LAW REFORM COMMITTEE
SINGAPORE ACADEMY OF LAW

PAPER ON REFORMS TO THE LAW OF RESTITUTION ON MISTAKES OF LAW

INTRODUCTION & EXECUTIVE SUMMARY OF RECOMMENDATIONS

1.1 This paper considers the law as it stands relating to claims for recovery of payments made under a mistake of law and the impact of the House of Lords' decision in Kleinwort Benson Ltd. v. Lincoln City Council & 3 other appeals [1999] 2 AC 349, and the implications for reform in the relevant aspects of the law of restitution.

1.2 There is also a discussion on whether the relevant reforms proposed in the English Law Commission's Report No. 227 on *"Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments"* ought to be adopted in Singapore.

1.3 This paper does not seek to be an exhaustive study of the law concerning recovery based on a mistake of law; rather, it serves to identify and discuss in a concise manner the relevant issues and the areas for reform.

1.4 Our main recommendations for reform are:

(a) The rule precluding the recovery of payments made, services rendered and benefits conferred under a mistake of law, is to be abrogated by legislation;

(b) There should however be no recovery where the benefit was conferred on the basis of a settled view of the law at the time of such conferment, but which was subsequently departed from by judicial decision;

(c) The proposed legislation be of retrospective effect;

(d) Section 29(1)(c) of the Limitation Act be amended to clarify that it applies irrespective of whether the mistake is one of law or of fact;

(e) There be an overriding limitation period of 12 years from the relevant date of payment or the conferment of the benefit (which is the consequence of the mistake).

1.5 This paper is divided into the following sections:

(a) the common law rule prohibiting the recovery of payments made under a mistake of law;

(b) the criticisms of the common law rule;

(c) the reforms in various jurisdictions concerning the common law rule;

(d) the decision of the House of Lords in Kleinwort Benson Ltd. v. Lincoln City Council;

(e) the potential reforms;

(f) the proposed abrogation of the common law rule;

(g) the problems with the situation when a mistake is made on the basis of a settled view of the law;

(h) the applicable limitation periods;

(i) whether there should be reforms to deal with the position of compromises;

(j) the recommended legislation; and

(k) a summary of the recommendations.

(A) THE COMMON LAW RULE

2.1 Under common law (prior to the decision in Kleinwort Benson), payments made under a mistake of law are not recoverable, unlike payments made under a mistake of fact.

2.2 This rule originated from Bilbie v Lumley [1802] 2 East 469. In Bilbie v Lumley, a material fact had been withheld from an insurance underwriter, but was later disclosed before the claim was paid. The underwriter did not realise that because of this non-disclosure, he could have repudiated the claim. An action was then brought to recover the moneys paid.

2.3 Lord Ellenborough held against the underwriter and denied recovery of the moneys paid, stating:

> Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried.

2.4 Bilbie v Lumley was subsequently approved in Kelly v Solari [1841] 9 M&W 54 and the rule against recovery based on a mistake of law subsequently became firmly entrenched, and was even confirmed by the House of Lords as recently as 1993 in Woolwich Equitable Building Society v IRC [1993] AC 70 (although doubts were cast on the rule by three of the Law Lords).[1]

2.5 In Singapore, the common law rule has been applied in Serangoon Garden Estate Ltd v Marian Chye [1959] MLJ 113 and was approved in dicta by the Court of Appeal in Borneo Motors (S) Pte Ltd v William Jacks & Co (S) Pte Ltd [1992] 2 SLR 881.

2.6 Lai Siu Chiu J in Minah Mande v John Edward Schneider & anor (DCA NO. 43 of 1997) (unreported) also applied the rule against recovery for a mistake of law. In her

[1] For a further exposition on the common law, see Part II of the English Law Commission Report No. 227 *"Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments"*

judgment, Lai J noted that the English Law Commission had recommended its abrogation but felt that it was too entrenched to be abolished judicially.

(B) THE CRITICISMS OF THE COMMON LAW RULE

3.1 Academic criticism has been rife. It was generally felt that it was artificial and arbitrary to attempt to create a dichotomy between mistakes of fact and mistakes of law.

3.2 The English Law Reform Commission noted that the rule often required the courts to draw a distinction between mistakes of law and fact, which distinction they recognized was *"notoriously difficult to make"*. As a consequence, practitioners often strained to attempt to characterise the mistake as one of fact rather than law.

3.3 The following example from the New South Wales Law Reform Commission best illustrates this:

> A and B have a contract under which A is required to pay $10,000 to B upon B delivering a computer with certain specifications to C. If A makes a payment under the mistaken belief that B has delivered the computer to C, A can recover the payment by a legal action called "money had and received".
>
> But if A, misunderstands the effect of the contract, makes a payment knowing the condition of the computer that has been delivered to C but because of A's misunderstanding of the contractual terms believing wrongly that it met the contractual specifications, the payment is irrecoverable. Although A would not have made the payment in either case had the true situation been known, recovery is allowed in the first case because the mistake is categorised as one of fact, and denied in the second because it is categorised as one of law.

3.4 In either situation, to allow the payee to retain the monies would be to unjustly enrich him as the payment would not have been made save for the mistake. There is no

reason why there should be an arbitrary effect in that recovery should be permitted under the former situation and not in the latter.

3.5 A further reason advanced by the English Law Commission for the abrogation of the rule was that as a result of the difficulty in drawing the distinction between mistakes of fact and law, the rule was uncertain and unpredictable in its application in view of the temptation for judges to manipulate that distinction in order to achieve practical justice.

(C) THE REFORMS ADVOCATED OF THE COMMON LAW RULE

4.1 Several law reform commissions have considered the mistake of law rule and recommended its abrogation[2].

4.2 As a result, the rule has been abolished judicially. In Canada, the rule was abrogated by the Supreme Court of Canada in Air Canada v British Columbia [1989] 1 SCR 1161, in Australia, by the High Court of Australia in David Securities Pte Ltd v Commonwealth Bank of Australia [1992] 66 ALJR 768 and in South Africa in Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue [1992] (4) SA 202.

4.3 Certain jurisdictions have also abrogated the rule legislatively. [3]

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[2] The Law Reform Commission of British Columbia (1981);
New South Wales Law Reform Commission (1987);
Law Reform Committee of South Australia (1984);
Scottish Law Commission (1993);
English Law Reform Commission (1994)

[3] In New Zealand (section 94A of the Judicature Act 1908, as amended by section 2 of the Judicature Amendment Act 1958) and in Western Australia (section 23 of the Law Reform (Property, Perpetuities and Succession) Act 1962).

(D) KLEINWORT BENSON LTD V LINCOLN CITY COUNCIL & 3 OTHER APPEALS

5.1 In Kleinwort Benson Ltd. v. Lincoln City Council & 3 other appeals [1999] 2 AC 349, the House of Lords were invited on a leap-frog appeal from the Queens Bench Division of the High Court of Justice to consider whether the mistake of law rule should be maintained as part of English law.

5.2 The brief facts of the case are as follows. Kleinwort Benson had entered into interest rate swap transactions with each of the respondents in the appeals, all local government authorities. Such transactions were later held in 1992 by the House of Lords in Hazell v Hammersmith & Fulham London BC [1992] AC 1 to be contracts which were beyond the powers of the local authorities involved and were accordingly void. Consequent to the decision in Hazell, Kleinwort Benson commenced proceedings against each of the respondents claiming restitution of the sums it had paid to them under these transactions which were all fully performed by both parties according to its terms across the whole of the agreed period.

5.3 The subject matter of the action was not the sums paid by Kleinwort Benson to the respondents within the six year limitation period expiring with the date of the issue of the writ (the payments that were made within the six year limitation period were repaid by the respondents pursuant to the ruling in Westdeutsche Landesbank Girozentale v Islington London BC [1994] 4 All ER 890 that monies paid under a void interest rate swap contract were recoverable by an action for money had and received), but concerned earlier payments made outside the six year period. This was because the respondents had contended that Kleinwort Benson's claim for the monies paid more than six years before the writs were issued were time-barred.

5.4 As a result, Kleinwort Benson pleaded an alternative cause of action, that the monies in question were paid by it under a mistake, viz. a mistaken belief that it was paid pursuant to a binding contract between it and the respondents. The respondents

nevertheless argued that Kleinwort Benson was similarly precluded from seeking repayment of the monies paid beyond the 6 year limitation period.

5.5 Kleinwort Benson argued that they could not have discovered the mistake until the House of Lords gave judgment in Hazell and that they were entitled to rely on section 32(1)(c) of the Limitation Act 1980, with the result that time did not begin to run until the date of the judgment in Hazell, namely 24 January 1991.

5.6 Section 32(1)(c) of the Limitation Act 1980 reads as follows:

> (1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act either-
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> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (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 fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.[4]

5.7 At first instance, Langley J. ordered (by consent) the trial of two preliminary issues, viz. (1) whether the facts pleaded by Kleinwort Benson disclosed a cause of action in mistake; and (2) if the answer to (1) was "Yes", whether such a mistake was one in respect of which Kleinwort Benson could rely on section 32(1)(c) of the Limitation Act 1980.

5.8 Langley J answered in the negative to Issue (1), on the basis that he was bound by Court of Appeal authority to do so, and accordingly, did not give an answer to Issue (2).

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[4] Section32(1) is in pari materia with section 29(1) of Singapore's Limitation Act (Cap 163)

5.9 Lord Goff, in delivering the leading judgment of the House of Lords, dealt with the issues in the following order:

> Issue (1): whether the rule precluding recovery of money paid under a mistake of law should remain part of English law.
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> Issue (1)(A): if the answer is "No," whether there should be an exception to recovery on the ground of mistake of law in cases where the money has been paid under a settled understanding of the law which has subsequently been changed by judicial decision;
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> Issue (1)(B): whether there should be a similar exception in cases where the money has been the subject of an honest receipt by the defendant.
>
> Issue (2): the impact upon recovery of the fact that all the interest rate swap transactions in question were fully performed.
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> Issue (3): whether, on the true construction of section 32(1)(c) of the Act of 1980, the subsection applies to mistakes of law.

Issue (1):

5.10 The Law Lords were unanimous in deciding Issue (1) that the rule precluding recovery based on a mistake of law could no longer be maintained, from the application of the rule against unjust enrichment, being that it is unjust for a person to retain a benefit which he has received at the expense of another, without any legal ground to justify its retention, which that other person did not intend him to receive.

Issue (1)(A):

5.11 The Law Lords were however divided as to Issue (1)(A). The disagreement centred on whether monies paid under a mistake of law were still recoverable even where

the payment was made under a settled understanding of the law, which was subsequently departed from by judicial decision.

5.12 The respondents in the appeal had in fact argued that any reformulation of the rule should be undertaken by Parliament and not judicially. Lord Browne-Wilkinson and Lord Lloyd agreed and stated that the old rule should not be abrogated under such circumstances. Lord Browne-Wilkinson held that although the decision in Hazell is retrospective in its effect, Kleinwort Benson was not labouring under any mistake of law at that date, as at that time there was no mistake.

5.13 Lord Goff, Lord Hoffman and Lord Hope (forming the majority) held instead that there was no reason why there should be such a restriction in principle.

5.14 The English Law Commission had in fact recommended that the mistake of law rule be legislatively abrogated but with the further recommendation that the following provision be enacted:

> "3.--(1) 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.
>
> (2) 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."

5.15 The Commissions' arguments were set out as follows under paragraphs 2.57 and 2.58 of the Consultation Paper:

> 2.57 One question is the effect of a judicial alteration of the law. Where the general understanding of the law changes as a result of a court decision should a payment made on the basis of the former understanding of the law be recoverable? Where the law is changed by legislation it would seem beyond

> doubt that a payment made on the basis of the old law cannot be recovered on the basis of a mistake because there is no mistake of law at the time the payment was made: at that time the law was indeed as the payer believed it to be. It seems clear to us that as a matter of policy the result should be no different where the law is effectively changed by judicial decision rather than legislation.
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> 2.58 It can however be argued that a payment made before a judicial 'change' of the law is indeed made as a result of a mistake and therefore should be recoverable because of the commonly accepted theory of the operation of the common law that judicial decisions are declaratory and do not change the law. We believe that this would not be a desirable result: to interpret the impact of the common law in this manner is a mere fiction and should not be allowed to affect substantive rights"

5.16 The majority of the House of Lords disagreed with the English Law Commission and decided otherwise. These issues are dealt with more fully in the relevant section below.

Issue (1)(B):

5.17 Issue (1)(B) arose from a principle proposed by Brennan C.J.(then Brennan J.) in David Securities Pty. Ltd. v. Commonwealth Bank of Australia (1991-1992) 175 C.L.R. 353 wherein he stated at p. 399 that:

> It 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.

5.18 Lord Goff held that such a proposed defence was so wide that it would exclude the right of recovery in a very large proportion of cases and accordingly rejected it as forming part of the common law.

Issue (2):

5.19 In respect of Issue (2), Lord Goff held 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.

Issue (3):

5.20 In respect of Issue (3), the Law Lords were unanimous in deciding that the relevant limitation period in respect of a mistake of law was that under section 32(1)(c) of the Limitation Act 1980.

5.21 Lord Hope held that the word "mistake" in subsection (1)(c) appeared without any qualification and that there was nothing there which restricted its application to a mistake of fact. He noted that one objection that may be made was that time may run on for a very long time before a mistake of law could have been discovered with reasonable diligence, especially where a judicial decision is needed to establish the mistake. Another objection was that in some cases, a mistake of law may have affected a very large number of transactions, and that the potential for uncertainty is very great. However, he felt that the risk of widespread injustice remained to be demonstrated and if the risk was too great, it was a matter for the legislature.

5.22 Lord Goff recognised that the effect of section 32(1)(c) was that the cause of action may be extended for an indefinite period of time but nevertheless held that the relevant limitation period was that laid down by section 32(1)(c). Lord Hoffman agreed and although noting that the Limitation Act as presently drafted is inadequate to deal with the problem of retrospective changes in law by judicial decision, he stated that any measures to redress the balance should then be a matter for the legislature.

5.23 Lord Browne-Wilkinson accepted that the relevant limitation period applicable was that laid down by section 32(1)(c) of the Limitation Act 1980. However,

in view of the majority's decision, this meant that on every occasion in which a higher court changed the law by judicial decision, all those who had made payments on the basis that the old law was correct (however long ago such payments were made) would have six years in which to bring a claim to recover money paid under a mistake of law. This was a fundamental change in the law which Lord Browne-Wilkinson felt the House of Lords should not make but instead to indicate that an alteration in the law is desirable but leave it to Parliament to produce *"a satisfactory statutory change in the law which, at one and the same time, both introduces the new cause of action and also properly regulates the limitation period applicable to it"*.

(E) THE POTENTIAL REFORMS

6.1 Consequent to Kleinwort Benson[5], the proposed reforms to be considered are:

(1) (a) whether the common law rule that a payment made under a mistake of law is irrecoverable is still good law;

(b) if not, whether legislation is necessary "to repeal" such "law";

(2) whether the English Law Commission's recommendation that there be no recovery if monies were paid in accordance with *"a settled view of the law at*

[5] Kleinwort Benson was in fact considered by the Court of Appeal in Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit & anor appeal [2000] 1 SLR 517. In 1981, Tan Geok Tee paid US$642,451.04 to the 1st respondent under the assumption that the 1st respondent's wife had an interest in a certain property. In February 1998, the Court of Appeal ruled that the 1st respondent's wife did not have an interest in the property. The appellant (Tan's executrix) sought to include in the Statement of Claim a claim for recovery of the monies paid to the 1st respondent on the basis that the payment by Tan was made under a mistake of law, which mistake was only discovered in February 1998 with the Court of Appeal ruling and that the claim was thereby not time-barred by application of section 29(1)(c) of the Limitation Act. This proposed amendment was disallowed in the courts below. Thean JA, in delivering the judgment of the Court of Appeal, referred to Kleinwort Benson but did not give any definitive ruling on it as the Court there was not concerned, at an interlocutory stage, to consider whether there was a mistake of law and/or whether the claim was in fact time-barred or that section 29(1)(c) of the Limitation Act applied. The Court of Appeal however found that these were issues which were and ought to be determined at a trial and ought not to have been disallowed by the courts below.

the time, which was later departed from by subsequent judicial decisions" should be adopted in Singapore;

(3) (a) whether the interpretation of the House of Lords in Kleinwort Benson of the applicable limitation period in s. 32(1)(c) of the English Limitation Act 1980 (which is identical to s. 29(1)(c) of the Singapore Limitation Act (Cap 163)) should be followed in Singapore; and

(b) if so, whether the Singapore Limitation Act needs to be amended.

(F) ABROGATION OF THE COMMON LAW RULE

7.1 For the reasons discussed above, the common law rule that a payment made under a mistake of law is irrecoverable is no longer tenable. The question is whether legislation would be necessary for such purpose and if so, what the operative reforms should be.

7.2 Unless Ching Mun Fong or the issues advanced in it, comes for full determination before the Courts soon, it is recommended that legislation be enacted to abrogate the old rule.

7.3 The English Law Commission had in its report recommended that any proposed legislation should provide that the classification of a mistake as either of law or of fact shall not of itself be material to the determination of the claim and that the claim should not be denied on the ground that it was a mistake of law. The first proposition essentially assimilates the approach to be taken for all mistake claims, whereas the second proposition is to give effect to the abrogation of the old common law rule.

7.4 There are two models for consideration: the draft Restitution (Mistakes of Law) Bill in the English Law Commission report and the draft Restitution (Mistake of Law) Bill 1987 in the New South Wales Law Reform Commission report.

English Bill:

1.(1) In this Act "mistake claim" means a claim made in any proceedings for restitution of a sum in respect of an act done under mistake.

(2) In this Act "act" includes anything which may found a claim for restitution, that is to say, the making of a payment, the conferring of a non-pecuniary benefit or the doing of work.

2. The classification of a mistake as a mistake of law or as a mistake of fact shall not of itself be material to the determination of a mistake claim; and no such claim shall be denied on the ground that the alleged mistake is a mistake of law.

New South Wales Bill:

"Benefit" includes any payment of money, the crediting of an account, the transfer of any real or personal property or of any interest in any real or personal property and the performance of any service.

If relief in respect of any benefit conferred under mistake is sought in any proceedings before a court by any party to the proceedings and the relief could be granted if the mistake were wholly one of fact, the relief shall not be denied only because the mistake is one of law, whether or not it is in any degree also one of fact.

7.5 The language of the relevant provisions in both draft Bills is essentially that a claim based on a mistake shall not be denied just because the mistake is one of law. However, the New South Wales Bill goes further in that the reform should be with regard

to any form of benefit conferred and not just for recovery of payments. In making such a recommendation, the New South Wales Law Commission was in fact agreeing with the views of the Law Reform Commission of British Columbia and the Law Reform Committee of South Australia.[6] We agree that the reform should not be restricted merely to recovery of payments alone.

7.6 We therefore prefer the relevant language in the New South Wales Bill with the clarification that the reforms extend to any form of benefit conferred, including the transfer of real property.

7.7 The further issue is whether the legislation is to be of retrospective effect.

7.8 The English Law Commission had recommended that claims brought in respect of acts done before the commencement of the legislation should remain subject to the common law and unaffected by the changes in the legislation. The English Law Commission did not wish to disturb claims already in progress or existing causes of action. Significantly, the English Law Commission did not wish the legislation to constitute a definitive statement that it was part of English law that there was a bar against recovery for a mistake of law (which the commission had noted was a subject of some dispute).

7.9 In contrast, the New South Wales Law Reform Commission had recommended that the proposed legislation apply to a mistake whenever made, the basis being that the reform was to correct an unjust and technical anomaly.

7.10 It is recommended that the legislation be of retrospective effect. We agree that the reforms are in substance to rectify what is otherwise an unjustifiable legal tenet, and it would be unjust to only allow claims to be made for acts done after a certain prescribed date (which in any case would be a somewhat artificial demarcation).

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[6] Paras 5.10-5.17 of the New South Wales Law Reform Commission Report 53 on Restitution of Benefits Conferred Under Mistake of Law

7.11 We think that there would on balance be less uncertainty in providing that the legislation applies to an act whenever made. We do not think that there would be a grave risk of the floodgates being opened, especially as the limitation bar will continue to apply. In any case, if the ruling of the House of Lords in Kleinwort Benson is in fact accepted as part of the common law in Singapore, it would also be the case that recovery on the basis of a mistake of law can be made for any acts whenever done.

(F) THE PROBLEMS WITH THE SITUATION WHEN A MISTAKE IS MADE ON THE BASIS OF A SETTLED VIEW OF THE LAW

8.1 Where a party pays money (or confers some other type of benefit on another) on the basis of a settled view of the law and the law is subsequently changed by judicial decision such that the payer would no longer be obliged to make the payment, the question arises whether the payer should be allowed to recover those monies as having been paid under a mistake of law.

8.2 As mentioned above, this was the specific issue which the House of Lords addressed in Kleinwort Benson and upon which the difference in opinion between the majority and the minority lay.

8.3 The difficulty with the issue arises because at the time of the payment, the payer would have been acting in accordance with the law as it was then understood. In other words, he was not acting under a mistake. Yet, when the law is subsequently changed by judicial decision, the Courts are traditionally understood as declaring that this was in fact always the law, even at the time the payment was made in the past. This suggests that there was in fact a mistake and that restitution should be allowed.

8.4 In discussing this issue, we shall first deal with the issue of what constitutes "settled law" in this context. Next, we shall consider what constitutes a change in the

settled law. Then we shall consider the two opposing views as to whether or not recovery should be allowed in this situation before offering an analysis and stating our conclusions on this point.

What is "settled law"?

8.5 "Settled law" can mean at least one of two things. First, the law can be settled in this context in the sense that there is binding judicial authority on the specific point in issue. Here, the Courts have specifically addressed the point and decided the issue and there should be no doubt that the law in such a case is settled and established. However, as stated by the English Law Commission, it is not realistic to restrict "settled law" to propositions which arise only from judicial decisions as it is often only in the light of the actual operation of the law in practice and criticism or discussion of it in legal literature that these acquire the flavour of immutability.

8.6 Thus the law can be said to be "settled", even without binding judicial authority, if there exists, as Lord Browne-Wilkinson said in Kleinwort Benson, *"a generally held view of lawyers skilled in the field*." The English Law Commission had in mind:

> "the situation where, had the payer taken advice from a qualified 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."

8.7 This test would be satisfied even though legal commentaries might contain strands of dissent from the settled propositions which a practitioner would derive provided that the practitioner would not have regarded those dissenting views as giving rise to serious doubts.

8.8 While it is often more difficult to establish what settled law is in the absence of a binding judicial decision, it would be better not to exclude the second definition of

"settled law" from this analysis. A point of law can in practice be equally "settled" with or without binding judicial authority. In any event, whether there is judicial authority on point or not is often fortuitous. There may not be any judicial authority on a particular point simply because no one had chosen to litigate the point. In fact, it might be argued that the more settled a point of law is in the minds of lawyers, the less likely it will be challenged in court.

8.9 Of course, the Court will have to deal with potentially difficult issues of whether the law on a particular point was in fact settled. However, in practice the party seeking restitution will bear the burden of proving that the view he acted in accordance with was a settled view of the law.

8.10 The test must be an objective one. It will not be sufficient for the payer to prove that he and/or his lawyers honestly believed that the law was settled in some particular respect. If that is the test, the more unreliable a party's lawyers are, the more likely that party would succeed in his claim for restitution.

8.11 The Court should consider objectively whether a lawyer who was reasonably experienced in the relevant field would have advised the payer that he had to make the payment in question.[7] As the English Law Commission had stated, *"the Court must be satisfied that the payer and his legal advisers could not have come to any conclusion, at*

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[7] It may be useful to contrast this test with the so-called *Bolam* test from Bolam v Friern Hospital Management Committee [1957] 2 All ER 118 in the area of medical negligence. The *Bolam* test states that a doctor is not negligent, if he is acting in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art, merely because there is a body of such opinion that takes a contrary view. Thus, as long as one reasonable body of doctors would have performed a procedure in a certain way, that doctor is not negligent even if there are 3 or 4 other sections of the profession which would have performed the procedure in a different manner.

A *Bolam*-like test cannot work to establish what is "settled law" entitling a payer to restitution for payment under a settled view of the law which is subsequently changed. The reason is that as long as there is a reasonable body of lawyers who hold a contrary view (i.e. that the payer is not obliged to make the payment), the law is not settled. This would be so even in the situation where a reasonable body of lawyers were of the view that the law clearly required a payer to make payment but a body of lawyers of equally reasonable number felt that the law was not settled one way or the other. In this situation, there would be a divergence of opinion not only as to whether the payer was obliged to make the payment but also whether the law was settled or not.

the time of payment, other than that to which they came (or, perhaps, would have come if they had addressed their minds to the issue).”

8.12 There are various formulations of what constitutes “settled law”. The formulation by the English Law Commission has been set out above. In New Zealand and Western Australia, the legislation dealing with restitution in the context under discussion speak of a “common understanding” of the law as opposed to “settled law”.[8]

8.13 The difficulty with the use of the New Zealand and Western Australian formulation of *“common understanding*” is that it does not make it clear whose common understanding it is. In Bell Bros Pty Ltd v Shire of Serpentine – Jarrahdale [1969] WAR 104, the trial judge stated that *“commonly understood”* meant *“that which would appear to the ordinary individual”*. However, on appeal, the court accepted that the understanding must be of persons who have at least some knowledge of the subject. That may or may not refer to lawyers only. In Bell Bros, the class of persons whose *“common understanding”* was found to be relevant by the court was those who had legislative or administrative responsibility for the making of the ultra vires by-law requiring payment to the defendant-municipality.

8.14 Our view is that it should be the understanding of lawyers practicing in this field which should be relevant. After all, that would be the view of the law which the payer would have relied on had he sought advice from competent counsel and if the payer chose not to seek such advice, then he assumes the risk that he is not acting in accordance with the law whatever it may be. Thus, the “settled law” formulation of the English Law Commission is preferred and recommended.

[8] See section 94A(2) of the New Zealand Judicature Amendment Act 1958; section 23(1) of Australian Law Australian Law Reform (Property, Perpetuities and Succession) Act 1962..

What constitutes a change in the settled law?

8.15 Just as the law can become settled without judicial decision, it is possible to speak of a change in the settled law without judicial decision. A point of law that was settled may become unsettled because a sufficiently significant number of people may have come to doubt it.

8.16 There are some problems with this analysis because it is based in part on changes in perception. Further, it does not seem to work in the situation where the law was previously settled by judicial decision. Thus, regardless of the weight of academic and legal scholarship otherwise, those same legal scholars would have to admit that binding precedent still dictates that the settled law has not changed, at least not until the judicial decision is overruled.

8.17 An example may be found in Lister v Stubbs [1890] LR 45 Ch. D 1 which for years had been the subject of intense and uniformed criticism from all quarters of the legal profession. Yet, it was not until 1993 when the House of Lords overruled it that it no longer represented the settled law.

8.18 For the purposes of the present discussion, it would be more meaningful to speak of changes in the law by way of judicial decision. That would provide a clearer and more precise definition of the situation.

No mistake, therefore no restitution

8.19 Having defined for the purposes of this discussion the meaning of settled law and what constitutes a change in the settled law, we turn to consider the two opposing views as to whether or not recovery should be permitted when payment was made on a settled view of the law which subsequently changed.

8.20 One view of the matter is that restitution should not be available to a payer who paid money on the basis of settled law which was subsequently changed by judicial decision. The main reason for this is that the payer was not operating under any mistake at the time payment was made.

8.21 As Lord Browne-Wilkinson pointed out in Kleinwort Benson, the premise of this argument is that in order for the payer to recover his money, the payer has to have been labouring under the mistake at the date of payment. The other Law Lords (both majority and minority) accepted that premise. The mistake here is crucial, as it is the basis upon which the payee's enrichment can be said to be "unjust" thus entitling the payer to restitution.

8.22 Building on that premise, Lord Browne-Wilkinson reasoned that at the time the payment was made, the payer was not under any mistake at all. When the payment was made, the law was settled and the payer made the payment in accordance with that settled view of the law. Thus, at the time of the payment, there was no mistake. There being no mistake, there should be no restitution.

8.23 As Lord Browne-Wilkinson stated at p 363F of Kleinwort Benson,:

> "In holding that money paid under a mistake of law is recoverable, an essential factor is that the retention of the money so paid would constitute an unjust enrichment of the payee. What constitutes the unjust factor is the mistake made by the payer at the date of payment. If, at the date of payment, it was settled law that payment was legally due, I can see nothing unjust in permitting the payee to retain moneys he received at a time when all lawyers skilled in the field would have advised that he was entitled to receive them and the payer was bound to pay them. Again it is critical to establish the position at the time of payment: if, at that date, there was nothing unjust or unmeritorious in the receipt or retention of the moneys by the payee in my judgment it was not an unjust enrichment for him subsequently to retain the moneys just because the law was, in one sense, subsequently changed."

8.24 Lord Browne-Wilkinson accepted that when a judicial decision overturns a settled view, that judicial decision operates retrospectively. However, while the law may be changed retrospectively, it cannot change the state of mind of the payer retrospectively. As Lord Browne-Wilkinson said at p 358B of his judgment, *"retrospection cannot falsify history"*. While a subsequent judicial decision could alter the law, it could not change facts. The state of mind of the payer at the time of the payment is, in Lord Browne-Wilkinson's view, a historical fact.

8.25 Each payment was made in accordance with settled law, then the payer was not labouring under any mistake of law at that date. The subsequent overruling judicial authority could not create a mistake where no mistake existed at the relevant time.

8.26 After all, a claim in restitution exists to prevent unjust enrichment. Mistakes of law and fact give rise to a right of recovery because the mistake makes the payee's enrichment unjust. It also makes his retention of the enrichment unjust. Where the payer was never under any actual mistake, it is argued that there is nothing unjust about the status quo.

8.27 For the same reason, the English Law Commission was firmly against allowing recovery by the payer where payment was made on the basis of settled law which was subsequently changed by judicial decision. In the English Law Commission's view, "*the payment should not be recoverable because in substance there has been no mistake.*"[9]

8.28 Another significant argument against allowing recovery when there is a change in settled law is the view that the contrary position would affect the certainty and finality of payments and transactions. It is necessary for commerce that parties should be able to have confidence in the finality of the transactions they enter into.[10] As Lord Browne-Wilkinson stated in Kleinwort Benson, the view that restitution should be available when

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[9] English Law Commission Report No. 227, para 5.3.

[10] Finality of transactions is often said to be of particular concern in the increasingly important area of e-commerce.

there is a change in settled law "would be subversive of the great public interest in the security of receipts and the closure of transactions."

8.29 Taking the point one step further, as Lord Lloyd did in Kleinwort Benson, it may be argued that appeal courts may be more reluctant to change the law because of the impact that change would have on the finality of past transactions.

8.30 While an appeal court may be of the view that a particular point of previously settled law should be changed, the court might equally be concerned that not just the payment in question would be affected. The change in the law might result in other payments made in similar circumstances being reclaimed. The greater the number of past transactions that might be affected the more reluctant an appeal court might be to effect a change in the law. Any such effect would be particularly unfortunate because it might be thought that areas of law that affect large numbers of payments are more commonplace and more in need of constant revision and improvement.

8.31 It would be unfortunate if the threat of the floodgates being opened to a torrent of additional litigation as a result of the finality of past financial transactions being unsettled were to dissuade an appeal court from making an otherwise necessary correction or change to a settled view of the law.

8.32 Jurisprudentially, the theory was that the law did not change. Judges did not make law; they merely declared it. Thus, when judges changed settled law, they were not so much changing it as declaring that the previous (albeit settled) understanding of the law was erroneous. The practical result of this theory was that the change in the law acted retrospectively. Taken to its logical conclusion, the theory dictates that the payer was under a "mistake" when he made payment in reliance on settled law which was subsequently changed.

8.33 Both the English Law Commission and Lord Browne-Wilkinson pointed out that this theory was artificial. *"Judicial lawmaking has been more widely acknowledged in*

recent years, particularly since 1966 when the House of Lords stated that, while continuing to treat former decisions as normally binding, it would depart from a previous decision when it appeared right to do so."[11] Once the artificiality has been recognised, the theory should no longer found the basis for saying that the payer was under a mistake when he relied on the previously settled law.

8.34 England aside, other jurisdictions which have abrogated the rule against recovery for mistake of law have not extended this to the situation where settled law is subsequently changed by judicial decision. In Commissioner of State Revenue v Royal Insurance Australia Ltd (1994) 182 CLR 51, the Australian High Court held that there should be no recovery for mistake of law when a statute was repealed with retrospective effect.

8.35 Section 94A(2) of the New Zealand Judicature Amendment Act 1958 provides:

> "Nothing in this section shall enable relief to be given in respect of any payment made at a time when the law requires or allows, or is commonly understood to require or allow, the payment to be made or enforced, by reason only that the law is subsequently changed or shown not to have been as it was commonly understood to be at the time of the payment."

8.36 The Western Australian provision, Law Reform (Property, Perpetuities and Succession) Act 1962, s 23(1), is identical to the New Zealand provision.

8.37 In the United States, recovery is permitted for mistakes of law. However, there is generally no recovery for mistake of law where there is a change in settled law. See for example Mercury Machine Importing Corp v City of New York 144 NE 2d 400 (1957).

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[11] English Law Commission Report No. 227, para 5.6. A similar point was made by Chief Justice Beverley McLauchlin of Canada at the Singapore Academy of Law Annual Lecture 2000.

Mistake of law entitling payer to restitution

8.38 We now turn to the contrary view which is that a party which makes a payment on the basis of settled law should be allowed to recover the payment if the previously settled law is changed by judicial decision. This was the view of Lords Goff, Hoffman and Hope in Kleinwort Benson and the arguments in favour of this view are set out in their judgments.

8.39 Lord Goff based his argument squarely on the declaratory theory of judicial decision 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."[12]

8.40 Thus, the argument goes as follows. The payer believed that he was obliged by the law to make the payment. The subsequent change in the law, applying retrospectively under the declaratory theory of judicial decision, dictates that the payer was actually mistaken when he made the payment in reliance on the old law.

8.41 Lord Goff made it clear that he was not willing to abrogate the declaratory theory of judicial decision or to restrict it in any way as the theory was foundational to the English common law system and this system was "subject" to this declaratory theory.

8.42 Lord Goff acknowledged that it was important to have finality for closed transactions. However, he said that this finality would be achieved through defences like that available when there has been a change of position by the payee. It should not be achieved by a settled law defence because that defence was fundamentally wrong in

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12 Kleinwort Benson [1999] 2 AC at 381C.

principle since subsequent overruling judicial authority made it clear that the payer had in fact been under a mistake of law.

8.43 Both Lord Hoffman and Lord Hope added to this by pointing out that while it was advantageous to have finality of closed transactions, such considerations were essentially utilitarian policy considerations. They took the view that judicial decisions should be based on the law and not policy, the latter being the domain of the legislature.

8.44 Lords Goff, Hoffman and Hope each also acknowledged that other commonwealth jurisdictions had decided not to allow recovery where there is a change in settled law. However, they also noted that that position in Australia and New Zealand had not gone uncriticised.

8.45 Lord Hope also argued that there would be some difficulty deciding which formulation of the settled law defence should be used. There were difficulties whether the phrase "settled law" was used or whether it was the phrase "common understanding" as used in the New Zealand and Western Australian legislation. Both phrases would be difficult to apply and there would be a certain degree of uncertainty as to whether either standard can be established by evidence.

8.46 Moreover, Lord Hope argued that if there was a "settled law' defence, "the worse the legal advice the more likely the payer could show that the defence was not applicable."[13]

Analysis

8.47 The fundamental difference in the two conflicting positions is founded on the different scopes given to the declaratory theory of judicial decision and to the retrospective effect of the theory. For ease of reference, the two views will be referred to as Lord Browne-Wilkinson's view and Lord Goff's view respectively.

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[13] Kleinwort Benson [1999] 2 AC at 415A.

8.48 Lord Goff's view sticks to a traditional interpretation of the declaratory theory, an interpretation which has at least two overlapping aspects to it. First, the theory states that judges do not make law, they merely declare what the law was all along. Secondly, the recent 'declaration' operates retrospectively such that it is effective as if it had always been the law.

8.49 Lord Browne-Wilkinson's view accepts that judges do make law and that they are not merely declaring what the law was all along. Thus, when judges 'change' settled law, they are doing just that: changing and altering the previously understood legal position. This view sees the retrospectivity of the declaratory theory rather differently from Lord Goff's view. Lord Browne-Wilkinson's view accepts that judicial decisions operate retrospectively in that as of the date of the new judicial decision, the law prior to that decision is deemed to have been otherwise than settled on that date.

8.50 This view accepts that judges have changed the law and that there is some artificiality to the retrospectivity (which perhaps is necessary for a coherent operation of the common law system). However, it does not go so far as pretending, as Lord Goff's view does, that there was no change in the law and that the law was always as it has recently been declared to be.

8.51 In short, Lord Goff's view is a more traditional and artificial application of the declaratory theory of judicial decision while Lord Browne-Wilkinson's view is a more realistic and practical application of the theory.

8.52 However, regardless of which of these views is correct, the declaratory theory of judicial decision does not hinder a legislative solution to the problem. If the Singapore Court of Appeal were considering whether to follow Kleinwort Benson, it would no doubt have to consider whether it was going to abrogate or retain the declaratory theory of judicial decision in its classical form. However, Parliament would not be constrained

by this theory. If Parliament decided to change the law and allow a settled law defence, the declaratory theory of judicial decision would not stand in its way.

8.53 Lord Goff's reasoning, being based on the declaratory theory, is less forceful in the context of statutory law reform. On the other hand, the force of the reasoning of Lord Browne-Wilkinson and the English Law Commission would remain even in the context of legislative law reform.

8.54 A number of the other arguments of the majority of the House of Lords are similarly irrelevant in the context of law reform. Lords Hoffman and Hope's argument that the settled law defence was based on policy considerations would not be an argument which should hinder legislative law reform as policy choices are precisely what legislation is supposed to express.

8.55 Instead, we agree with the practical logic that the English Law Commission and Lords Browne-Wilkinson and Lloyd employed: at the time the payment was made, the payer was under no mistake and therefore, there is no basis for restitution. In addition, it is important that the finality of past transactions not be interfered with especially when the only apparent justification is the reliance on an artificial and impractical application of the judicial theory of decision making, a theory that has no application in the context of legislative reform.

8.56 Accordingly, the relevant provisions in the draft Bill in the English Law Commission Report as annexed to this paper are recommended for adoption in Singapore.

(H) THE APPLICABLE LIMITATION PERIODS

9.1 As discussed above, the House of Lords decided in Kleinwort Benson that the applicable limitation period for mistakes should apply equally irrespective of whether it is of fact or of law.

9.2 The English Law Commission did not deal with this point generally, save that in respect of another issue which they were asked to consider, namely claims for repayment of tax paid as a result of a mistake. For this aspect, they did not consider recommending shorter limitation periods and noted at the same time that section 32(1)(c) of the English Limitation Act would apply.

9.3 The determination in Kleinwort Benson is sound. If there is to be no distinction between a mistake of fact and of law, there is no reason why the applicable limitation period for claim based on a mistake of fact under section 29(1)(c) of the Singapore Limitation Act should not apply for a claim based on a mistake of law as well.

9.4 Section 29(1)(c) in the event does not contain any language which suggests that it is to be restricted to a mistake of fact only. The only issue is whether the plaintiff has discovered or could with reasonable diligence have discovered the mistake.[14]

9.5 We accordingly recommend that legislative amendments be made to section 29(1)(c) of the Limitation Act clarifying that the relevant mistake can be either one of fact or of law.

9.6 The remaining issue is whether to impose a degree of finality in any event. Their Lordships in Kleinwort Benson had recognised that time may run for a long time before the mistake of law is discovered but in the same vein, held that it was for Parliament to address the issue if it gave rise to a grave risk of injustice.

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[14] There are few cases with regard to interpreting section 29(1)(c) nor in the UK, as evident from the judgments of their Lordships in Kleinwort Benson

9.7 One alternative may be to impose a "longstop" as is applicable for negligence, nuisance and breach of duty actions involving latent damage as prescribed under section 24B of the Limitation Act. The "longstop" was first introduced into English law in 1986 to ensure that there was some finality in respect of claims for latent damage, after a reasonable period of time. In respect of latent damage, the overriding time limit is 15 years from the act that is alleged to constitute the negligence, nuisance or breach of duty and to which the injury or damage which is being claimed of is alleged to be attributable.

9.8 We think it is necessary to prescribe an overriding time limit for limitation periods in respect of claims founded on a mistake, be it of law or of fact. Otherwise, potentially, a transaction that was carried out based on a mistake, may be unraveled decades later, as time only starts to run from the time when such mistake was discovered or when the mistake could, with reasonable diligence, have been discovered.

9.9 We would therefore recommend that there be an overriding limitation period of 12 years from the act or transaction in respect of which relief is sought from the consequences of a mistake, consistent with the limitation period in respect of actions to recover land under section 9(1) of the Limitation Act.

(I) WHETHER THERE SHOULD BE REFORMS TO DEAL WITH THE POSITION OF COMPROMISES

10.1 A related issue is whether reforms should also be considered to ensure that compromises or settlements are not unraveled on the basis of a mistaken view of the law.

10.2 The English Law Commission had dealt with this issue substantively.[15] After having considered the existing common law, the Law Commission concluded that it was not necessary to deal with the position of compromises and that this area should best be

[15] paras 2.25-2.38, English Law Commission Report

left to the development of the common law on a case by case basis. This approach was consistent with the general tenor of the Law Commission not to create a comprehensive statutory right of recovery but for the same rules to apply for all kinds of mistake.

10.3 This conclusion was very much based on the analysis that in common law, recovery is prohibited of money previously paid if made in pursuant to a compromise of the claim. Accordingly, even if payment was made under a mistake, recovery is denied if the payment was made in compromise of a claim. In this regard, three tenets of public policy upholding a settlement was recognised: (a) upholding bargains, (b) respecting finality and (c) avoiding litigation.[16]

10.4 We therefore do not recommend any specific reforms to deal with compromises.

(J) THE RECOMMENDED LEGISLATION

11.1 We therefore recommend for consideration the draft Bill annexed to this paper.

(K) A SUMMARY OF THE RECOMMENDATIONS

12.1 Our recommendations are therefore:

(a) The rule precluding the recovery of payments made under a mistake of law be abrogated by legislation;

(b) There be no recovery where payment was made on the basis of settled law which was subsequently changed by judicial decision;

(c) The legislation is to be of retrospective effect;

[16] para 2.26, *ditto*

(d) Section 29(1)(c) of the Limitation Act be amended to clarify that it applies irrespective of whether the mistake is one of law or of fact;

(e) There be an overriding time limit of 12 years for limitation periods in respect of claims made under a mistake;

(f) No specific reforms are required to deal with the position on compromises.

Dated this 9 April 2001

Cavinder Bull
Member of the Law Reform Committee of the Singapore Academy of Law

Chou Sean Yu
Member of the Law Reform Committee of the Singapore Academy of Law

ANNEX

DRAFT CIVIL LAW (AMENDMENT) BILL 2001

A BILL

intituled

An Act to amend the Civil Law Act (Chapter 43 of the 1999 Revised Edition) and to make a related amendment to the Limitation Act (Chapter 163 of the 1996 Revised Edition).

Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:

Short title and commencement

1. This Act may be cited as the Civil Law (Amendment) Act 2001 and shall come into operation on such date as the Minister may, by notification in the *Gazette*, appoint.

New section 31 of Civil Law Act

2. The Civil Law Act (Cap. 43) is amended by inserting, immediately after section 30, the following section:

"**Proceedings in respect of benefits conferred under mistake**

31.—(1) If relief in respect of any benefit conferred under a mistake is sought in any proceedings before a court by any party to the proceedings, the classification of the mistake as a mistake of law or as a mistake of fact shall not of itself be material to the determination of the claim, and no such claim shall be denied on the ground that the alleged mistake is a mistake of law.

(2) An act done or omission made in accordance with a settled view of the law shall not be regarded as founding a claim for relief in respect of any benefit conferred under a mistake, by reason only that a subsequent decision of any court or tribunal departs from that view.

(3) 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 been the subject of a decision by any court or tribunal.

(4) In this section, "benefit" includes any payment of money, the crediting of an account, the transfer of any real or personal property or of any interest in any real or personal property and the performance of any service.".

Amendment of section 29 of Limitation Act

3. Section 29 of the Limitation Act (Cap.163) is amended by inserting, immediately after subsection (2), the following subsections:

"(3) Notwithstanding subsection (1), no action for relief from the consequences of a mistake shall be brought after the expiration of 12 years from the date of the occurrence of the event which gave rise to the cause of action or, if the event occurred over a series of dates, from the last of such dates.

(4) For the purposes of this section, "mistake" means a mistake of law or fact.

Savings

4.—(1) Subject to subsection (2), the provisions of sections 2 and 3 of this Act shall apply to any mistake claim notwithstanding that the event which gave rise to the cause of action occurred before the commencement of this Act.

(2) Nothing in this Act shall affect the rights or obligations of any person under any judgment given or order made by any court or tribunal before the commencement of this Act in respect of a mistake claim.

(3) In this section, "mistake claim" means any claim for relief from the consequences of a mistake of law or a mistake of fact.

EXPLANATORY STATEMENT

This Bill seeks to amend the Civil Law Act (Cap.43) and the Limitation Act (Cap.163) to implement the following recommendations of the Law Reform Committee of the Singapore Academy of Law:

(*a*) that the common law rule precluding the recovery of payments made, services rendered and benefits conferred, under a mistake of law should be legislatively abrogated and with retrospective effect;

(*b*) that there should, however, be no recovery in the case of any payment, service or benefit that has been made, rendered or conferred on the basis of a settled view of the law at the time when the payment, service or benefit was so made, rendered or conferred, notwithstanding that that settled view of the law has subsequently been departed from by judicial decision;

(*c*) that section 29(1)(*c*) of the Limitation Act (Cap.163) should be amended to clarify that that provision applies irrespective of whether the mistake is one of law or of fact; and

(*d*) that, in the case of a claim arising from a mistake, there should be an overriding limitation period of 12 years from the date of the occurrence of the event which gave rise to the cause of action.

Clause 1 relates to the short title and commencement of the Bill.

Clause 2 inserts a new section 31 in the Civil Law Act which —

(*a*) abrogates the common law rule that precludes the recovery of payments made, services rendered and benefits conferred, under a mistake of law; and

(*b*) provides that there shall be no recovery in the case of any payment, service or benefit that has been made, rendered or conferred on the basis of a settled view of the law at the time when the payment, service or benefit was so made, rendered or conferred, notwithstanding that that settled view of the law has subsequently been departed from by judicial decision.

Clause 3 amends section 29 of the Limitation Act —

(*a*) to clarify that the word "mistake" in that section (including subsection (1)(*c*) thereof) refers to a mistake of law or a mistake of fact; and

(*b*) to provide, in the case of a claim arising from a mistake, for an overriding limitation period of 12 years from the date of the occurrence of the event which gave rise to the cause of action.

Clause 4 is a savings provision which provides for the amendments made by clauses 2 and 3 to the Civil Law Act and the Limitation Act respectively to apply retrospectively to any claim arising from a mistake of law or fact, unless such claim is one in respect of which a judgment or order of any court or tribunal has, before the commencement of the Bill, been given or made.

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