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] 4 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 Lumbley [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 (1989) 59 DLR (4th) 161, Canadian Pacific Airlines v British Columbia [1989] 1 SCR 1133), and Scotland (Morgan Guaranty Trust Co of New York v Lothian 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 (Baitersert) 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 so 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

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

最近，英國上議院在 Kleinwort Benson Ltd v Lincoln City Council and other appeals [1998] 4 All ER 513 一案，以三比二多數裁定，「法律錯誤」原則 — 即基於法律錯誤而事實錯誤而付出的金錢不能討回的原則 — 不再是英國法律的一部分。

Lord Goff 強調，在第 530 頁，上述原則的廢止，並不單單是基於它受損失，更重要的是在「任何理所當然情形和公義的『不能討討』規定，根本不可能在基於不公不得糾正原則下的法律架構內生存」。他認為，當某方錯誤地（無論是在法律上或在事實上）付出金錢後，彼方應應當把款項歸還。原則上，他是這樣說的：「香港法院亦由以大多數裁定，即使某方是基於一項相隔遙遠的裁決或對法律的整體看法的正面責任而付出，而該裁決或看法隨後在法院推翻或改變，該款項仍會被視為根據『法律錯誤』而付出。原因是，在審理程序上，即使被告在法庭上被裁定負有全責，其法律的法律內容永遠是以最終確定的為準。

此外，該上議院一致裁定，儘管《時效法令》第 32(1)(c) 條（此條文與香港《時效法令》第 347 條第 26(1)(c) 條的法律條文相同）並非為著歸還法院而設立，但是一條款也適用於追訴基於法律錯誤而付出款項的訴訟程序。這是因為，「時間期限原人受損失，若能合理把握，亦可被老人家。」「法律錯誤」原則不再適用於香港的法律程序。

香港訴訟各方應注意的事項

香港法官在判決中強調，「法律錯誤」原則不再適用於香港的法律程序。此一判決對香港訴訟程序將產生重大影響。