# *立法會*
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From : Clerk to Panel

To : Hon Andrew WONG Wang-fat JP (Chairman)
Hon Emily LAU Wai-hing, JP (Deputy Chairman)
Hon LEE Wing-tat
Hon Martin LEE Chu-ming, SC, JP
Hon Margaret NG
Hon Ronald ARCULLI, JP
Hon CHEUNG Man-kwong
Hon Ambrose CHEUNG Wing-sum, JP
Hon Christine LOH
Hon Gary CHENG Kai-nam
Hon Jasper TSANG Yok-sing, JP
Hon Howard YOUNG, JP
Dr Hon YEUNG Sum
Hon Ambrose LAU Hon-chuen, JP
Hon SZETO Wah

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**Special Meeting of the LegCo Panel on Constitutional Affairs**

**Right of Abode Issue**

I attach the Department of Justice's letter (in English only) dated 29 June 1999 on the right of abode issue for Members' reference.

2. The Chinese version of the letter but not the attachment will follow.

(LAW Wing-lok)
for Clerk to Panel

Encl.

c.c. All other Hon Members of Legislative Council
LA
SALA

律政司司長辦公室的信頭

本司檔號 Our Ref: SJO 5047/2/1C Pt. 7 29 June 1999

來函檔號 Your Ref:

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**By Fax & By Post** [2509 0775]

Clerk to the LegCo Panel
on Constitutional Affairs
Legislative Council Building
8 Jackson Road
Hong Kong
[Attn: Mr Law Wing-lok]

Dear Mr Law,

**Right of Abode**
**LegCo's Constitutional Affairs Panel**

At the meeting of the Panel on 25 June 1999, I undertook to provide members with a copy of a House of Lords decision that I referred to. The case concerned was Kleinwort Benson Ltd v Lincoln C.C. [1998]3 W.L.R. 1095. I enclose the headnote to the case and relevant extracts.

The facts of the case are rather complicated, but the decision is important because of the principles laid down concerning the effect of a decision that reverses earlier court decisions on a point of law. In particular, the House of Lords held that -

(1) an authoritative interpretation of legislation operates retrospectively to the date the legislation was enacted, but does not affect cases which have already been decided;

(2) the interpretation applies to all cases subsequently coming before the courts for decision, even though the events in question in such cases occurred before the date of that interpretation, and even though previous interpretations were to a different effect.

The Administration takes the view that its implementation of the NPCSC interpretation is entirely consistent, not only with the express terms of the interpretation, but also with the principles stated by the House of Lords. There are no legal grounds for maintaining that people who were not parties concerned in the CFA decision (e.g. those whose claims were made after the decision was made) should continue to benefit from those parts of the CFA's decision that are no longer good law.

Yours sincerely,

(R Allcock)
Deputy Law Officer /
Secretary for Justice's Office

c.c. LO(C)
Mr Peter Wong
S for S (Attn: Mr Timothy Tong) [Fax 2147 3165]
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Mr Jimmy Ma, Legal Advisor [Fax 2868 2813]

KLEINWORT BENSON LTD. . . . . APPELLANT

AND

LINCOLN CITY COUNCIL . . . . . RESPONDENT

SAME . . . . . APPELLANT

AND

BIRMINGHAM CITY COUNCIL . . . . . RESPONDENT

SAME . . . . . APPELLANT

AND

SOUTHWARK LONDON BOROUGH COUNCIL . . RESPONDENT

SAME . . . . . APPELLANT

AND

KENSINGTON AND CHELSEA ROYAL LONDON BOROUGH COUNCIL . . . . . RESPONDENT

[CONSOLIDATED APPEALS]

1998 March 9, 10, 11, 12, 16; Oct. 29

Lord Browne-Wilkinson, Lord Goff of Chieveley, Lord Lloyd of Berwick, Lord Hoffmann and Lord Hope of Craighead

*Restitution—Unjust enrichment—Money paid under mistake of law—Money paid to local authority under interest rate swap agreement—Settled understanding of law subsequently changed by judicial decision—Interest rate swap agreements held to be ultra vires local authorities—Payment subject of honest receipt by local authority—Whether recoverable as being paid under mistake of law—Whether limitation period running from date of discovery of mistake—Limitation Act 1980 (c. 58), s. 32(1)(c)*

On various dates between 1982 and 1985 the plaintiff bank entered into interest rate swap agreements with each of four local authorities. Each transaction was fully performed by both parties according to its terms and resulted in the bank paying to the authorities sums totalling £811,208. Following a decision of the House of Lords in 1991 holding that such interest rate swap contracts were outside the statutory powers of local authorities the bank commenced proceedings in the Commercial Court against the four local authorities claiming restitution of the sums it had paid to them. Amounts totalling £388,114, representing sums which had been paid less than six years before the respective writs had been issued, were recovered by the bank pursuant to summary judgment or voluntary repayment. With regard to the outstanding payments totalling £423,094 which had been made outside the six-year limitation period, the judge made orders for the trial of a preliminary issue as to whether the bank's claim that such payments had been made by it in the mistaken belief that they were being made pursuant to a binding contract disclosed a cause of action in mistake and, if so, whether the mistake was one in respect of which the bank could rely on section 32(1)(*c*) of the

Limitation Act 1980[1] so that the period of limitation had not began to run until the bank had "discovered the . . . mistake . . . or could with reasonable diligence have discovered it." The judge held in each case that he was bound by authority to hold that money paid under a mistake of law was not recoverable in restitution and accordingly declined to answer the question whether the bank could rely on section 32(1)(*c*). Having granted a certificate that a point of law of general public importance was involved in his decision in respect of which he was bound by decisions of the Court of Appeal, leave was given for consolidated appeals direct to the House of Lords.

On appeal by the bank:—

*Held*, allowing the appeals (Lord Browne-Wilkinson and Lord Lloyd of Berwick dissenting), that on an application of the principle of unjust enrichment the rule precluding recovery of money paid under a mistake of law could no longer be maintained and recognition should be given to a general right to recover money paid under a mistake, whether of fact or law, subject to the defences available in the law of restitution; that money paid under a mistake of law was recoverable even where the payment had been made under a settled understanding of the law which was subsequently departed from by judicial decision or where the payment had been received by the recipient under an honest belief of an entitlement to retain the money; that there was no principle in English law that money paid under a void contract was irrecoverable on the ground of mistake of law where the contract had been fully performed according to its terms; and that, accordingly, since the relevant limitation period applicable to such claims was that laid down by section 32(1)(*c*) of the Act of 1980, namely six years from the date on which the mistake was or could with reasonable diligence have been discovered, the facts pleaded by the bank disclosed a cause of action in mistake which was not time-barred (post, pp. 1113E–H, 1116C, 1119G–H, 1121B–C, 1125A, 1126D–E, 1127A–B, 1128E–1129A, 1136H–1137A, 1139C–D, 1143C–E, 1148H–1149B, 1151A–B, 1152C–E, 1154A–C, 1155C–D).

*Bilbie v. Lumley* (1802) 2 East 469 and *Brisbane v. Dacres* (1813) 5 Taunt. 143 overruled.

Decision of Langley J. reversed.

The following cases are referred to in their Lordships' opinions:

*Air Canada v. British Columbia* [1989] 1 S.C.R. 1161; 59 D.L.R. (4th) 161

*Attorney-General for Hong Kong v. Reid* [1994] 1 A.C. 324; [1993] 3 W.L.R. 1143; [1994] 1 All E.R. 1, P.C.

*Baker v. Courage & Co.* [1910] 1 K.B. 56

*Beauchamp (Earl) v. Winn* (1873) L.R. 6 H.L. 223, H.L.(E.)

*Beaufort Developments (N.I.) Ltd. v. Gilbert-Ash N.I. Ltd.* [1998] 2 W.L.R. 860; [1998] 2 All E.R. 778, H.L.(N.I.)

*Bell Bros. Pty. Ltd. v. Shire of Serpentine-Jarrahdale* [1969] W.A.R. 155

*Bilbie v. Lumley* (1802) 2 East 469

*Brisbane v. Dacres* (1813) 5 Taunt. 143

*British Hydro-Carbon Chemicals Ltd. and British Transport Commission—Petitioners*, 1961 S.L.T. 280, H.L.(Sc.)

*Chatfield v. Paxton (Note)* (1798) 2 East 471

*Commissioner of State Revenue v. Royal Insurance Australia Ltd.* (1994) 182 C.L.R. 51; 69 A.L.J.R. 51

*Cooper v. Phibbs* (1867) L.R. 2 H.L. 149, H.L.(I.)

*David Securities Pty. Ltd. v. Commonwealth Bank of Australia* (1992) 175 C.L.R. 353

*Dawnays Ltd. v. F. G. Minter Ltd. and Trollope and Colls Ltd.* [1971] 1 W.L.R. 1205; [1971] 2 All E.R. 1389, C.A.

[1] Limitation Act 1980, s. 32(1)(*c*): see post, p. 1107C–D.

*Where the law is established by judicial decision subsequently overruled*

I will take the case where the law has been established by a single decision of the Court of Appeal made in 1930. In 1990 the payer makes a payment which would only have been due to the payee if the Court of Appeal decision was good law. The payer was advised that the Court of Appeal decision was good law. In 1997 this House overruled the Court of Appeal decision. Is the plaintiff entitled to recover the payment made in 1990 on the ground of mistake of law?

There is, as I understand it, no dispute that in order to recover the plaintiff has to have been labouring under the mistake at the date of payment and to have made the payment because of that mistake. Certainly that position has been accepted by the bank in their written reply and by my noble and learned friend, Lord Goff of Chieveley. The question is whether the subsequent overruling of the 1930 Court of Appeal decision requires the court to hold that at the date of payment (1990) the law (contrary to what the plaintiff had been advised) was not the law established by the Court of Appeal decision of 1930.

The theoretical position has been that judges do not make or change law: they discover and declare the law which is throughout the same. According to this theory, when an earlier decision is overruled the law is not changed: its true nature is disclosed, having existed in that form all along. This theoretical position is, as Lord Reid said in the article "The Judge As Law Maker" (1972–1973) 12 J.S.P.T.L. (N.S.) 22, a fairy tale in which no one any longer believes. In truth, judges make and change the law. The whole of the common law is judge-made and only by judicial change in the law is the common law kept relevant in a changing world. But whilst the underlying myth has been rejected, its progeny—the retrospective effect of a change made by judicial decision—remains. As Lord Goff in his speech demonstrates, in the absence of some form of prospective overruling, a judgment overruling an earlier decision is bound to operate to some extent retrospectively: once the higher court in the particular case has stated the changed law, the law as so stated applies not only to that case but also to all cases subsequently coming before the courts for decision, even though the events in question in such cases occurred before the Court of Appeal decision was overruled.

Therefore the precise question is whether the fact that the later overruling decision operates retrospectively so far as the substantive law is concerned also requires it to be assumed (contrary to the facts) that *at the date of each payment* the plaintiff made a mistake as to what the law then was. In my judgment it does not. The main effect of your Lordships' decision in the present case is to abolish the rule that money paid under a mistake of law cannot be recovered, which rule was based on the artificial assumption that a man is presumed to know the law. It would be unfortunate to introduce into the amended law a new artificiality, viz., that a man is making a mistake at the date of payment when he acts on the basis of the law as it is then established. He was not mistaken at the date of payment. He paid on the basis that the then binding Court of Appeal decision stated the law, which it did: the fact that the law was later retrospectively changed cannot alter retrospectively the state of the payer's mind at the time of payment. As Deane J. said in the High Court of Australia in *University of Wollongong v. Metwally* (1984) 158 C.L.R. 447, 478:

> "A Parliament may legislate that, for the purposes of the law which it controls, past facts or past laws are to be deemed and treated

abolition of the mistake of law bar, he would prima facie be entitled to restitution."

He then proceeds to rehearse the arguments for and against legislative change of the law in this respect.

The question then arises whether, having regard to the fact that the right to recover money paid under a mistake of law is only now being recognised for the first time, it would be appropriate for your Lordships' House so to develop the law on the lines of the Law Commission's proposed reform as a corollary to the newly developed right of recovery. I can see no good reason why your Lordships' House should take a step which, as I see it, is inconsistent with the declaratory theory of judicial decision as applied in our legal system, under which the law as declared by the judge is the law applicable not only at the date of the decision but at the date of the events which are the subject of the case before him, and of the events of other cases in pari materia which may thereafter come before the courts. I recognise, of course, that the situation may be different where the law is subject to legislative change. That is because legislation takes effect from the moment when it becomes law, and is only retrospective in its effect to the extent that this is provided for in the legislative instrument. Moreover even where it is retrospective, it has the effect that as from the date of the legislation a new legal provision will apply retrospectively in place of that previously applicable. It follows that retrospective legislative change in the law does not necessarily have the effect that a previous payment was, as a result of the change in the law, made under a mistake of law at the time of payment. (I note in parenthesis that in *Commissioner of State Revenue v. Royal Insurance Australia Ltd.*, 182 C.L.R. 51, the High Court of Australia was divided on the question whether the retrospective legislation there under consideration had the effect that a previous payment had been made under a mistake of law.) As I have already pointed out, this is not the position in the case of a judicial development of the law. But, for my part, I cannot see why judicial development of the law should, in this respect, be placed on the same footing as legislative change. In this connection, it should not be forgotten that legislation which has an impact on previous transactions can be so drafted as to prevent unjust consequences flowing from it. That option is not, of course, open in the case of judicial decisions.

At this point it is, in my opinion, appropriate to draw a distinction between, on the one hand, payments of taxes and other similar charges and, on the other hand, payments made under ordinary private transactions. The former category of cases was considered by your Lordships' House in *Woolwich Equitable Building Society v. Inland Revenue Commissioners* [1993] A.C. 70, in which it was held that at common law taxes exacted ultra vires were recoverable as of right, without the need to invoke a mistake of law by the payer. Moreover reference was made, in the course of the hearing, to the various statutory provisions (usefully summarised in the Law Commission's Consultation Paper, No. 120, pp. 74–84) which regulate the repayment of overpaid tax. For present purposes it is of interest that, in the case of some taxes (including income and corporation tax), no relief is given "in respect of an error or mistake as to the basis on which the liability . . . ought to have been computed where the return was in fact made on the basis of or in accordance with the practice generally prevailing at the time when the return was made:" see the proviso to section 33(2) of the Taxes Management Act 1970.

clause 3. It does not create a defence to a general right of recovery. It is not like the defence of change of position recognised by the House in *Lipkin Gorman v. Karpnale* [1991] 2 A.C. 548. Clause 3 is more in the nature of a defining clause. Its purpose is to clarify and delimit what is meant by "mistake" in cases where the law has changed.

This brings us to the central question. Nobody now suggests that the common law is static. It is capable of adapting itself to new circumstances. Is it then capable of being changed? Or is it only capable of being developed? The common-sense answer is that the common law is capable of being changed, not only by legislation, but also by judicial decision. This is nowhere clearer than when a long-standing decision of the Court of Appeal is overruled. Indeed in a system such as ours, where the Court of Appeal is bound by its own previous decisions, the main justification for the existence of a second tier appeal is that it enables the House to redirect the law when it has taken a wrong turning. I am not thinking of landmark cases such as *Donoghue v. Stevenson* [1932] A.C. 562 or *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465. I am thinking of more ordinary cases, of which there may be one or two a year, in which a line of recent Court of Appeal authority is overturned. By way of example one can take two cases from the field of building contracts: *Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd.* [1974] A.C. 689 overruling *Dawnays Ltd. v. F. G. Minter Ltd. and Trollope and Colls Ltd.* [1971] 1 W.L.R. 1205, and *Beaufort Developments (N.I.) Ltd. v. Gilbert-Ash N.I. Ltd.* [1998] 2 W.L.R. 860 overruling *Northern Regional Health Authority v. Derek Crouch Construction Co. Ltd.* [1984] Q.B. 644. Or there are the less frequent cases in which long-standing decisions are overruled, such as *Hindcastle Ltd. v. Barbara Attenborough Associates Ltd.* [1997] A.C. 70 overruling *Stacey v. Hill* [1901] 1 K.B. 660 and *Attorney-General for Hong Kong v. Reid* [1994] 1 A.C. 324 disapproving *Lister & Co. v. Stubbs* (1890) 45 Ch.D. 1.

What then is the House doing when it overrules a line of Court of Appeal authority? First and foremost it is determining what the law is in relation to the case which it is deciding. It will then apply that law to the facts of the particular case. Since the transaction giving rise to the case will have occurred in the past, it can be said that to that very limited extent (and the same is true of every decision of every court) it is applying the law retrospectively.

An inevitable consequence of determining the law in relation to a particular case is that the same law will apply to other cases as yet undecided, in which the same point arises. This is so whether the transaction in question lies in the past or the future. So again, to that limited extent, it can be said that the decision operates retrospectively. But that, as it seems to me, is the full extent of any retrospective effect. There is no way in which the decision can be applied retrospectively to cases which have already been decided. Nor is there any logical reason why there should be. It is the function of the court to decide what the law is, not what it was. So when the House of Lords overrules a line of Court of Appeal decisions it does not, and cannot, decide those cases again. The law as applied to those cases was the law as decided at the time by the Court of Appeal. The House of Lords can say that the Court of Appeal took a wrong turning. It can say what the law should have been. But it cannot say that the law actually applied by the Court of Appeal was other than what it was. It cannot, in my learned and noble friend, Lord Browne-Wilkinson's vivid expression, falsify history.

the subject of development by the judges—normally, of course, by appellate judges. We describe as leading cases the decisions which mark the principal stages in this development, and we have no difficulty in identifying the judges who are primarily responsible. It is universally recognised that judicial development of the common law is inevitable. If it had never taken place, the common law would be the same now as it was in the reign of King Henry II; it is because of it that the common law is a living system of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live. The recognition that this is what actually happens requires, however, that we should look at the declaratory theory of judicial decision with open eyes and reinterpret it in the light of the way in which all judges, common law and equity, actually decide cases today.

When a judge decides a case which comes before him, he does so on the basis of what he understands the law to be. This he discovers from the applicable statutes, if any, and from precedents drawn from reports of previous judicial decisions. Nowadays, he derives much assistance from academic writings in interpreting statutes and, more especially, the effect of reported cases; and he has regard, where appropriate, to decisions of judges in other jurisdictions. In the course of deciding the case before him he may, on occasion, develop the common law in the perceived interests of justice, though as a general rule he does this "only interstitially," to use the expression of O. W. Holmes J. in *Southern Pacific Co. v. Jensen* (1917) 244 U.S. 205, 221. This means not only that he must act within the confines of the doctrine of precedent, but that the change so made must be seen as a development, usually a very modest development, of existing principle and so can take its place as a congruent part of the common law as a whole. In this process, what Maitland has called the "seamless web," and I myself (*The Search for Principle*, Proc. Brit. Acad. vol. LXIX (1983) 170, 186) have called the "mosaic," of the common law, is kept in a constant state of adaptation and repair, the doctrine of precedent, the "cement of legal principle," providing the necessary stability. A similar process must take place in codified systems as in the common law, where a greater stability is provided by the code itself; though as the years pass by, and decided cases assume a greater importance, codified systems tend to become more like common law systems.

Occasionally, a judicial development of the law will be of a more radical nature, constituting a departure, even a major departure, from what has previously been considered to be established principle, and leading to a realignment of subsidiary principles within that branch of the law. Perhaps the most remarkable example of such a development is to be found in the decisions of this House in the middle of this century which led to the creation of our modern system of administrative law. It is into this category that the present case falls; but it must nevertheless be seen as a development of the law, and treated as such.

Bearing these matters in mind, the law which the judge then states to be applicable to the case before him is the law which, as so developed, is perceived by him as applying not only to the case before him, but to all other comparable cases, as a congruent part of the body of the law. Moreover when he states the applicable principles of law, the judge is declaring these as constituting the law relevant to his decision. Subject to consideration by appellate tribunals, and (within limits) by judges of equal jurisdiction, what he states to be the law will, generally speaking, be





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A applicable not only to the case before him but, as part of the common law, to other comparable cases which come before the courts, whenever the events which are the subject of those cases in fact occurred.

It is in this context that we have to reinterpret the declaratory theory of judicial decision. We can see that, in fact, it does not presume the existence of an ideal system of the common law, which the judges from time to time reveal in their decisions. The historical theory of judicial B decision, though it may in the past have served its purpose, was indeed a fiction. But it does mean that, when the judges state what the law is, their decisions do, in the sense I have described, have a retrospective effect. That is, I believe, inevitable. It is inevitable in relation to the particular case before the court, in which the events must have occurred some time, perhaps some years, before the judge's decision is made. But it is also C inevitable in relation to other cases in which the law as so stated will in future fall to be applied. I must confess that I cannot imagine how a common law system, or indeed any legal system, can operate otherwise if the law is be applied equally to all and yet be capable of organic change. This I understand to be the conclusion reached in *Cross and Harris, Precedent in English Law*, 4th ed. (1991), from which I have derived much assistance, when at p. 33 they ask the question: "what can our judges do D but make new law and how can they prevent it from having retrospective effect?" This is also the underlying theme of Lord Coulsfield's evidence to the Scottish Law Commission quoted in paragraph 3.14 of their Discussion Paper No. 99, on Judicial Abolition of the Error of Law Rule and its Aftermath (1996) (which I have read with interest and respect) in which, in the light of the decision of the Inner House in *Morgan Guaranty Trust* E *Co. of New York v. Lothian Regional Council*, 1995 S.C. 151, and especially the notable judgment of my noble and learned friend, Lord Hope of Craighead, in that case, they reconsider and resile from their previous proposal that Scots law should adopt a "settled understanding of the law" provision along the lines proposed by our own Law Commission. The only alternative, as I see it, is to adopt a system of prospective overruling. But such a system, although it has occasionally been adopted elsewhere with, F I understand, somewhat controversial results, has no place in our legal system. I wish to add that I do not regard the declaratory theory of judicial decision, as I have described it, as an aberration of the common law. Since I regard it as an inevitable attribute of judicial decision-making, some such theory must, I imagine, be applied in civil law countries, as in common law countries; indeed I understand that a declaratory theory of G judicial decision applies in Germany, though I do not know its precise form.

It is in the light of the foregoing that I have to ask myself whether the Law Commission's "settled understanding of the law" proposal forms part of the common law. This, as I understand the position, requires that I should consider whether parties in the position of the appellant bank were mistaken when they paid money to local authorities under interest H swap agreements which they, like others, understood to be valid but have later been held to be void. To me, it is plain that the money was indeed paid over under a mistake, the mistake being a mistake of law. The payer believed, when he paid the money, that he was bound in law to pay it. He is now told that, on the law as held to be applicable at the date of the payment, he was not bound to pay it. Plainly, therefore, he paid the money under a mistake of law, and accordingly, subject to any applicable defences, he is entitled to recover it. It comes as no surprise to me that, in the swaps