

Topic 3 - Mistake

Restitution provides relief to fully capable individuals where the autonomy of their decision to confer a benefit has been impaired.

Restitution provides relief when a benefit has been conferred due to a mistake of fact or law; a mistake vitiates a plaintiff's consent. This means that the plaintiff has acted when their autonomy is impaired by informational deficit.

- A court will treat the conduct as if the plaintiff did not consent

What is a mistake?

Mistake VS Misprediction: A claim for restitution must be founded upon a mistake, not a misprediction.

Lord Walker in *Cf Pitt v Holt* said at [109]:

“A misprediction relates to some possible future event, whereas a legally significant mistake normally relates to some past or present matter of fact or law.”

A flawed perception is but the first link in a chain of events that leads to an untoward consequence. In a classic case of mistake, one's flawed perception is significant because it is followed by a faulty decision, as a result of which one takes an ill-advised action with what, absent alleviation, would be an untoward consequence. This is what makes the mistake legally significant. As the Supreme Court of Utah expressed it, a mistake is discovered 'by comparing what was believed to be the fact alongside of the discovered actual fact.'

Ignorance:

In *David Securities*, the HC held that ignorance can amount to a mistake:

‘mistake not only signifies a positive belief in the existence of something which does not exist but also may include ‘sheer ignorance of something relevant to the transaction in hand’

HOWEVER in *Pitt v Holt* (UK)

Ignorance is not something which Lord Walker in *Pitt v Holt* sees as constituting a mistake:

Forgetfulness, inadvertence or ignorance is not, as such, a mistake, but it can lead to a false belief or assumption which the law will recognise as a mistake - Lord Walker

- But the court can infer the existence of a conscious belief or tacit assumption which are mistakes.

Sheer ignorance of a fact, so that one cannot call it to mind, cannot be the basis of even a passive perception - A Farnsworth

3.1 Types of Mistakes

Mistakes of Fact:

Kelly v Solari (1841) - Forgetting a fact

- Insurance company paid money to the defendant under a life insurance policy; they forgot that the policy had in fact lapsed
- Mistake of fact = the plaintiff believed something different to the facts of reality (that the policy had lapsed -> they hence did not need to pay the defendant)
- HELD: Court of Exchequer
 - *'I think the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment.'* - Lord Abinger CB
 - *'if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it.'* - Parke B
- Forgetting a fact gave rise to a right of recovery; knowledge must exist in the mind at the time of payment (not knowledge previously known and forgotten); carelessness is no bar to recovery

the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money

- Bramwell B in *Aiken v Short* (1856)

Mistakes of Law:

Until remarkably recently, payments under a mistake of law were not recoverable at common law. *Bilbie v Lumley* (1802) effectively abolished the 'bar' on seeking recovery for a mistake of law.

P doesn't realise that a contract contains provisions which are contrary to statute and illegal. This renders those provisions void. This is a mistake of law.

David Securities v CBA (1992)

- HELD:
- *If the ground for ordering recovery is that the defendant has been unjustly enriched, there is no justification for drawing distinctions on the basis of how the enrichment was gained, except in so far as the manner of gaining the enrichment bears upon the justice of the case*
- No longer a distinction between mistake of law and mistake of fact for the purposes of permitting recovery.

Mistake and Retrospective legislative change:

Royal Insurance (1994)

- Royal paid stamp duty for which it was not ultimately liable.
- Amendments to the relevant legislation had been introduced, of which it was unaware, which provided for an exemption.

Payments fell into three main categories.

(a) Payments which were always exempt and Royal just did not know they were exempt.

(b) Payments made between 1985 and 1987 which were initially taxable but after legislative change, became exempt.

(c) Payments made after the retrospective amendment, but did not realise the amendment had occurred, were never taxable

For (a) and (c) seem to be mistakes; (b) are more tricky - the liability changed, but there is no mistake

- HELD: majority, there had been no mistake but there was a statutory liability to refund the money
 - *there was no mistake affecting the payment of the amount in item (ii)(a). When paid, the Comptroller was entitled — indeed, she was bound — to retain it. But, by force of the operation attributed to the 1987 amendment, the Commissioner is retrospectively disentitled to retain what was paid as stamp duty under the Act as it had stood before the 1987 amendment commenced.* - Brennan J
 - Created a right of refund, not that the payor was acting under a mistake
 - Even though retrospectively they had no liability to pay it, they did not make a mistake
- Mason CJ dissenting: there was a mistake
 - Retrospectively, they made a mistake

Mistake and judicial change to law:

- Judicial change is retrospective; does a change in judicial law render a payment mistaken if made in accordance with settled understanding of law at the time?

Kleinwort Benson v Lincoln City Council

- The judiciary can directly overturn clearly stated law OR the judiciary can declare a judgment on law where there was no clearly stated law but there was an accepted 'settled understanding'
- FACTS: plaintiff bank made payments to the defendant local authority under an 'interest rate swap' agreement. These arrangements were rendered void by the House of Lords as they exceeded the power of the local authority.
- Some of the payments were made 6 years prior to the issuing of the new writ
- HELD:

- The court acknowledged that the judiciary can change the law with a retrospective effect
- When they entered into the transaction, they believed due to settled understanding that they had the authority; they did not know they did not until the later judgment
- A mistake was made
- By virtue of s 32 of the Limitation Act 1980, the (6-year) limitation period in mistake actions starts to run only when the mistake is discovered or reasonably discoverable. The House of Lords upheld the claim by a majority of 3:2
- *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 payment, he was not bound. Plainly, therefore, he paid the money under a mistake of law.* - Lord Goff - he argued *Royal Insurance* is for statutory changes ONLY
- A declaration of the law which changes the settled view has the result that the payer has acted under a mistake.
- •Lord Hope: would the payer 'have made the payment if he had known what he is now being told was the law'? It is the state of the law at the time of the payment + the state of the mind of the payor that indicates a mistake
- •Mistakes of fact may take some time to discover. Why should mistake of law be different?
- They only realise they made a mistake retrospectively; but it is still a mistake
- Lord B-W (dissenting) The law has changed but not the intention of the payer at the time the payment was made. Realising retrospectively they did not have the authority to do something does not render the action they made in the past a mistake

Does this impact the security of transactions?

Was the council acting under a misprediction, not a mistake?

When legislation is amended, it is not inherently retrospective, but prospective UNLIKE the courts where their judgments are retrospective

Mistake and judicial change to a tax law:

Deutsche Morgan

- First issue: Does doctrine of mistake apply to change in judicial law wrt payment of tax?