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Mistake of Law Rule Abrogated

Lusina Ho takes a look at the recent House of Lords decision with respect to mistake of law and discusses its potential impact in Hong Kong.

In Kleinwort Benson Ltd v Lincoln City Council and other appeals [1998] 3 All ER 513, the House of Lords held, by a 3-2 majority, that the mistake of law rule which states that money paid upon a mistake of law (as opposed to a mistake of fact) is irrecoverable no longer formed part of English law.

Lord Goff emphasised (at 530) that the abrogation of the mistake of law rule was due not only to specific criticism of the rule as such, but more to the fact that a blanket rule of non-recovery, irrespective of the justice of the case, cannot sensibly survive in a rubric of the law based on the principle of unjust enrichment. In his view, the recipient of a mistaken payment (whether of law or of fact) should make restitution because it is unjust for a party to retain the enrichment at the expense of the payor. A party’s interest in the security of receipt should be protected by defences rather than an over-broad denial of recovery.

The majority further held that a payment was made upon a mistake of law even if it was made in reliance upon the correctness of an earlier decision or general perception of the law that was subsequently overruled or changed by judicial decision. For, according to the declaratory theory, the subsequent decision operated retrospectively such that the law was regarded as having always been what was eventually established.

Furthermore, the House unanimously held that s 32(1)(c) of the Limitation Act (in the same material terms as s 26(1)(c) of the Limitation Ordinance (Cap 347) LHK), which was not drafted with the law of restitution in mind, was nonetheless applicable to an action brought to recover money paid upon a mistake of law. As a consequence, ‘the period of limitation shall not begin to run until the plaintiff has discovered the ... mistake ... or could with reasonable diligence have discovered it.’

It remains to be seen whether Hong Kong courts will adopt a more restrictive interpretation of the Limitation Ordinance in the interest of finality of transactions.

The facts

The House of Lords applied the above rulings to the facts in Kleinwort Benson. The Lords held that, where the appellant banks had made payments to the respondent local authorities under interest rate swap transactions that were assumed to be valid at the time they were entered into (but were subsequently held by the House of Lords in Hazell v Hammersmith and Fulham London BC [1992] AC 1 to be void on the ground of ultra vires), the payments were made upon a mistake of law and were therefore recoverable. Moreover, applying s 32(1)(c) of the Limitation Act, the appellants’ actions were not time-barred.

Points of Interest for Hong Kong Litigants

The Kleinwort Benson decision is significant for three reasons. First, it abolishes the mistake of law rule which had stood for almost two centuries (Bilbie v Lumley [1802] 2 East 469). The House of Lords was in fact unanimous on the de-merits of the mistake of law rule and pointed to its fallacious reliance upon the maxim that ignorance of the law is no defence, its overly broad-brush approach and the too fine a distinction between mistake of law and of fact, to name but a few (the dissenting opinions preferred to leave law reform to Parliament (per Lord Browne-Wilkinson), and to enact certain defences).

Moreover, the mistake of law rule had already been abolished by the highest courts of Australia (David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353), Canada (Air Canada v British Columbia Airline (1989) 39 DLR (4th) 161, Canadian Pacific Airlines v British Columbia [1989] 1 SCR 1133), and Scotland (Morgan Guaranty Trust Co of New York v Lohman Regional Council [1995] SLT 299). As these decisions are nowadays of the same persuasive authority as English decisions, should the opportunity arise, Hong Kong courts are very likely to follow suit.

The second, and wider significance of Kleinwort Benson, is that it joins Banque Financiere de la Cite v Parc Baultersum Ltd [1998] 1 All ER 737 in elevating the principle of unjust enrichment from being simply a unifying principle to explain a few traditional causes of action (like money had and received) to a cause of action in and of itself. Whether Hong Kong courts will also embrace the law of restitution remains to be seen. It suffices to note that in Kwai Hung Realty Ltd & Ors v Kung Mo Ng & Ors [1998] 1 HKC 145, Waung J recognised that the law of tracing was part of the law of restitution.
Third, Kleinwort Benson signifies a shift in the debate from liability to defences. The majority rejected, among others, the defence that payment made under a settled understanding of the law, which was subsequently departed from by judicial decision, was not recoverable. The minority on the other hand convincingly argued that the interest of the security of receipts justified this defence, and that it would be unjust to regard a payment as based on a so-called ‘mistake’ which is a legal fiction created by the much-criticised declaratory theory. In the final analysis, what is needed is a balancing between the interest in the security of receipts and that in not giving effect to a transaction that was subsequently rendered to be based on mistake. This can only take place on a case-by-case basis.

In the final analysis, and before these controversies are resolved, a few practical points are in order.

First, procedural advantages in the form of an indefinite extension of the limitation period might be obtained after all, it has never been disputed that the default rules of restitution can be superseded by voluntary agreement.

where a payment recoverable upon other grounds like failure of consideration or ultra vires demands by public authorities can also be said to be made upon a mistake of law. It remains to be seen whether Hong Kong courts will adopt a more restrictive interpretation of the Limitation Ordinance in the interest of finality of transactions. Second, it is still important to identify how the mistake of law came about. A retrospective change of law by the legislature may be treated differently from a judicial change, which is by its nature retrospective. Third, contracts may be drafted in such a way as to provide for the eventuality of subsequent judicial changes such as Hazell. After all, it has never been disputed that the default rules of restitution can be superseded by voluntary agreement.

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「法律錯誤」原則被廢止

何錦麟探討最近一宗有關「法律錯誤」原則的英國上訴院判決，以及該判決對香港可能帶來的影響

最近，英國上訴院在 Kleinwort Benson Ltd v Lincoln City Council and other appeals [1998] 4 All ER 513 一案，以比二大多數裁定，「法律錯誤」原則 — 即基於法律錯誤而訴求分毫賠償 — 不能成立的原則 — 不再是英國法律的一部分。

Lord Hoffmann 強調（見第 530 頁），上述原則的廢止，並非單單基於它備受批評，更重要的是在於「任何體面個別情況和公義的」不能談到的原則，根本不可能在基於不公可得原則上的法律架構內生存。他認為，當某方錯誤地（不論是在法律上或事實上）付出金錢，收款人應把款項歸還，原因是如果他/她在付款人未受損的情況下獲得款項，這便是不公平的。若收款人有權或有理由收取款項，應透過索還補償，而非藉將之太高的「不能談到」原則作為規則保護。

上訴院亦以大多數裁定，即使在法律上，違反法律的訴訟或對法律的整體看法的正確性而付出，而該訴訟或看法隨後被法院推翻或改變，該款項仍可被視為根據「法律錯誤」而付出。原因是，在法律理應下，隨即的判決在運作上具表達效用，故此法律的正確性應是最後確定的為準。

此外，上訴院一致裁定，儘管《時效法令》第 32(1)(c) 條（此條文與香港《時效條例》第 347 章第 26(1)(c) 條的意義相同）並非著重歸還法律而提起訴訟，但該條文仍適用於追討基於法律錯誤而付出的款項的訴訟行動。這即是說，「法律錯誤」在原告人發覺，或經合理努力而應可發覺錯誤 — 之前，並不開始計算。

案情

上訴院把上述裁定引用於 Kleinwort Benson 一案的案情。上訴人（銀行）根據抵押擔保期限交易而向被申請人（當地主管機構）付款。該等交易在訂立時被置於無效，但隨後被上訴院裁定基於違紀而無效（見 Hazell v Hammersmith and Fulham London BC [1992] AC 1 一案）。上訴院裁定，上訴人乃基於法律錯誤而付款，因此可追討款項。此外，上訴院引用了《時效法令》第 32(1)(c) 條，裁定上訴人的追討行動並未逾時而告失效。

「法律錯誤」原則 — 不再是英國法律的一部分

香港訴訟各方應注意的事項

Kleinwort Benson 一案值得注意，理由有三。首先，它廢除了已存在超過兩個世紀（見 Bibby v Lumby [1802] 2 East 469 一案）的「法律錯誤」原則。事實上，上訴院各法官約同地指出了該原則的各種弊病，例如它錯誤地以「對法律無知並非辯護理由」的格言為依據，其範圍過於廣泛而被過於褊狭地應用。以及「法律錯誤」與「事實錯誤」間的差別過於細微。不同不同意的法官認為法律改革工作應交由英國國會進行（見 Lord Browne-Wilkinson 的判決），並應制訂某些辯護理由。


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