

BRIDGING THE GREAT DIVIDE BETWEEN MISTAKES OF LAW AND FACT IN RESTITUTION: IS THE BRIDGE SAFE TO CROSS?

On 29 October 1998, the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council, and other appeals*¹ ('*Kleinwort Benson's case*') finally abrogated the rule barring recovery of payments made under a mistake of law in restitution in England. This article seeks to examine whether the Singapore courts should follow the English approach or whether the difficulties which were articulated by the minority in the House of Lords should stand in the way of such a development locally.

I. INTRODUCTION

In *Kleinwort Benson's case*, Kleinwort Benson ('the bank') entered into several swaps contracts with several local authorities and pursuant to those contracts paid out a total of £811,208.90 to the latter. Subsequent to those payments, the House of Lords in *Hazell v Hammersmith and Fulham London Borough Council and Ors*² held that the relevant statute³ did not confer upon the local authorities the requisite capacity to enter into such swaps contracts. As a result of that decision, the bank brought actions against the various local authorities claiming the sums paid. Of the £811,208.90, some £388,114.72 of the payments were made within the six-year limitation period and had already been recovered by the bank on the ground of failure of consideration. The present claim concerned only the balance of £423,094.18 representing earlier payments and recovery under this head was *prima facie* time-barred. In order to overcome this time-bar, the bank sought to recover this balance on the alternative ground of mistake of law.

II. THE GREAT DIVIDE

Historically, the great divide in the law of restitution at common law was to be found between a mistake of law and a mistake of fact. According to the UK Law Commission Report in 1994: 'It is generally accepted that in English law the fact that a payment is made under a mistake of law is not of itself a ground for recovery of the payment. By contrast, a payment made under a mistake of fact is *prima facie* recoverable.'⁴

1 [1998] 3 WLR 1095.

2 [1992] 2 AC 1.

3 Section 111 Local Governments Act 1972.

4 The Law Commission Report (Law Com No 227), *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments*, 30th September 1994.

In the earliest annals of English law, there was no such divide between a mistake of fact and one of law.⁵ The first suggestion that such a divide existed emerged from the *obiter dictum* of Buller J in *Lowrie v Bourdieu*⁶ where his Lordship based the rule of non-recovery on the maxim *ignorantia juris non excusat*. The origin of the rule, however, as part of the *ratio decidendi* of a case, is well-known to be born of the decision of Lord Ellenborough CJ in *Bilbie v Lumley*.⁷ His Lordship in that case opined that '[e]very man must be taken to be cognisant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case.'⁸ In that case, an underwriter had paid a claim under a policy which he was entitled in law to repudiate for non-disclosure. His claim to recover the money so paid was thus barred by the 'mistake of law' rule that Lord Ellenborough CJ established.

Many academics have suggested that *Bilbie v Lumley* can be restricted to its facts and that the proposition by Lord Ellenborough CJ in that case should be narrowed. In particular, Gareth Jones is convinced that the 'principle in *Bilbie v Lumley* should [only] preclude recovery of money which was paid in *settlement* of an honest claim ... Any other payment made under a mistake of law should be recoverable if it would have been had the mistake been one of fact. [Emphasis added.]'⁹ However, history has proven otherwise. In *Wilson and M'Lellan v Sinclair*,¹⁰ Lord Brougham LC took the view that a restitutionary claim under the rubric of mistake could only succeed if the said mistake was 'in the fact.' By

5 RM Jackson, *The History of Quasi-Contract in English Law*, (1986) (Wm W Gaunt & Sons Inc) at 58-61.

6 (1780) 2 Doug 468 at 471.

7 (1802) 2 East 469.

8 *Ibid.*, at 472. Although *Bilbie v Lumley* was the origin of the rule, *Brisbane v Dacres* (1813) 5 Taunt 143, in which the whole question was fully argued and the decision in *Bilbie v Lumley* reconsidered and affirmed in reasoned judgments, might more properly have been regarded as encapsulating the reasoning on which the rule was based. In *Brisbane v Dacres*, the court did not found its decision upon the maxim *ignorantia juris non excusat* and Gibbs J reformulated the rationale of the rule in the following terms: '[W]here a man demands money of another as a matter of right, and that other, with a full knowledge of the facts, upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily paid. It may be, that upon a further view he may form a different opinion of the law, and it may be, his subsequent opinion may be the correct one. If we were to hold otherwise, I think that many inconveniences may arise; there are many doubtful questions of law: when they arise, the Defendant [sic] has an option, either to litigate the question, or to submit to the demand, and pay the money. I think, that by submitting to the demand, he that pays the money gives it to the person to whom he pays it and makes it his, and closes the transaction between them.' at 152.

9 Gareth Jones, *Goff & Jones: The Law of Restitution*, 5th Edn (1998) at 214-5.

10 (1830) 3 Wilson & Shaw 398, at 409.

1841, Parke B in *Kelly v Solari*¹¹ accepted that ‘money paid with full knowledge of all the facts cannot be recovered back by reason of its having been paid in ignorance of the law.’ By 1943, Groom-Johnson J considered it to be ‘beyond argument’ in all the courts below the House of Lords that a payment made as a result of a mistake of law is generally irrecoverable.¹²

III. ABROGATION OF THE ‘MISTAKE OF LAW’ RULE

A. Critique of the great divide

This great divide has been the subject of severe criticism by academics and judges alike. As Lord Goff of Chieveley in his leading judgment in *Kleinwort Benson* pointed out, the criticisms are mainly threefold:¹³

First, the rule allows the payee to retain a payment which would not have been made to him but for the payer’s mistake, whereas justice appears to demand that money so paid should be repaid unless there are special circumstances justifying its retention. Second, the distinction drawn between mistakes of fact (which can ground recovery) and mistakes of law (which cannot) produces results which appear to be capricious.¹⁴ ... Third, as a result of the difficulty in

11 (1841) 9 M & W 54, at 55. See also Lord Abinger CB at 57-58 where his Lordship opined: ‘In the case of *Bilbie v Lunley*, the argument as to the party having means of knowledge was used by counsel, and adopted by some of the judges; but that was a peculiar case, and there can be no question that if the point had been left to the jury, they would have found that the plaintiff had actual knowledge of the facts. The safest rule however is, that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again. [Emphasis added.]’

12 *Sawyer and Vincent v Window Brace Ltd* [1943] KB 32. It should be noted that before the decision of the House of Lords in *Kleinwort Benson*’s case, the question had never fallen to be decided by the House of Lords, although it has been the subject of severe criticism by academics and the House of Lords in *Woolwich Equitable Building Society v IRC* [1993] AC 70 as well as the Law Commission Report (Law Com No 227), *supra*, n 4.

13 *Supra*, n 1 at 1112-3 per Lord Goff of Chieveley. See also the Law Commission Consultation Paper No 120, *Restitution of Payments under a Mistake of Law*, paras 2.24 to 2.26. See however, Aedit Abdullah, ‘The Abrogation of the Rule against Recovery in Mistake of Law’ [1998] SJLS 469 at 471-2.

14 To flesh out the second criticism by Lord Goff of Chieveley, one may refer to the Law Commission Report (Law Com No 227), *supra*, n 4 at paras 2.5 to 2.15, where it was pointed out that many qualifications and exceptions existed to the general rule. For example, where contracts are deemed illegal by legislation enacted for the protection of the payer, the payer was allowed to recover notwithstanding that payment was made under a mistake of law as the parties were not *in pari delicto*: see *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192; *Eadie v Township of Brantford* [1967] SCR 573; cf *Hydro Electric Commission of the Township of Napean v Ontario Hydro* (1982) 132 DLR (3d) 193 at 241 per Estey J whose criticisms were adopted in *Air Canada and Pacific Western Airlines v The Queen in Right of the Province of British Columbia and the Attorney General of British Columbia* [1989] 1 SCR 1161; see also Gareth Jones, *supra*, n 9 at 220-1; Maddaugh and McCamus, *The Law of Restitution* (1990) at 268; Crawford (1967) 17 U of Toronto LJ 344. Further, a payment made under a

some cases of drawing the distinction between mistakes of law and fact, and the temptation for judges to manipulate that distinction to achieve practical justice in particular cases, the rule became uncertain and unpredictable in its application.¹⁵

mistake of law may also be recovered where there is an agreement to repay if it turns out that the money is not in fact due and such an agreement may be implied in law: see *Woolwich Equitable Building Society v IRC* [1989] 1 WLR 137 per Nolan J, following Vaisey J in *Sebel Products Ltd v Commissioners of Custom and Excise* [1949] 1 Ch 409. Where other grounds for recovery in restitution are available, for example, duress or undue influence, the mistake of law rule will not bar recovery: see *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All ER 890 at 933 per Hobhouse J. Trustees or personal representatives who make overpayments as a result of a mistake of law may also obtain relief in equity in some circumstances: see *Dibbs v Goren* (1949) 11 Beav 483; *Re Musgrave* [1916] 2 Ch 417; Gareth Jones, *supra*, n 9 at 223-5; *Re Diplock* [1947] Ch 716; [1948] Ch 465; sub nom *Ministry of Health v Simpson* [1951] AC 251; *cf R v Tower Hamlets LBC, ex parte Chetnik Developments Ltd* [1988] AC 858 at 876-7 and *Sharp Bros & Knight v Chant* [1917] 1 KB 771. Payments made under a mistake of law to an officer of the court may also be recovered: see *Ex parte James* (1874) LR 9 Ch App 609. Similarly, it has been held that payments made by an officer of the court as a result of an error of law are recoverable: see *Re Birkbeck Permanent Benefit Building Society* [1915] 1 Ch 91. If the mistake is one of a foreign law, it would be treated as one of fact since questions of foreign law are treated as questions of fact to be proved by evidence: see *Lazard Bros and Co v Midland Bank Ltd* [1933] AC 289. Therefore, it is generally regarded that payments made under such mistakes are recoverable notwithstanding that there is no judicial pronouncement to that effect: see Gareth Jones, *supra*, n 9 at 232. The mistake of law rule is also qualified by the equitable jurisdiction of the court to grant relief from the consequences of mistake: see *Gibbons v Mitchell* [1990] 1 WLR 1304 at 1309 per Millett J; *Daniell v Sinclair* (1881) 6 App Cas 181 at 190; *Cooper v Phipps* [1867] LR 2 HL 149; *Earl Beauchamp v Winn* (1873) LR 6 HL 223. Further, as a result of the development in *Woolwich Equitable Building Society v IRC*, *supra*, n 12, recovery is allowed in the case of *ultra vires* payments to and by public authorities irrespective of whether there has been a mistake of law.

- 15 Examples of judicial manipulation can be seen in *Solle v Butcher* [1950] 1 KB 671 and *George (Porky) Jacobs Ltd v City of Regina* [1964] 326. In the latter case, the plaintiff had paid licence fees to the municipality at a daily rate. Both parties believed that these amounts were due under a non-existent by-law but, in reality, the law only required the payment of an annual fee. The court held that the plaintiff had been mistaken as to the existence of a by-law requiring the payment of the particular fees and, classifying the mistake as one of fact, allowed recovery. The difficulty with such an approach lies in the drawing of a further distinction, in addition to the one drawn between mistakes of fact and law, between mistakes as to the interpretation of a law and mistakes as to the existence of a law. It is clear that such a further distinction is unacceptable. The traditional rule barring recovery of payments made under a mistake of law, as it developed historically, was never restricted to merely barring recovery where the mistake was as to the interpretation of a law. Further, whilst at first sight it appears extremely simple to distinguish between mistakes as to the interpretation of a particular law and mistakes as to its existence, a close examination reveals that this is not the case. Most people, with the possible exception of lawyers, simply do not think of the law as discrete provisions that can be broken down into various Acts, and further subdivided into specific chapters and sections and subsections. Hence, when a lay person says that he was of the mistaken belief that he was liable to pay 20% in taxes when the relevant taxation statute only required payment of 10% in taxes, it is practically impossible to decide whether he had simply been mistaken as to whether a particular section (or subsection) in the relevant tax law required a 20% payment or whether he had held the mistaken belief that there was a non-existent section (or subsection) in the relevant taxation law requiring the 20% payment.

B. *Bridging the great divide*

The first judicial signs within the Commonwealth that the great divide would be bridged can be traced to the dissenting judgment of Dickson J in *Hydro Electric Commission of the Township of Nepean v Ontario Hydro* who noted that '[o]nce a doctrine of restitution or unjust enrichment is recognised, the distinction as to mistake of law and mistake of fact becomes simply meaningless'.¹⁶ His Honour, though in the minority, was subsequently followed by the majority of the Supreme Court of Canada in *Air Canada and Pacific Western Airlines v The Queen in Right of the Province of British Columbia and the Attorney General of British Columbia*, in which La Forest J (with whom Lamer and L'Heureux-Dube JJ agreed) declared that '*the distinction between mistake of fact and law should play no part in the law of restitution. Both species of mistake, if one can be distinguished from the other, should, in an appropriate case, be considered as factors which can make an enrichment at the plaintiff's expense "unjust", or "unjustified". [Emphasis added.]*'¹⁷

The route was soon followed by the High Court of Australia in *David Securities Pty Ltd and Ors v Commonwealth Bank of Australia*,¹⁸ where the majority (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ)¹⁹ decided that 'the rule precluding recovery of moneys paid under a mistake of law should be held not to form part of the law in Australia' and that it 'would be logical to treat mistakes of law in the same way as mistakes of fact, so that there would be a *prima facie* entitlement to recover moneys paid when a mistake of law or fact has caused the payment'.²⁰

The first signs that this trend would be followed in England was seen in the *Woolwich* case which led the Law Commission to opine that the mistake of law rule would not survive reconsideration by the House of Lords.²¹ The rule was indeed laid to rest by the House of Lords on 29 October 1998 when it arose for consideration in *Kleinwort Benson's* case. The House of Lords were unanimous in the opinion that the mistake of law rule should be abolished,²² being of the view that the recognition that the law of restitution rests upon the foundation of unjust enrichment demands that the rule be abrogated. However, the minority dissented over concerns as to the effects that such an abrogation by the majority would have.

¹⁶ *Supra*, n 14 at 209.

¹⁷ *Supra*, n 14 at 1201.

¹⁸ (1992) 109 ALR 57.

¹⁹ And in which Dawson J agreed and Brennan J agreed in part.

²⁰ *Supra*, n 18 at 73.

²¹ The Law Commission Report (Law Com No 227), *supra*, n 4 at 27.

²² *Supra*, n 1 at 1105 per Lord Browne-Wilkinson, at 1115-6 per Lord Goff of Chieveley, at 1130 per Lord Lloyd of Berwick, at 1136-7 per Lord Hoffman, and at 1143 per Lord Hope of Craighead.

IV. SPECIAL DEFENCES FOR CLAIMS UNDER MISTAKE OF LAW?

So far as *Kleinwort Benson's* case was concerned with the abrogation of the mistake of law rule, it was the subject of little controversy, the House of Lords being unanimous that the abolition of the rule was long overdue. However, aside from bridging the great divide between mistakes of law and mistakes of fact, the majority of the House of Lords also took the opportunity to reject several defences to an action for recovery of payments made under a mistake of law.

A. *Honest receipt*

The defence of honest receipt was first proposed by Brennan J (as he then was) in *David Securities Pty Ltd and Ors v Commonwealth Bank of Australia*, where his Honour opined that '[i]t is a defence to a claim for restitution of money paid or property transferred under a mistake of law that the defendant honestly believed, when he learnt of the payment or transfer, that he was entitled to receive and retain the money or property.'²³ The rationale of this defence, which was not endorsed by the majority in *David Securities*, was to achieve a degree of certainty in past transactions.²⁴

As pointed out by Lord Goff of Chieveley, the defence sought to address the concern of judges 'about what is sometimes called the finality of transactions ... [which had] formed a significant part of the amalgam of concerns which led to the rule that money paid under a mistake of law was irrecoverable on that ground.'²⁵ According to Lord Goff of Chieveley, this defence suffers from a chronic lack of support because it is 'generally regarded as being wider than is necessary to meet the perceived mischief.'²⁶ In particular, the defence of honest receipt in the case of a claim for recovery of payment under a mistake of law would eclipse accepted defences to restitution such as that of change of position²⁷ and

²³ *Supra*, n 18 at 92.

²⁴ *Ibid.*, at 91 where his Honour opined: 'The reason for introducing any limitation of restitution of payments made under a mistake of law should be identified: it is to achieve a degree of certainty in past transactions. Unless some limiting principle is introduced, the finality of any payment would be as uncertain as the governing law.'

²⁵ *Supra*, n 1 at 1124.

²⁶ *Ibid.*

²⁷ The defence has been accepted in Canada (see *Rural Municipality of Storkhoaks v Mobil Oil Canada Ltd* (1975) 55 DLR (3d) 1 and *Air Canada and Pacific Western Airlines v The Queen in Right of the Province of British Columbia and the Attorney General of British Columbia*, *supra*, n 14), Australia (see *Bank of New South Wales v Murphett* [1983] 1 VR 489 and *David Securities Pty Ltd v Commonwealth of Australia*, *supra*, n 18), New Zealand (see s 94B of the New Zealand (Judicature) Act 1908), England (see *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548) and Singapore (see *Seagate Technology Pte Ltd v Goh Han Kim* [1995] 1 SLR 17). The authors do

the settlement of a *bona fide* claim.²⁸ As such, Lord Goff of Chieveley thought that ‘it would be most unwise for the common law, having recognised the right to recover money paid under a mistake of law on the ground of unjust enrichment, immediately to proceed to the recognition of so wide a defence as [that proposed by Brennan J] which would exclude the right of recovery in a very large proportion of cases. The proper course is surely to identify particular sets of circumstances which, as a matter of principle or policy, may lead to the conclusion that recovery should not be allowed; and in so doing to draw on the experience of the past, looking in particular from the analogous case of money paid under a mistake of fact’.²⁹

B. *Completed transactions*

Unlike the defence of honest receipt, the completed transactions defence does not have its roots in judicial pronouncement but rather arose out of a footnote to an article by Professor Peter Birks entitled ‘No Consideration: Restitution after Void Contracts’.³⁰ According to Professor Birks:

[T]here is one good argument against allowing restitution [on the basis of mistake of law in the case of void contracts], namely the transferor’s mistaken belief in his/her liability to make the transfer and the liability of the other to reciprocate. It is that after the execution of the supposed contract the force of this type of mistake is spent ... Therefore, even though it is true ... that the mistake will have been causative at the time of the performance, that mistake cannot on this reasoning be relied upon when matters have progressed to the point at which it can clearly be seen that the only prejudice which it might have entailed never in fact eventuated.³¹

not propose to look into the intricacies of the change of position defence; the interested reader may refer instead to Yeo Tiong Min, ‘Restitution, Change of Position and Compensation’ [1995] SJLS 209 for an insight into the ramifications of the Court of Appeal’s acceptance of the defence in the Singapore context.

28 The defence has been accepted in Canada (see *Air Canada and Pacific Western Airlines v The Queen in Right of the Province of British Columbia and the Attorney General of British Columbia*, *supra*, n 14) and Australia (see *David Securities Pty Ltd and Ors v Commonwealth Bank of Australia*, *supra*, n 18).

29 *Supra*, n 1 at 1125; see also the judgments of Lord Lloyd of Berwick at 1136 (concurring with Lord Goff of Chieveley), Lord Hoffman at 1136-7 (concurring with Lord Goff of Chieveley), and Lord Hope of Craighead at 1151 where their Lordships also reject the honest receipt defence.

30 (1993) 23 UWALR 195.

31 *Ibid.*, at 230, fn 137 .

According to Lord Goff of Chieveley,³² the argument is inconsistent with the well-established rule that the cause of action for recovery of money paid under a mistake of *fact* accrues at the time of payment. Where under the agreement a series of payments are to be made, and that agreement is void, so that each payment has been made under a mistake of *law*, the cause of action to recover arises on the date when *each* payment was made. If Professor Birks' argument were accepted, at the moment when the final payment is made under such a void contract, not only will the final payment be irrevocable, despite the fact that it was made under precisely the same mistake as made by the payer in respect of previous payments, but the payer will somehow be divested of his accrued right to recover all those previous payments as well. The difficulty with Professor Birks' view is that the mistake subsists regardless of whether or not the transaction is completed and as such, it is difficult to see how the claim can be extinguished by the event of closure.

Furthermore, Professor Birks' criticism must also be viewed in its context. The learned author had been criticising the decision of Hobhouse J in *Westdeutsche Landesbank Girozentrale v Islington LBC* which had allowed the recovery of payments of money made under void swaps agreements on the basis of absence of consideration. Professor Birks preferred the view that the proper basis of recovery was the failure of consideration so that if the transaction was completed, the basis of recovery under the rubric of failure of consideration would cease to exist. Therefore, the second problem to his defence of completed transactions as applied to recovery under a mistake of law, according to Lord Goff of Chieveley,³³ is that Professor Birks' analysis in the context of void contracts, allows 'failure of consideration ... to trump mistake of law as a ground for recovery of benefits conferred ... [even] though the usual preference of English law [is] to allow either of two alternative remedies to be available ...'

As further pointed out by Lord Goff of Chieveley,³⁴ the proposed defence is incompatible with the *ultra vires* rule as it is odd that an *ultra vires* transaction should become binding on a local authority simply on the ground that it has been completed notwithstanding that the contract is one which 'public policy has declared to be void.' As Lord Hope of Craighead³⁵ put it concisely, 'the result [of applying Professor Birks' defence is] to give practical effect to a transaction which, on the doctrine of *ultra vires*, did not legally exist' and such a result would have the effect of defeating the purpose of the *ultra vires* doctrine, which serves to protect the public. Whilst this purpose could arguably still be served by limiting the defence to the case of a claim of restitution against the

³² *Supra*, n 1 at 1126.

³³ *Ibid.*

³⁴ *Ibid.*, at 1126-7.

³⁵ *Ibid.*, at 1152-4.

local authorities, but not *vice versa*, such an approach does not seem justifiable on any sensible basis of fairness to the parties to the void contract.³⁶

C. The ‘settled law’ defence

The issue which divided the House of Lords in *Kleinwort Benson*’s case, however, was the applicability of the ‘settled law’ defence.³⁷ The defence was accepted by the minority, Lord Browne-Wilkinson and Lord Lloyd of Berwick, but rejected by the majority (consisting of Lord Goff of Chieveley, Lord Hoffman, and Lord Hope of Craighead). The dissenting judges were of the opinion that, if at the date of payment, the law was settled either by clear judicial authority or the practice and understanding of all lawyers skilled in the field, then the payment was not paid under a mistake of law even if a subsequent judicial decision departs from that settled view.³⁸ In this matter, the minority had relied on the Law Commission Report wherein the defence was stated in the following terms:³⁹

An act done in accordance with a settled view of the law shall not be regarded as founding a mistake claim by reason only that a subsequent decision of a court or tribunal departs from that view.

36 Andrew Burrows, ‘Swaps and the Friction Between Common Law and Equity’ [1995] RLR 15 at 19; adopted by Lord Goff of Chieveley in his judgment, *ibid*, at 1127 and Lord Hope of Craighead in his judgment at 1154. As the learned author also points out, ‘[t]he difficulty with Birks’ position is that it would seem to require us, in every case in which the plaintiff seeks restitution from mistake in entering into a purported contract, to add another causation enquiry to the standard “but for” test. [In other words,] one has to ... ask “Would the plaintiff have made the payment had he or she known that the defendant would fully perform his or her promise?” Only if that question is ... answered “no” will restitution be allowed. Yet if a payer wishes to pull out of a void or voidable contract and to recover money paid under it, on the basis that it was mistaken in paying the money, normal principle and precedent indicate that it should be entitled to do so even if, as events have turned out, it has suffered no prejudice from that mistake.’

37 There is some dispute as to whether the ‘settled law’ defence is truly a defence or simply a means to clarify and delimit what is meant by ‘mistake’ in cases where the law has changed. Lord Hope of Craighead (*supra*, n 1 at 1151) treated it as a defence whilst the minority (*supra*, n 1 at 1132 per Lord Lloyd of Berwick and at 1099 per Lord Browne-Wilkinson) took the view that it simply sought to clarify the meaning of ‘mistake’ in the context of mistake of law.

38 *Supra*, n 1 at 1099, 1103-1104 and 1104-1105 (per Lord Browne-Wilkinson); and at 1133 and 1135 (per Lord Lloyd of Berwick).

39 Clause 3(1) of the Draft Restitution (Mistakes of Law) Bill, see the Law Commission Report (Law Com No 227), *supra*, n 4 at 196. Further, clause 3(2) provides: ‘A view of the law may be regarded for the purposes of this section as having been settled at any time notwithstanding that it was not held unanimously or had not been the subject of a decision by a court or tribunal.’ The Law Commission Report, at para 5.11 points out: ‘We have in mind the situation where, had the payer taken advice from a qualified legal practitioner who was reasonably experienced in the field of law in question at the time of payment, and that practitioner had obtained access to all of the ordinarily available legal materials on the point of law in issue, he would have had no doubt in advising the payer that the law supported the payment.’

1. *Prior case law*

The Law Commission in its recommendations, relied chiefly on the decision of *Henderson v Folkestone Waterworks Co*,⁴⁰ a case that was also relied upon by Lord Browne-Wilkinson in the minority in *Kleinwort Benson's* case.⁴¹ In *Henderson's* case, the plaintiff had paid water rates to the defendant calculated in accordance with the law as it was held to be by the Court of Appeal. Subsequent to the date of payment, the House of Lords changed the law and if calculated under the changed law, the plaintiff had overpaid. He thus sought to recover the overpayments on the ground that he had paid under compulsion. After counsel submitted that the payment was made in ignorance of the law, Lord Coleridge CJ interjected: 'Of what law? I was ignorant of it before the decision of the House of Lords. I had held to the contrary, and two eminent judges agreed with me. Can that be put as ignorance of law? Just see what consequences would follow — that wherever there has been a reversal of judgment all the money that has been paid under the previous notion of the law can be recovered back! Has that ever been held? Can it be that every reversal of a decision may give rise to hundreds of actions to recover money previously paid?'⁴²

In the event, Lord Coleridge CJ (with whom A L Smith J concurred) dismissed the plaintiff's claim, noting that 'at the time the money was paid, which was before *Dobbs's* case, the law was in favour of the company, and there was no authority to show that it could be recovered back on account of a judicial decision reversing the former understanding of the law.'⁴³ In this respect, *Henderson's* case would appear to support the case that there would be no mistake of law even when the law is retrospectively changed. As pointed out by Lord Goff of Chieveley,⁴⁴ however, the decision can also be based on a straightforward application of the mistake of law rule as Lord Coleridge CJ notes at the end of his judgment that '[t]he law [does] not allow money voluntarily paid under a mistake of law to be recovered back.'⁴⁵ Lord Goff of Chieveley thus summarily dismisses the case as being of '[I]ittle or no importance ... in the present context.'⁴⁶ Attractive though this option may appear, it misses the point that the question of whether or not there was a mistake was considered *not* in the context of the mistake of law rule but in the context of a restitutionary claim under the head of payment under compulsion.⁴⁷

⁴⁰ (1885) 1 TLR 32.

⁴¹ *Supra*, n 1 at 1101-2.

⁴² *Supra*, n 40.

⁴³ *Ibid.*

⁴⁴ *Supra*, n 1 at 1120.

⁴⁵ *Supra*, n 40.

⁴⁶ *Supra*, n 1 at 1120.

⁴⁷ Counsel in his submissions, *supra*, n 40, before referring to the point on ignorance 'contended that where both parties had contracted under a mistake the money could be recovered. Moreover, he contended that this was really a payment under compulsion. It was, at all events, a payment in ignorance of law.'

The court, as well as counsel, appear to have taken the view that before the instant claim could succeed, there must be an operative mistake of law⁴⁸ and as such, in dismissing the claim, the decision that there was no such mistake was of crucial importance.

The flaw in the decision, however, lies in its failure to recognise the retrospective effect of a judicial decision in England. Lord Coleridge CJ had stated in his judgment that ‘the assessment had been altered *as to the future*. [Emphasis added.]’⁴⁹ Unless this is evidence of the judicial recognition of the doctrine of prospective overruling in England, his Lordship must be sorely mistaken in believing that a subsequent decision of the court reversing a former understanding of the law only had prospective effect. If that were so, his Lordship must have been in error in concluding that there was no operative mistake of law though the ultimate decision reached was arguably correct since the court had concluded that payment was made voluntarily and under the then-established principles, payments made voluntarily under a mistake of law could not be recovered.

In *Derrick v Williams*,⁵⁰ Sir Wilfred Greene MR appeared to take a contrary view to that adopted in *Henderson*’s case. In that case, the plaintiff had accepted a payment into court on the basis that the Court of Appeal had declared the law in a form which precluded the recovery of damages for loss of expectation of life. Subsequently the House of Lords in *Rose v Ford*⁵¹ reversed the Court of Appeal. The plaintiff brought fresh proceedings to recover these damages and failed. Lord Browne-Wilkinson in *Kleinwort Benson*’s case suggested that the decision is ‘consistent with the view that in deciding whether a person has acted under a mistake of law at a particular time, the question is whether they mistook the law as it then was without reference to subsequent retrospective change by later decisions.’⁵²

His Lordship must surely be wrong if he is of the opinion that *Derrick v Williams* is consistent with the view that there is no mistake of law when the law is retrospectively altered. It is crystal clear from the judgment that the Court of Appeal was of the view that such a mistake existed and Sir Wilfred Greene MR’s judgment is better read as only barring recovery

⁴⁸ *Ibid*, where Lord Coleridge CJ opined that ‘the law was quite clear that the plaintiff could not recover back this money. No doubt when money paid under an error in law had been extorted or obtained by duress or any kind of compulsion it could be recovered back, but this was not the case here. ... [A]t the time the money was paid, ..., the law was in favour of the company, ...’

⁴⁹ *Ibid*.

⁵⁰ [1939] 2 All ER 559.

⁵¹ [1937] AC 826.

⁵² *Supra*, n 1 at 1103.

as between litigants.⁵³ It is respectfully submitted that the position adopted by the Master of the Rolls is more consonant with the view that *prima facie*, a claim for recovery under a mistake of law would be allowed notwithstanding that such mistake is shown up only by subsequent decisions, but that the claim would be barred under the defence of a compromise of a *bona fide* claim, the position in *Derrick v Williams* being the exact converse of such a situation in that it is the payee instead of the payer who seeks to rely on the mistake.

The decision of the Court of Appeal in *R v Governor of Brockhill Prison, Ex parte Evans (No 2)*⁵⁴ also suggests that there will be an operative mistake where the law is changed retrospectively. That case concerned the detention of the plaintiff, the period of which was calculated in accordance with the interpretation of a penal statute as then laid down by prior case law. However, this method of calculation was subsequently and authoritatively overruled judicially and a different method of calculation was put forward as the true construction of the penal statute. If this new method of calculation was used, her detention would be excessive and the plaintiff thus brought an action against the prison governor for false imprisonment. The majority of the Court of Appeal (Lord Woolf MR and Judge LJ), allowing the plaintiffs action, held that the retrospective effect of the change in the law prevented the defendant from relying on the previously declared law as a defence. Indeed, all three members of the Court of Appeal accepted that, until and unless the doctrine of precedent was changed, a judicial overruling of a prior decision meant that the law was altered retrospectively because the court could not change the law prospectively but merely declared the law as it always been.⁵⁵ Although Roch LJ dissented from the result, it was the

⁵³ *Supra*, n 50 at 565, where his Lordship opines: 'It would be an intolerable hardship on successful *litigants* if, in circumstances such as these, their opponents were entitled to harass them with further litigation because their view of the law had turned out to be wrong, and, unless I were constrained by binding authority, I would be quite unable, on principle, to accept any such proposition. [Emphasis added.]'

⁵⁴ [1999] 2 WLR 103.

⁵⁵ Lord Woolf MR stated, *ibid*, at 107, that one principle 'deeply embedded' in the law is that 'any authoritative decision of the courts stating what is the law operates retrospectively'; that the 'decision does not only state what the law is from the date of the decision, it states what it has always been'. His Lordship also specifically applied the principle of retrospectivity to changes as to *interpretation* of the law (at 113). Lord Woolf MR therefore concluded (at 114-5) that: 'Until the approach to the doctrine of precedent is changed, the practical consequence is that once the later decision is given there is no right to rely on the earlier decision as correctly representing the law. ... The court did not purport to change and had no power to change the law for the future only. Although this could not be appreciated at the time of the false imprisonment the governor did misapply the law...'. Judge LJ concluded (at 130): 'For the present in this court we are bound to apply the theory [of retrospective overruling]—... based at least in part on the centrality in our constitution of parliamentary sovereignty—that the law was not changed by the decision of the Divisional Court on 15 November 1996.'

result of his Lordship's disagreement with the majority over the 'elements of the tort of false imprisonment', and not because his Lordship disagreed with the orthodox doctrine of retrospectivity.⁵⁶ The conclusion in *R v Governor of Brockhill Prison, Ex parte Evans (No 2)*, therefore, is that imprisonment which *appeared* lawful in the light of a prior judicial interpretation of an Act of Parliament, can *in fact* turn out to have been unlawful when another court subsequently, retrospectively and authoritatively gives a different construction to the statute; with the logical consequence that both the prior court and the gaoler relying on that court have made a mistake in their understanding of the law.

Lord Browne-Wilkinson⁵⁷ sought to distinguish the case on the basis that the Court of Appeal was concerned with the substantive law which once overruled, cannot be relied upon as a defence whereas in *Kleinwort Benson's* case, the question did *not* concern substantive law but rather turned on the state of mind of the payer. The problem with such an approach is abundantly clear: how does one determine whether there has been a mistake of *law* without referring to the substantive law?⁵⁸

2. Conceptual analysis

The conceptual analysis behind the approach of the minority can be summarised easily:⁵⁹ where a subsequent judicial decision overrules previous judge-made law, the law is said to change and hence, when payments are made on the basis of the previous law, the law then was as previously settled and thus the payment was never made under a mistake. The minority expressly reject the 'fairy tale' declaratory theory and accept that judges make and change the law, though they accept that the law, once changed, applies retrospectively.

⁵⁶ Roch LJ said, *ibid*, at 121: 'It is common ground that the dilemma created by these two considerations cannot be resolved, at least by this court, by saying that the decision of 15 November should not have retrospective effect. The fiction, well established in our law, is that when a court interprets a section in an Act of Parliament it is presumed that that section has had that meaning since its commencement date. There is a narrow but significant exception in the field of administrative law, where the court in its discretion can withhold an administrative law remedy where to grant it would lead to an undue interference in good administration. The resolution of this appeal depends upon the elements of the tort of false imprisonment.' His Lordship's analysis of the elements of the tort and defence of justification led him to conclude, at 125, that: 'Nevertheless the case of [*Olotu v Home Office* [1997] 1 WLR 328] is authority that the mere fact that the detention was unlawful does not result in the detainee being able to recover damages from the gaoler for the tort of false imprisonment. ... The governor's justification for detaining the appellant beyond 17 September was that he as a public servant was applying the relevant statutory provisions as interpreted by the courts.'

⁵⁷ *Supra*, n 1 at 1103.

⁵⁸ See also *infra*, nn 69-71 and accompanying text.

⁵⁹ *Supra*, n 1 at 1100-1 per Lord Browne-Wilkinson and at 1132-3 per Lord Lloyd of Berwick.

Therein lies the fundamental flaw of the approach taken by the minority. As Lord Hope of Craighead's judgment demonstrates clearly, in determining whether there was an operative mistake on the date of payment, the question is not one of whether the law was changed but rather whether the law applied retrospectively. As his Lordship points out, 'the critical question [is] whether the payer would have made the payment if he had known what he is *now* being told was the law. [Emphasis added.]'⁶⁰ Until a doctrine of prospective overruling is accepted judicially in England, which the courts in England have yet to do,⁶¹ the halfway house position suggested by the minority seems unsupportable. The minority appear prepared to accept that the law operates retrospectively so that the swaps contracts were void but nevertheless take the view that the bank was *not* mistaken in believing that they were valid. How such a contradictory state of affairs can exist seems to be inexplicable on any grounds of reason and is even more susceptible to attack than the 'fairy tale' declaratory theory of the common law.⁶²

Somewhat less convincing, however, is the view taken by two of the majority judges, Lord Goff of Chieveley⁶³ and Lord Hope of Craighead,⁶⁴ who appeared to accept that a retrospective amendment of a statute would not attract the same results as a judicial pronouncement with retrospective effect, but insisted that the position of the common law differed from that of statutory amendments. This position is especially surprising given Lord Hope of Craighead's recognition that the determination of whether there was a payment under a mistake of law which is recoverable is dependent not upon notions of Blackstonian or Austinian theories of the law, but whether the law has retrospective effect or not. Not surprisingly, this position was criticised by the minority in their respective judgments.⁶⁵

60 *Ibid.*, at 1148.

61 *Jones v Secretary of State for Social Services* [1972] AC 944 per Lord Simon of Glaisdale at 1026.

62 Furthermore, the approach taken by the minority leads to an incongruous application of the law depending upon whether payment has actually been made under the void contracts. If payment is made, as was the case in *Kleinwort Benson*, recovery under restitution is barred because the minority take the view that there was no mistake. However, where no payment has been made, the minority would appear to bar recovery under the contract by the would-be payee on the ground that the contract was void and hence unenforceable. Indeed there can be no other conclusion on this latter point.

63 *Supra*, n 1 at 1121.

64 *Ibid.*, at 1148.

65 *Ibid.*, at 1101 per Lord Browne-Wilkinson where his Lordship states that '[i]f that be true of statutory legislation, the same must *a fortiori* be true of judicial decision.'; and at 1134 per Lord Lloyd of Berwick where his Lordship states that 'it is difficult to defend, on policy grounds, a different rule for changes in the law effected by judicial decision.'

The view that a retrospective statutory amendment would not cause a mistake of law to arise stems from the Australian High Court decision in *Commissioner of State Revenue v Royal Insurance Australia Ltd.*⁶⁶ In that case, the majority of the judges took the view that a retrospective amendment of the relevant tax law by Parliament did not result in payments made under the old law being made under a mistake of law and thus restitutionary claims were not available for such payments.⁶⁷ The sole dissenting voice on this question was that of Mason CJ who took the view that ‘the retrospective operation of [the amendment] enables one to say that, in the light of the law as it was enacted with retrospective effect ..., the payments ... were made under a mistake as to the legal liability to pay them.’⁶⁸ This position was adopted by Lord Hoffman in *Kleinwort Benson’s* case, who following Mason CJ, opined: ‘I do not myself see why, in principle, if an Act of Parliament requires that the law be deemed to have been different on an earlier date, it should not follow that the person who acted in accordance with the law as it then was should be deemed to have made a mistake. ... But usually the question will turn upon the construction of the statute ...’⁶⁹

Notwithstanding the many voices in support of the position that there is no mistake where a statute is amended retrospectively, it seems that the preferable position, in principle, is that taken by Mason CJ and Lord Hoffman. One fault in adopting the position favoured by the authorities is that it is assumed that since the question of whether there was a mistake of law is a question determined solely by the payer’s state of mind, and that since that state of mind cannot be falsified by Parliament (and according to the minority, by analogy, the courts), there can be no retrospective ‘creation’ of a mistake. However, a closer analysis reveals that this assumption cannot be justified. It is not the payer’s state of mind alone which determines whether or not a mistake was made. The payer’s state of mind is only determinative of half the question, namely, the payer’s perception of the law. To determine the question of whether there has been a mistake, this state of mind must be compared to the substantive law. If the two correspond, then there is no mistake but not otherwise. Where a law (whether judge-made or statutory) operates retrospectively, it operates *not* on the payer’s state of mind but on the substantive law and in that fashion ‘creates’ a mistake.

⁶⁶ (1994) 69 ALJR 51.

⁶⁷ *Ibid.*, at 69 per Brennan J (with whom Toohey and McHugh JJ concurred) and at 75 per Dawson J.

⁶⁸ *Ibid.*, at 56-57.

⁶⁹ *Supra*, n 1 at 1139.

Furthermore, the principle of allowing recovery is based upon the unjust factor in the payee retaining payment and this is in turn determined by the question of whether there was an obligation to pay on the part of the payer. A retrospective amendment of the law, whether by statute or otherwise, necessarily affects the legal obligation of the payer.⁷⁰ If this legal obligation to pay is retrospectively extinguished, how then can the law of restitution, with its express recognition of 'unjust enrichment' as its basis,⁷¹ deny the claim?

A simple counter-example will highlight the fallacy in the proposition supported by the minority. Assuming that at the date of the payment, the payer was *not* legally obliged to make payment to the payee, but believed that he was so obliged. Subsequent to his making the said payment, the House of Lords amends the law so that he is indeed obliged to make payment. Applying the reasoning adopted by the minority to this counter-example, the payer would be allowed to reclaim his payment on the ground that he had been mistaken as to his liability at the date of payment, notwithstanding that the subsequent change in the law was retrospective with the consequence that there cannot possibly be any unjust enrichment of the payee since he is only retaining what is legally due to him as decided by the subsequent House of Lords decision.

Further difficulties abound with the approach taken by the minority. By the selective operation of the doctrine of retrospectivity, an anomaly is created in the law. The 'settled law' defence would lead to the case where a recalcitrant payer who refuses to pay the payee is allowed to take advantage of the retrospective change in the law whereas the dutiful payer who voluntarily pays is not so allowed, a position which seems difficult to justify on any grounds. Indeed, this anomaly suggests that the concern of the minority is directed *not* at the application of the doctrine of retrospectivity in the specific realm of mistake of law but rather the doctrine *per se*. However, in seeking to limit the retrospectivity doctrine in the manner chosen, they seek to introduce an unprincipled development

70 This much appears to be conceded by Brennan J in *Commissioner of Revenue v Royal Insurance Australia Ltd*, *supra*, n 66 at 69 where his Honour opined that '[i]f the 1987 amendment is to be effective retrospectively, the rights and liabilities of the Commissioner and those who overpaid money must be so altered as to place them in the same position as they would have been in had the Act not imposed the stamp duty abolished by the 1987 amendment ...' It would appear that Dawson J made the same concession, at 75, when his Honour stated that '[i]t does not seem to me that the retrospective amendment converted the payments of duty making up the amount of \$1,370,000 into payments made under a mistake of law, however much the amendment retrospectively removed the Comptroller's entitlement or authority to receive those payments.'

71 That the underlying basis of restitution is that of 'unjust enrichment' was first recognised in English law by the House of Lords decision of *Lipkin Gorman (a firm) v Karpnale Ltd*, *supra*, n 27.

to the law which surely causes more harm than good. Surely the more apropos development would have been the introduction of a doctrine of prospective overruling in appropriate cases.

Further, as Lord Goff of Chieveley pointed out, the ‘settled law’ defence ‘does not depend upon the lapse of any period of time after the date of the payment in question.’⁷² Indeed, as his Lordship further notes, ‘it is a remarkable feature of the proposed principle that, the longer ago the payment was made, the less likely is it to have been made under a settled understanding of the law.’⁷³ This is because, the law becomes more settled with time so that more recent transactions are more likely to have been made under a settled understanding compared to older transactions. It is thus easier to say that payment made under the 9,999th swaps agreement was made under a settled understanding than local authorities had the requisite capacity to enter into such agreements than the very first swaps agreement. This leads to the somewhat anomalous situation of protecting the sanctity of newer rather than older transactions when it is the re-opening of older transactions that is presumably the evil that the defence seeks to avoid.⁷⁴

Lord Lloyd of Berwick, in support of his dissenting opinion, mistakenly seeks to limit the extent of retrospectivity by reference to the proposition that previous decided cases cannot be challenged even though the law has changed and operates retrospectively.⁷⁵ However, this must surely be the result of the doctrine of *res judicata* rather than any inherent limit to the application of a retrospective law for it would be inconsistent to propose that a retrospective decision affects a transaction which was entered into in the past but not another transaction entered into on the same day simply because the latter had been the subject of a judicial decision other than by reference to the doctrine of *res judicata*. In this respect, it need only be pointed out that if *res judicata* did not apply, for example, where the plaintiff seeks to sue a third party, he is now entitled to rely on the retrospective change of the law notwithstanding that the exact same transaction is the basis of the suit.

It was suggested by the minority in *Kleinwort Benson*’s case⁷⁶ that a further reason why there should be no recovery is because there is no unjust factor where the payer and payee are at one in believing the law to be in accordance with a settled understanding and the law is subsequently changed, albeit retrospectively. However, unless the law develops in a Peter Pan-fashion where belief, mistaken or not, maketh

⁷² *Supra*, n 1 at 1122.

⁷³ *Ibid*, at 1123.

⁷⁴ As Lord Goff of Chieveley points out, *ibid*, at 1123, ‘[a]n appropriately drawn limitation statute would surely produce a more just result.’

⁷⁵ *Ibid*, at 1132.

⁷⁶ *Ibid*, at 1104-5 per Lord Browne-Wilkinson and at 1134 per Lord Lloyd of Berwick.

the law, this cannot be correct. As Lord Hoffman clearly demonstrates with his analogy to recovery of payments made under a mistake of fact, '[i]t has never been suggested that, in the case of a mistake of fact, [a payer] could not recover if everyone would probably have shared the same false belief.'⁷⁷ This clearly shows that the *sine qua non* for recovery is *not* the existence of a common mistaken belief between the parties but the existence or otherwise of an obligation to pay which impacts upon the voluntariness or intention of the payer to pay.

3. *Impact of Singapore's acceptance of prospective overruling on the analysis*

It appears that the concern which ultimately led the minority to their conclusion was the perceived need to preserve some security in past transactions.⁷⁸ Similar concerns have in fact led to the development of the doctrine of prospective overruling, in particular, where a court subsequently chooses to depart from an earlier judicial pronouncement. As Yong Pung How CJ said in *PP v Manogaran s/o R Ramu*,⁷⁹ 'if a person organises his affairs in accordance with an existing judicial pronouncement about the state of the law, his actions should not be impugned retrospectively by a subsequent judicial pronouncement which changes the state of the law, without his having been afforded an opportunity to reorganise his affairs.'

Notwithstanding the similar concerns underlying the approach of the minority and the doctrine of prospective overruling, which are no doubt legitimate, three distinct and clear differences exist between the operation of the doctrine of prospective overruling and the path chosen by the minority. Firstly, the minority's 'no mistake' approach does not share the same degree of flexibility as the doctrine of prospective overruling. Secondly, by drawing a brightline between prospective and retrospective overruling, equality and fairness is maintained, so that anomalous results will not be generated.⁸⁰ Thirdly, the doctrine of prospective overruling does not share the same conceptual difficulties as the approach advocated by the minority.⁸¹ As such it is clear that the legitimate concern of preserving the security of past transactions is better addressed by the doctrine of prospective overruling than the artificial 'no mistake' rule adopted by the minority.

⁷⁷ *Ibid.*, at 1137.

⁷⁸ *Ibid.*, at 1101 per Lord Browne-Wilkinson and at 1133 per Lord Lloyd of Berwick.

⁷⁹ [1997] 1 SLR 22 at 42.

⁸⁰ See *supra*, nn 71-74 and accompanying text.

⁸¹ See *supra*, nn 59-77 and accompanying text.

It is thus submitted that the proper approach in Singapore with respect to the controversial ‘settled law’ defence is even clearer with the judicial acceptance of the doctrine of prospective overruling by the Court of Appeal in *PP v Manogaran s/o R Ramu*.⁸² Since the local courts can in appropriate cases overrule a prior decision prospectively rather than retrospectively, and hence choose not to disturb past transactions, there is no need to resort to the artificial arguments raised by the minority in *Kleinwort Benson’s* case to bar recovery. If a judicial decision applies retrospectively, then the law against which the payer’s perception must be measured to determine if there was a mistake must be that represented by the retrospective decision. If the decision is merely prospective, then the law against which the payer’s perception must be measured to determine if there was a mistake must be that represented by the old law even though it has since been changed.

That said, it is the authors’ opinion that there are limits to the doctrine of prospective overruling, and clear distinctions must be drawn between three different instances of laws being overruled, namely, the striking down of a law as being unconstitutional; the re-interpretation of statutory provisions; and the overruling of purely judge-made common law. It seems clear that, at the very least, the striking down of a law as being unconstitutional must be fully retrospective in the light of the clear words of Art 4 of the Constitution⁸³ and here there can be no room for prospective overruling.

Furthermore, it is submitted that a distinction must also be drawn between the other two instances of judicial overrulings. In the case of purely judge-made common law, the present trend towards an admission of an Austinian view of the development of the law enables one to say that the law can be and is indeed sometimes changed by successive judicial pronouncements so that the common law which existed in the 19th century is not the same as that which exists today. Thus, where purely judge-made law is concerned, it is open to a court to hold that a previous view of the law will only be *prospectively* changed either because the previous

⁸² *Supra*, n 79 at 42-45.

⁸³ Art 4 of the Constitution of the Republic of Singapore provides: This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be *void*. [Emphasis added.] Some courts in other jurisdictions with constitutional provisions to the same effect have however decided that a declaration that a statute is unconstitutional may be made prospectively (see for example, *Golak Nath v State of Punjab* AIR 1967 SC 1643 and *PP v Data’ Yap Peng* [1987] 2 MLJ 311). It is respectfully submitted that these cases have been wrongly decided. For a more detailed discussion of this issue, please see Low Fatt Kin, Kelvin, Loi Chit Fai, Kelry, and Wee Ai Yin, Serene, ‘Towards a Maintenance of Equality: a Study of the Constitutionality of Maintenance Provisions which Sexually Discriminate’ (1998) 19 Sing LR 45 at 61 to 70.

view was *correct* and warranted by the different social circumstances existing then or because the older, *erroneous* view should not be retrospectively overruled so as not to generate the inconvenience of re-opening past transactions.

However, where statutes are concerned, their legal effects are as provided by Parliament and Parliament's intention is determined at the date of the passing of the relevant statute. The legal effect of a statute is immutable and whilst a court can correct an erroneous application of a statute, it cannot purport to amend its legal effect since to do so would amount to a judicial usurpation of the legislative powers of Parliament. The distinction between judge-made law and statute law in the context of judicial development of the law was also regarded as essential by Lord Devlin.⁸⁴ Writing extra-judicially, Lord Devlin noted that '[i]n relation to statute law ... there can be no general warrant authorising the judges to do anything except interpret and apply. ... In sum, in the common law there is a general warrant for judicial lawmaking; in statute law there is not. In the common law development is permitted, if not expected; in statute law there must be at least a presumption that Parliament has on the topic it is dealing with said all that it wanted to say'.⁸⁵ From this, it must surely follow that when a subsequent court departs from a previous judicial *interpretation* (or a widely held view) of a statute, there is no *change* in the law as such. The statute meant what it meant, then, just as now. Rather, all persons, including the previous court, who have acted on the previous erroneous interpretation of the statute must have been *mistaken* as to the true construction of the statute in the light of the subsequent judicial pronouncement.

It was just such a case of statutory interpretation in *Kleinwort Benson's* case. In *Kleinwort Benson's* case, the mistake of law concerned the capacity of the local authorities to enter into swaps agreements which in turn turned on the proper construction of s 111 of the Local Governments Act 1972. Once this is recognised, the minority's appeal to an Austinian view of the law to, in effect, give temporary validity to the swaps agreements must be rejected since judges cannot amend an Act of Parliament and there can only be one correct interpretation of an Act which must be determined at the date it was passed.⁸⁶

⁸⁴ Devlin, 'Judges and Lawmakers' [1976] 39 MLR 1.

⁸⁵ *Ibid.*, at 9.

⁸⁶ The same position, it is submitted, must be reached locally since there can be no prospective overruling of a judicial decision which interprets a statute without usurping the legislative powers of Parliament. To this end, it should be pointed out that whilst the Singapore Court of Appeal purported to do just that in *PP v Manogaran s/o R Ramu*, the decision must be viewed in its context. *PP v Manogaran s/o R Ramu* concerned the interpretation of a *penal* statute, and as such, it can be argued that prospective overruling was justified on its facts by Art 11(1) of the Constitution which provides: 'No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.'

V. WHEN DOES THE LIMITATION PERIOD BEGIN TO RUN?

As the sum claimed by the bank in *Kleinwort Benson*'s case was paid over to the local authorities prior to the six year limitation period laid down in s 5 of the UK Limitation Act 1980,⁸⁷ the bank argued that s 32(1)(c) of the UK Limitation Act 1980⁸⁸ applied so that the period of limitation only began to run from the time the mistake was or could with reasonable diligence be discovered and that the relevant time in that case was the date of judgment in *Hazell*'s case.

As against this submission, the local authorities argued that s 32(1)(c) does not on its true construction apply to mistakes of law, relying on the fact that the mistake of law rule operated in full force in 1939, when the provision was first enacted. It was further submitted that the use of the word 'discovered' in relation to mistakes in s 32(1)(c) showed that Parliament was referring not to mistakes of law but rather only to mistakes of fact.

The submission by the local authorities was rejected by the majority of the House of Lords. According to Lord Goff of Chieveley, the legislative history of s 32(1)(c) showed otherwise. Section 26(c) of the UK Limitation Act 1939, which was the precursor to s 32(1)(c), was enacted following the recommendations of the 5th Interim Report of the Law Revision Committee.⁸⁹ Prior to the enactment of s 26(c), it had been held that the equitable rule that time should only run under the Statute of Limitation from the time at which the mistake was, or could with reasonable diligence have been, discovered, did not apply to cases which fell exclusively within the cognisance of a court of law.⁹⁰ The Law Revision Committee was of the view that such a position was unsatisfactory and recommended that in all cases when relief was sought from the consequences of a mistake,

⁸⁷ See in the local context s 6(1)(a) of the Limitation Act (Cap 163, 1996 Ed) which provides: 'Subject to this Act, the following actions shall not be brought *after the expiration of 6 years from the date on which the cause of action accrued*: (a) actions founded on a contract or on tort; [Emphasis added.]' Notwithstanding the absence of any reference to restitutionary claims, s 5 of the UK Limitation Act 1980 has been interpreted as being wide enough to cover actions for money had and received: see *Re Diplock*, *supra*, n 14, at 514 per Lord Greene MR; *Kleinwort Benson Ltd v The Borough Council of Sandwell* February 12, 1993, unreported per Hobhouse J.

⁸⁸ See in the local context s 29(1)(c) of the Limitation Act which provides, so far as is relevant: 'Where, in the case of any action for which a period of limitation is prescribed by this Act — (c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered ... the mistake, ... or could with reasonable diligence have discovered it.'

⁸⁹ Cmnd 5334.

⁹⁰ *Ibid*, at para 23, referring to *Baker v Courage* [1910] 1 KB 56.

the equitable rule should prevail.⁹¹ As Lord Goff of Chieveley demonstrated, this 'equitable rule applied to all mistakes, whether they were mistakes of fact or mistakes of law'⁹² and thus the local authorities' submission could not be correct.

Indeed the submission of the local authorities commits yet another fallacy. In submitting that s 32(1)(c) of the UK Limitation Act 1980 does not apply to a claim under a mistake of law because such claims did not exist when its precursor was first enacted, they failed to address the question that must surely follow. If the reason that s 32(1)(c) of the UK Limitation Act 1980 cannot apply is because the cause of action did not exist so that legislature could not have addressed its mind to it, how then does the UK Limitation Act 1980 begin to apply at all? After all, the cause of action did not exist when the UK Limitation Act 1980 was first enacted so that by parity of reason, Parliament could not have intended s 5 to bar recovery under the head of mistake of law for the simple reason that such a cause of action did not exist.

VI. THE NEED FOR REFORM

Whilst the view taken by the minority suffers from conceptual defects, the position adopted by the majority is not exactly perfect either. As aptly pointed out by Lord Lloyd of Berwick, '[a] safeguard is needed because law, unlike facts, can change. Facts are immutable, law is not.'⁹³ The havoc that might be wreaked by the reopening of transactions many years later by the subsequent decision of the courts is a very real one, especially in the light of the inadequacies of the present Limitation Act. Indeed, this point is acknowledged even by two of the majority judges.⁹⁴

91 *Ibid*, where the Law Revision Committee recommended that 'in all cases when relief is sought from the consequences of mistake, the equitable rule should prevail and time should only run from the moment when the mistake was discovered, or could with reasonable diligence have been discovered. [Emphasis added.]'

92 *Supra*, n 1 at 1128, relying on *Earl Beuchamp v Winn* (1873) LR 6 House of Lords 223, at 232-5 and *Re Diplock supra*, n 14, at 515-6; see also Lord Hope of Craighead at 1154.

93 *Supra*, n 1 at 1131.

94 *Ibid*, at 1128 per Lord Goff of Chieveley where his Lordship opines: 'I recognise that the effect of section 32(1)(c) is that the cause of action in a case such as the present may be extended for an indefinite period of time. I realise that this consequence may not have been fully appreciated at the time when the provision was enacted, and further that the recognition of the right at common law to recover money on the ground that it was paid under a mistake of law may call for legislative reform to provide for some time limit to the right of recovery in such cases. The Law Commission may think it desirable, as a result of the decision in the present case, to give consideration to this question indeed they may think it wise to do so as a matter of some urgency.' Lord Hoffman, *supra*, n 1 at 1139, points out that '[t]he adoption of the "settled view" rule on these grounds would be a legislative act in a sense in which

Given the many conceptual difficulties and anomalies associated with the 'settled law' defence, it is suggested that the proper remedy therefore lies with an amendment of the Limitation Act. Specifically, it should be provided that s 29(1)(c) of Singapore's Limitation Act, the equivalent of s 32(1)(c) of the UK Limitation Act 1980, shall not apply to extend the limitation period where the mistake arose solely by the retrospective application of a subsequent judicial decision or legislative provision. Where, however, the mistake of law did not arise because of some retroactive statutory provision or judicial pronouncement, but is a 'genuine' mistake such as a misconception arising from a misreading of statutes, an omission to refer to relevant statutes or case law or reliance on incompetent counsel, s 29(1)(c) should continue to apply in its full force. It is admitted, however, that such an amendment does not address fully the concerns expressed by the Law Commission which take the view that any amendment to the law, whether prospective or retrospective, should *never* affect the sanctity of past transactions.⁹⁵ The present recommendation, on the other hand, leaves it open for a payer to institute a claim for restitution on the basis of payment under a mistake of law where the law has been retrospectively amended so long as he does so within the statutory 6 year period *from the date of payment*. Notwithstanding this, it is respectfully submitted that this is the proper balance that should be struck given the many difficulties associated with the 'settled law' defence.⁹⁶

the abrogation of the mistake of law rule would not.' His Lordship further opines: 'I accept that allowing recovery for mistake of law without qualification, even taking into account the defence of change of position, may be thought to tilt the balance too far against the public interest in the security of transactions. The most obvious problem is the Limitation Act, which as presently drafted is inadequate to deal with the problem with retrospective changes in law by judicial decision. But I think that any measures to redress the balance must be a matter for the legislature.' However, Lord Hope of Craighead, *supra*, n 1 at 1155, opines: 'I think that the risk of widespread injustice remains to be demonstrated. If the risk is too great, that is a matter for the legislature.'

⁹⁵ Law Commission Report (Law Com No 227), *supra*, n 4 at paras 5.2 to 5.13.

⁹⁶ It should also be noted that whilst the 'settled law' defence or one of its variants has been adopted statutorily in New Zealand (s 94A(2) of the Judicature Act 1908), Western Australia (s 23(2) of the Law Reform (Property, Perpetuities and Succession) Act 1962) and recommended by the Law Reform Commission of New South Wales (Paper No 53 (1987) at 51-56, paras 5.20-5.29), it has been rejected by the Law Reform Commission of British Columbia (report No 51 (1981) at 68), the Law Reform Committee of South Australia (Report No 84 (1984) at 31) and Scottish Law Commission (Discussion Paper No 99, *Judicial Abolition of the Error of Law Rule and its Aftermath* (1996)).

VII. CONCLUSION

The judicial abrogation of the mistake of law rule is a belated development which will no doubt be welcomed by the English legal community.⁹⁷ Following the fall of the mistake of law rule in one of its last strongholds, it is now most unlikely that the local courts would persist in applying the great divide in restitution.⁹⁸ Indeed, there is *dicta* to that effect in the recent decision of Yong CJ in *PP v Intra Group (Holdings) Co Inc*⁹⁹ where his Honour refers to *Kleinwort Benson* with apparent approval. It is also the authors' view that the rejection of the 'settled law' defence by the majority is conceptually sound notwithstanding the difficulties that may arise as a result. The deficiency in the law and its failure to address the perceived need to protect, to some extent, the security of past transactions clearly lies with the inadequacy of the present Limitation Act and the proper remedy would be its amendment rather than the adoption of a defence which is conceptually unsound.

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⁹⁷ Indeed, in the recent unreported English decision of *Nuridin & Peacock plc v DB Ramsden & Company Ltd* (unreported, 5 Feb 1999), Neuberger J embraced the House of Lords' abrogation of the mistake of law rule.

⁹⁸ The mistake of law rule appears to have been accepted locally: see *F C Seck trading as Oversea Structural Co v Wong & Lee* [1940] MLJ Rep 146 where Terrell Ag CJ opined at 146 that '[i]t is true that an action will not generally lie to recover back money paid under a mistake in law where both parties are fully cognizant of the facts'; *Serangoon Garden Estate Ltd v Marian Chye* (1959) 25 MLJ 113 at 114 where Chua J opined that '[t]he question then arises whether the money paid by the respondent was paid under a mistake of law or under a mistake of fact.'; and most recently in *Borneo Motors (S) Pte Ltd v William Jacks & Co (S) Pte Ltd* [1992] 2 SLR 881 where Chao Hick Tin J (delivering the judgment of the Court of Appeal) at 886 noted, *obiter*, that '[t]he law requires a person who receives money to which he is not entitled to repay the person who made it, unless the mistake is one of law.'

⁹⁹ Unreported, CR No 21 and 24 of 1998, 29 Oct 1998 and 15 Jan 1999, at paras 51-53.

* LLB (NUS). The authors are grateful to Associate Professor Andrew Phang Boon Leong and Mr Aedit Abdullah of the Faculty of Law, National University of Singapore, for their encouragement and support. They must also be thanked for their invaluable suggestions and stimulating discussions on an earlier draft of this article. Mr Yeo Tiong Min of the Faculty must also be thanked for bringing some recent cases to the authors' attention. The interested reader should also refer to Aedit Abdullah, 'The Abrogation of the Rule against Recovery in Mistake of Law: *Kleinwort Benson Ltd v Lincoln City Council*' [1998] SJLS 469 for a different perspective.