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.'

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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 *Klienwort Benson*, is that it joins *Banque Financiere de la Cite v Parc (Battersea) 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

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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

何錦璇探討最近一宗有關「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，以三比二大多數裁定，「法律錯誤」原則 — 即基於法律錯誤而非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（見第 530 頁），上述原則的廢止，並非單單基於它備受批評，更重要的因素在於「任何漠視個別案情和公義的『不能討回』籠統規定，根本不可能在建基於不公得利原則上的法律架構內生存。」他認為，當某方錯誤地（不論是在法律上或在事實上）付出金錢，收款人應把款項歸還，原因是如果他 / 她在付款人受害的情況下持有款項，這便是不公平的。若收款人有權或有理由收取款項，應透過答辯提出，而非藉範圍太廣的「不能討回」規定尋求保護。

上議院亦以大多數裁定，即使款項是根據一項較早前的裁決或對法律的整體看法的正確性而付出，而該裁決或看法隨後被法院推翻或改變，該筆款項仍會被視為根據「法律錯誤」而付出。原因是，在宣告性理論下，隨後的判決在運作上具追溯效力，故此法律的內容永遠是以最後確立的為準。

此外，上議院一致裁定，儘管《時效法令》第 32(1)(c) 條（此條文與香港《時效條例》（第 347 章）第 26(1)(c) 條的實質內容相同）並非為著歸還法律而草擬出來，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，「時效期在原告人發覺、或經合理努力而應可發覺 … 錯誤 … 之前，並不開始計算。」

案情

上議院把上述裁決引用於 *Kleinwort Benson* 一案的案情。上訴人（銀行）根據利率掉期交易向答辯人（當地主管機構）付款。該等交易在訂立時被假設為有效，但隨後被上議院裁定鑒於越權而無效（見 *Hazell v Hammersmith and Fulham London BC* [1992] AC 1 一案）。上議院裁定，上訴人乃基於法律錯誤而付款，因此可追討款項。此外，上議院引用了《時效法令》第 32(1)(c) 條，裁定上訴人的追討行動並未因過時而告失效。

「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 *Bilbie v Lumbley* [1802] 2 East 469 一案）的「法律錯誤」原則。事實上，上議院各法官不約而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、它的範圍過於廣泛而被過於輕率隨便地運用、以及「法律錯誤」與「事實錯誤」間的差別過於細微。（持不同意見的法官認為法律改革工作應交由英國國會進行（見 Lord Browne-Wilkinson 的判詞），並且應制訂某些辯護理由。）

再者，「法律錯誤」原則已被澳洲（見 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 一案）、加拿大（見 *Air Canada v British Columbia* (1989) 59 DLR (4th) 161 及 *Canadian Pacific Airlines v British Columbia* [1989] 1 SCR 1133 案件）及蘇格蘭（見 *Morgan Guaranty Trust Co of New York v Lothian Regional Council* [1995] SLT 299 一案）等地方的最高法院廢除。鑒於現時此等裁決與來自英國的裁決在香港具有同樣的說服性權威，故此香港法院在適當的時候很可能會跟隨上述裁決而行。

Kleinwort Benson 一案的第二個且更大的重要性所在，是它與另一案 *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1998] 1 All ER 737 攜手把不公得利的原則的地位提升，由原本只是用來解釋少數傳統訴因（例如曾經持有及收受金錢）的一項統一原則，提升為一個自身而獨立的訴因。香港是否也會採納歸還法律，仍是未知之數，但我們只須注意到，在 *Kwai Hung Realty Ltd & Ors v Kung Mo Ng & Ors* [1998] 1 HKC 145 一案，壬式英法官確認了追蹤財產的法律乃屬歸還法律的一部分。

第三，*Kleinwort Benson* 一案顯示了爭議的焦點已由法律責任轉移到辯護理由上。案中上議院大多數法官否定的各項辯護理由之一，是根據各方對法律的某種共識理解付出金錢，而該等理解不被隨後司法裁決跟隨的，則付款方不能討回金錢。但上議院少數法官的意見頗具說服力，他們認為收款人在收訖款項上擁有權益，這已足以令上述辯護理由成立；而把付款視為所謂「錯誤」（一個由飽受批評的宣告性理論製造出來的法律假想概念），是絕不公平的。最終來說，我們需要在收訖款項上的權益與拒絕執行一宗隨後變為基於錯誤而進行的交易兩者之間取得平衡，這只能視乎每件案件本身的情況而定。

最終而言，在上述爭議未獲解決前，我們應留意下列各點。首先，當一筆款項既可以其他理據（如失去約因或公共機構越權作出要求等）討回，亦可以法律錯誤為理據而討回時，有關一方可能可透過無限期延展時效期而在訴訟程序上取得優勢。但香港法院是否會顧及有關交易的最終目的而對《時效條例》作出較具限制性的詮釋，仍是未知之數。第二，辨認法律錯誤如何發生，仍是重要的一環。由立法機關通過的具追溯力的法律改變，與性質根本就是具追溯力的法庭裁決帶來的法律改變，兩者的後果可能有所不同。第三，個別合約可就隨後法庭裁決帶來的改變訂明有關條文（見上述 *Hazell* 一案）— 畢竟，歸還法律一旦不能應用，仍可以自願性協議取代，這點是不容爭議的。

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