even where the contract of employment ostensibly incorporates all relevant terms from the collective agreement. In order to be apt for incorporation the terms must, by their nature and character, be suitable to take effect as contractual terms. Some collective terms will not do so because, for example, they are too vague or aspirational, or because their purpose is solely to regulate the relationship between the collective parties."

…

40 As to [37(d)], the fact of different links was accepted but, again, reliance was placed on clause (h) as entitling the Defendant to alter terms of usage by posting information on the website.

41 Whilst the Defendant's Counsel did not accept the Plaintiff's assertion as to the underlying basis of the agreement, this was, he said, no bar to incorporating a clause which modified the imposition of risk in a given situation.

42 On an application for summary judgment, the Court must assess each of these contentions to see whether taken either individually or in combination they constitute an arguable defence. If they do, the Court should not continue to analyse the relative strength of the arguments but leave that to be considered at trial.

43 In my judgment, the Defendant's contentions on this issue do raise an arguable defence. As indicated above, clause (h) is somewhat unusual and its scope is not sufficiently clear to reject the Defendant's argument on interpretation as being untenable. Equally, the legal argument on incorporating terms into contracts based on the passage in *Lewison* is one that merits full argument at trial. Finally, even if the underlying basis of the Agreement is as contended for by the Plaintiff, I do not consider that this would preclude an express exception in the nature of the proposed aberrant value clause.

**Issue (c): Unilateral mistake at common law**

44 This contention is raised on the basis that, contrary to the Defendant's previous argument, there was a breach of contract in reversing the seven trades. In these circumstances, the Defendant asserts that the doctrine of unilateral mistake at common law renders the contracts void.

45 The first point to note is that the Plaintiff reserved the right to contend at any trial that relief of this nature could only be sought by a party to the contract and that whilst the Platform was used to facilitate the matching of the orders, the Defendant was not a party. I was not however asked to take this into account for this application.

46 The law in relation to unilateral mistake has been comprehensively considered by the Court of Appeal in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 ("*Chwee*"). The basic facts are not dissimilar to the facts in this case save that there was human rather than computer intervention on both sides.

47 In *Chwee*, the defendant sold products over the internet using two different websites. A particular Hewlett Packard laser printer was advertised for sale on both websites at a price of $3,854. One afternoon, an employee of the defendant mistakenly altered the price of the printers to $66. The error was not identified until the following morning when a potential customer checked with the defendant whether the price was correct. The error was then corrected.

48 During the period while the mistaken price was left uncorrected, 784 people made a total of 1,008 purchases for 4,086 printers. On discovering the mistake, the defendant informed all the purchasers that it would not honour the orders because of the mistake. The plaintiffs who between them had ordered hundreds of printers brought an action to enforce the sales and were met with a defence of unilateral mistake. The defendant succeeded at trial and the plaintiffs appealed to the Court of Appeal.

49 The judgment of the Court of Appeal was delivered by Chao Hick Tin JA. The following passages should be noted:

> **Unilateral mistake in common law**
>
> 30 We will first consider the statements of law advanced by the judge below. It is trite law that, as a general rule, a party to a contract is bound even though he may have made a mistake in entering into the contract. The law looks at the objective facts to determine whether a contract has come into being. The real motive or intention of the parties is irrelevant: see Treitel, *The Law of Contract* (Sweet & Maxwell, 11th Ed, 2003) at 1. The *raison d'etre* behind this rule is the promotion of commercial certainty.
>
> 31 However, there is an exception to this rule when the offeree knows that the offeror does not intend the terms of the offer to be the natural meaning of the words: see *Shogun Finance Ltd v Hudson* [2004] 1 AC 919 ("*Shogun Finance*") at [123] and *Hartog v Colin & Shields* [1939] 3 All ER 566 ("*Hartog*"). The reason behind this exception is self-evident, as a party who is aware of the error made by the other party cannot

> claim that there is *consensus ad idem.* The law should not go to the aid of a party who knows that the objective appearance does not correspond with reality. It would go against the grain of justice if the law were to deem the mistaken party bound by such a contract.
>
> …
>
> 33 Indeed, in law, there are three categories of mistake, namely, common, mutual and unilateral mistakes. In a common mistake, both parties make the same mistake. In a mutual mistake, both parties misunderstand each other and are at cross-purposes. In a unilateral mistake, only one of the parties makes a mistake and the other party knows of his mistake. For the purpose of the present proceedings, we are only concerned with the effect of a unilateral mistake.
>
> 34 However, it does not follow that every mistake would vitiate a contract. It has to be a sufficiently important or fundamental mistake as to a term for that to happen. There is no doubt that the error in the present case as to the price is a fundamental one. Accordingly, it is wholly unnecessary for us to deal with the question as to what nature of mistake would constitute a serious mistake sufficient to vitiate a contract. It is also unnecessary for us to address a related controversial question whether a mistake as to quality, or the substance of the thing contracted for, is of sufficient gravity to negate an agreement.
>
> …
>
> 53 In our opinion, it is only where the court finds that there is actual knowledge that the case comes within the ambit of the common law doctrine of unilateral mistake. There is no *consensus ad idem*. The concept of constructive notice is basically an equitable concept: see *The English and Scottish Mercantile Investment Company, Limited v Brunton* [1892] 2 QB 700 at 707 *per* Lord Esher MR. In the absence of actual knowledge on the part of the non-mistaken party, a contract should not be declared void under the common law as there would then be no reason to displace the objective principle. To the extent that the judge below seems to have thought otherwise, *ie*, that where the non-mistaken party has constructive knowledge of the mistake the contract thus entered into would be void under common law, we would respectfully differ.

50 Accordingly, in order to succeed in rendering a contract void under the common law doctrine of unilateral mistake, the Defendant must show that there

was a sufficiently important or fundamental mistake as to a term of the contract and that the Plaintiff who is seeking to enforce that contract must have actual knowledge of the mistake. The principle or purpose underlying the doctrine is set out in *Chwee* at [31]:

> The law should not go to the aid of a party who knows that the objective appearance does not correspond with reality. It would go against the grain of justice if the law were to deem the mistaken party bound by such a contract.

51 On the facts in *Chwee*, it was a plain case. The first plaintiff was well aware that the offer was too good to be true and alerted his friends who also bought the printers. The mistake was a mistake by a human in getting the price wrong and the knowledge was actual knowledge of the other party to the contract.

52 Here computers are involved. Human error caused the correct passwords and cryptographic keys not to be keyed into the Quoter Program, which caused the Platform to perform abnormally. However, it was not the Platform which offered the abnormally high exchange rate, it was the Plaintiff who offered to sell at the abnormal rate. Its offer would never have been matched in ordinary trading circumstances as the Quoter Platform would have quoted a real market price far lower that the limit offer price of around 10 BTC for 1 ETH proposed by the Plaintiff.

53 But a further consequence of the original human error was that the Platform wrongly identified the Force-closed Customers as being in default and thus wrongly instituted Stop Loss orders selling the BTC held by the Force-closed Customers not at a true market price as would have happened in normal circumstances but at the Plaintiff's abnormal rate.

54 The Defendant contends that these facts demonstrate the existence of a clear mistake. Even though the acts were the acts of a computer (*ie*, the computer hosting the Platform), the mistake arose from a human error by an employee of the Defendant which in the final event caused the computer to process the Stop Loss orders not at a true market price but at the abnormal price. The mistake caused the Force-closed Customers' holdings to be sold when they should not have been sold and, if they had to be sold, at a price lower than the true market price. The Force-closed Customers were thus mistaken as to both the need for the contract and the sale price, which was a fundamental term of the contract.

55 Hence the Defendant contends that this is a mistake which goes to the heart of the contract and is analogous to the error in *Chwee*.

56 So far as actual knowledge of the Plaintiff is concerned, the Defendant's primary contention is that however the abnormally high limit order price came to be offered, it could not have represented a genuine offer to sell in a realistic market. The Plaintiff must have known that the price was wholly out of line with all the other prices it had been seeking to trade at during that day (all of which were more than 250 times lower). These factors, says the Defendant, are more than sufficient to raise a *prima facie* case that the "non-mistaken party is probably aware of the error made by the mistaken party" (*Chwee* at [41]).

57 Indeed, the Defendant goes further and draws attention to the fact that it has sought particulars from the Plaintiff as to how the orders came to be made. However, their request has been refused and the Plaintiff's evidence in reply does not condescend into any detail as to how the orders came to be made. In paragraph 10.2 of Ms Boonen's second affidavit dated 19 October 2017, she states:

> The Orders were placed automatically by the Plaintiff's proprietary system which seeks to quote prices which are at or near the best available prices on the Platform at a particular point in time. If there were no or few other available orders to sell BTC at that time, then the Plaintiff's system would naturally quote higher prices to sell BTC. …

This demands an investigation at trial to understand why the system quoted a high price but, more specifically, why it selected 10 BTC for 1 ETH as the exchange rate.

58 The Plaintiff responds to this by making two main submissions. First, there was no mistake since the Plaintiff's orders were placed on the Platform at its chosen rate of exchange and notwithstanding that this was a high rate, the Platform matched the orders with others (the Stop Loss orders) which were also on the Platform. Hence the Force-closed Customers, via the Platform, "knew" that the Plaintiff was offering to sell at the stated rate and elected to accept that offer. There was thus no relevant mistake. The fact that the Force-closed Customers may not have intended to enter the trades is, it contends, irrelevant.

59 Secondly, the Plaintiff contends that it placed the limit orders without knowledge as to whether or not they would be fulfilled, and that it had no knowledge that there was a technical glitch or that the matching orders were placed as a result of a margin call or that the platform would recalculate the positions of the margin traders based on the price stated in the Plaintiff's orders. The Plaintiff thus did not have the requisite knowledge.

60 The doctrine of unilateral mistake is well developed in circumstances where the error is a human error and the knowledge or lack of it is directly ascertainable from the humans involved. Where computers are concerned, the law is less well developed. When can the workings of a computer or computer

program constitute actual knowledge on the part of the programmer or operator of the computer? In his judgment at first instance in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594, V K Rajah JC (as he then was) made the following observation at [102]:

> Inevitably mistakes will occur in the course of electronic transmissions. This can result from human interphasing, machine error or a combination of such factors. Examples of such mistakes would include (a) human error (b) programming of software errors and (c) transmission problems in the communication systems. Computer glitches can cause transmission failures, garbled information or even change the nature of the information transmitted. This case is a paradigm example of an error on the human side. Such errors can be magnified almost instantaneously and may be harder to detect than if made in a face to face transaction or through physical document exchanges. Who bears the risk of such mistakes? It is axiomatic that normal contractual principles apply but the contractual permutations will obviously be sometimes more complex and spread over a greater magnitude of transactions. The financial consequences could be considerable. The court has to be astute and adopt a pragmatic and judicious stance in resolving such issues.

61 In the present case, I do not consider that the Plaintiff's responses to the Defendant's arguments are sufficient to deny it the right to a trial. The Defendant's case on the mistake itself is a cogent one and I accept that a more thorough investigation of the facts behind the setting of the abnormally high offer price is justified in order to place the court in a proper position fully to assess the state of the Plaintiff's knowledge. Equally, after the full facts are established, it will be possible to examine the law on unilateral mistake where computers are involved in greater detail than was possible on an application for summary judgment.

62 For these reasons, I dismiss the Plaintiff's application for summary judgment.

Simon Thorley
International Judge

Danny Ong, Sheila Ng and Daniel Gaw (Rajah & Tann Singapore LLP) for the plaintiff;
Paul Ong and Marrissa Karuna (Allen & Gledhill) for the defendant.