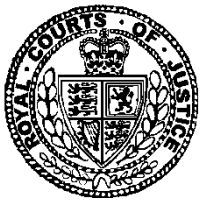

Neutral Citation [2020] EWHC 55 (Ch)

Case No: 320 of 2013
Appeal No: BM80020CH

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
APPEALS (ChD)

On appeal from the order of Her Honour Judge George, sitting at the County Court at Lincoln, dated 15 January 2018

Birmingham Civil Justice Centre
33 Bull Street
Birmingham B4 6DS

Date: 24 January 2020

Before:
THE HONOURABLE MR JUSTICE MARCUS SMITH

- -

JEREMY PHILIP ELSTON

Appellant
(Applicant below)

- and -

(1) LAWRENCE KING
(2) SUE ROSCOE
(trustees in bankruptcy of Jeremy Philip Elston)

Respondents
(Respondents below)

- -

- -

Mr James Malam (instructed on a direct access basis by Mr Elston) for the **Appellant**
Mr James Morgan, QC (instructed by Freeths LLP) for the **Respondents**

Hearing date: 6 December 2019
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

A. INTRODUCTION

1. At a hearing before Her Honour Judge George, sitting in the County Court at Lincoln, Mr Elston (the Applicant before Judge George and the Appellant before me) sought restitution of monies paid out from his pension funds to his trustees in bankruptcy (the Respondents here and below[1]) pursuant to an Income Payments Agreement made between them dated November 2014.[2] This was the second Income Payments Agreement entered into by the Appellant, but is the only agreement relevant for the purposes of this appeal. I shall therefore refer to it as the "Income Payments Agreement".

2. The basis for the Appellant's claim in unjust enrichment was that Income Payments Agreement had been concluded under a mistake of law and should be set aside and the payments made pursuant to the agreement repaid.[3] Her Honour Judge George dismissed the Appellant's claim in a judgment (the "Judgment") dated 8 December 2017. The basis for dismissing the claim was as follows:

    (1) The payments which the Appellant sought to recover had been made pursuant to a valid agreement, the Income Payment Agreement. Until that agreement was set aside, there could be no question of recovering payments made pursuant to that agreement.

    (2) The parties to the Income Payments Agreement – that is, the Appellant and the Respondents – had proceeded on the basis of a common (or mutual) mistake of law as to the jurisdiction of the court to make an income payment order. However, for a common mistake to be capable of setting aside an agreement, the requirements laid down by the Court of Appeal in *Great Peace Shipping Limited v. Tsavliris Salvage (International) Limited*[4] needed to be satisfied. In this case, they were not because:

        (a) The Income Payments Agreement constituted a compromise agreement, pursuant to which the risk of there being a subsequent change in the law was assumed by the Appellant.

        (b) The Income Payments Agreement continued to be capable of performance.

    (3) In any event, even if the foregoing was wrong, the Respondents had the benefit of a partial defence of change of position.

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[1] The Second Respondent was removed as trustee by order of the court on 27 June 2017. I shall, for ease of reference, continue to refer to the Respondents.

[2] The Appellant signed on 20 November 2014 and the Respondents signed on 25 November 2014.

[3] In fact, the pleaded claim was for restitition of the monies paid on grounds of mistake. At trial, all of the parties, and the Judge, appreciated that the payments that the Appellant made, or caused to be made, were made pursuant to a contract and – absent that contract being set aside – any restitutionary claim must fail.

[4] [2002] EWCA Civ 1407.

3. The Appellant appealed against substantially all of the legal holdings of the Judge: her factual findings were not challenged. This appeal thus turns on whether, the Judge's factual findings being unchallenged, the Judge correctly applied the law to the facts.

4. I propose to approach the questions in this appeal in the following way:

   (1) First, I consider (in Section B below) the nature of the Income Payments Agreement that was concluded between the Appellant and the Respondents. Although it was, apparently, common ground before the Judge that the Income Payments Agreement was a form of statutory contract,[5] the Appellant's pleadings before the Judge kept the point open,[6] and I consider that it is important to understand precisely the nature of the instrument agreed between the parties when applying the law regarding common mistake in *Great Peace Shipping*.

   (2) Secondly, I set out (in Section C below) the nature of the change of law that gave rise to the mistake of law alleged by the Appellant in this case. It is a peculiarity of subsequent changes in the law that what is, on any sensible view, not a mistake at all but a future revision of the law, has the potential of rendering past decisions taking a contrary view (or persons' understanding of such decisions) in effect mistakes capable of having private law consequences. That is the approach taken in *Kleinwort Benson Limited v. Lincoln City Council*,[7] where Lord Goff explained:[8]

      > "…when judges state what the law is, their decisions do…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 inevitable in relation to other cases in which the law as so stated will in future fall to be applied..."

   (3) Thirdly, I set out (in Section D below) the rules regarding the setting aside of transactions on grounds of mutual mistake, with specific reference to compromise agreements. Section D considers not only the law in this area, but also the Judge's conclusion that the Income Payment Agreement could not be set aside on grounds of common mistake.

   (4) Fourthly, I consider (in Section E) the change of position defence.

B. THE NATURE OF THE INCOME PAYMENTS AGREEMENT

5. The Income Payments Agreement was made pursuant to section 310A of the Insolvency Act 1986.

6. Section 310A provides as follows:

[5] See paragraph 8 of the Respondents' written submissions on appeal.

[6] See, for instance, paragraphs 12 and 22 of the Appellant's Points of Claim.

[7] [1999] 2 AC 349 at 378-379.

[8] At 378-379.

"**Income payments agreement**

(1) In this section *"income payments agreement"* means a written agreement between a bankrupt and his trustee or between a bankrupt and the official receiver which provides–

(a) that the bankrupt is to pay to the trustee or the official receiver an amount equal to a specified part or proportion of the bankrupt's income for a specified period, or

(b) that a third person is to pay to the trustee or the official receiver a specified proportion of money due to the bankrupt by way of income for a specified period.

(2) A provision of an income payments agreement of a kind specified in subsection (1)(a) or (b) may be enforced as if it were a provision of an income payments order.

(3) While an income payments agreement is in force the court may, on the application of the bankrupt, his trustee or the official receiver, discharge or vary an attachment of earnings order that is for the time being in force to secure payments by the bankrupt.

(4) The following provisions of section 310 shall apply to an income payments agreement as they apply to an income payments order–

(a) subsection (5) (receipts to form part of estate), and

(b) subsections (7) to (9) (meaning of income).

(5) An income payments agreement must specify the period during which it is to have effect; and that period–

(a) may end after the discharge of the bankrupt, but

(b) may not end after the period of three years beginning with the date on which the agreement is made.

(6) An income payments agreement may (subject to subsection (5)(b)) be varied–

(a) by written agreement between the parties, or

(b) by the court on an application made by the bankrupt, the trustee or the official receiver.

(7) The court–

(a) may not vary an income payments agreement so as to include provision of a kind which could not be included in an income payments order, and

(b) shall grant an application to vary an income payments agreement if and to the extent that the court thinks variation necessary to avoid the effect mentioned in section 310(2)."

7. The terms of section 310A strongly suggest that an income payments agreement is a contract between the bankrupt and his trustee in bankruptcy or the official receiver,[9] albeit one that is subject to the statutory controls set out in section 310A. That was the conclusion of His Honour Judge Hodge (sitting as a Judge of the High Court) in *Booth v. Mond*, and I agree with him.[10]

8. In this case, the Income Payments Agreement made provision for the Appellant to pay to the Respondents, by way of contributions to his bankruptcy debts, certains sums of money out of various pension plans taken out by the Appellant. The details do not matter: all that needs to be noted is that the Appellant was obliged to draw down available lump sums under his pension as and when they became available to him pursuant to the terms of those plans.

9. The Income Payments Agreement concluded with the following paragraphs:

> "I understand that when this agreement is signed by either of my Trustees in Bankruptcy it will become a legally binding document and that it may only be varied by written agreement with either of my Trustees in Bankruptcy or by order of the Court.
>
> If, for any reason, I cannot maintain the payments or they cannot be made, I will tell my Trustee in Bankruptcy immediately and explain the reason.
>
> This agreement will come into force and become legally enforceable after it has been signed by both the debtor and the Trustee in Bankruptcy."

10. Pursuant to the Income Payments Agreement, the following payments were facilitated by the Appellant:[11]

Date	**Amount**
20 January 2015	£20,546.75
22 January 2015	£2,647.92
30 January 2015	£14,697.06
3 February 2014	£10.00
4 February 2015	£1,717.47
27 November 2015	£2,647.92
27 January 2016	£1,717.47
24 November 2016	£2,647.92
6 February 2017	£1,717.47
Total	**£48,349.98**

[9] The repeated references to an "agreement" strongly suggest this, as does the power of the parties in section 310A(6)(a) to vary the "agreement".

[10] [2010] EWHC 1576 (Ch).

[11] The payments were made directly from the pension provider to the Respondents, and not via the Appellant. The figures are set out in [14] of the Judgment.

C. THE "MISTAKE" OF LAW

11. The question of "mistake" is a slippery one when it comes to legal analysis. This Section simply seeks to deal with the factual position, and leaves the legal questions to be dealt with in Section D.

12. The change in the law, which gives rise to the Appellant's contentions regarding a mistake of law, is very clearly set out in [16]*ff* of the Judgment, which I gratefully draw from:

(1) Rights under a pension policy are rights that would ordinarily form part of a bankrupt's estate and vest in his or her trustee in bankruptcy pursuant to section 283 of the Insolvency Act 1986.

(2) However, section 11(1) of the Welfare Reform and Pensions Act 1999 provided that "[w]here a bankruptcy order is made against a person on a bankruptcy application made or petition presented after the coming into force of this section, any rights of his under an approved pension arrangement are excluded from his estate".

(3) This exclusion of approved pension arrangements is qualified by section 310 of the Insolvency Act 1986, which makes provision for income payments orders. Section 310 provides as follows:

"**Income payments orders**

(1) The court may make an order ("*an income payments order*") claiming for the bankrupt's estate so much of the income of the bankrupt during the period for which the order is in force as may be specified in the order.

(1A) An income payments order may be made only on an application instituted–

(a) by the trustee, and

(b) before the discharge of the bankrupt.

(2) The court shall not make an income payments order the effect of which would be to reduce the income of the bankrupt when taken together with any payments to which subsection (8) applies below what appears to the court to be necessary for meeting the reasonable domestic needs of the bankrupt and his family.

(3) An income payments order shall, in respect of any payment of income to which it is to apply, either–

(a) require the bankrupt to pay the trustee an amount equal to so much of that payment as is claimed by the order, or

(b) require the person making the payment to pay so much of it as is so claimed to the trustee, instead of to the bankrupt.

(4) Where the court makes an income payments order it may, if it thinks fit, discharge or vary any attachment of earnings order that is for the time being in force to secure payments by the bankrupt.

(5) Sums received by the trustee under an income payments order form part of the bankrupt's estate.

(6) An income payments order must specify the period during which it is to have effect; and that period–

(a) may end after the discharge of the bankrupt, but

(b) may not end after the period of three years beginning with the date on which the order is made.

(6A) An income payments order may (subject to subsection (6)(b)) be varied on the application of the trustee or the bankrupt (whether before or after discharge).

(7) For the purposes of this section the income of the bankrupt comprises every payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled, including any payment in respect of the carrying on of any business or in respect of any office or employment and (despite anything in section 11 or 12 of the Welfare Reform and Pensions Act 1999) any payment under a pension scheme but excluding any payment to which subsection (8) applies.

(8) This subsection applies to–

(a) payments by way of guaranteed minimum pension.

(9) In this section, *"guaranteed minimum pension"* has the same meaning as in the Pension Schemes Act 1993."

(4) In *Raithatha v. Williamson*,[12] Mr Bernard Livesey, QC (sitting as a deputy High Court Judge), held that pensions payments which a bankrupt could elect to take at the date of his bankruptcy, but in relation to which he had not so elected, were payments "in the nature of income to which he had become entitled" within section 310(7) of the Insolvency Act 1986.

(5) *Raithatha* was a decision in 2012: permission to appeal was granted by Mr Livesey, QC, but the appeal appears not to have proceeded. Some years on, in *Horton v. Henry*, at first instance,[13] Mr Robert Englehart, QC (sitting as a deputy High Court Judge) doubted the decision in *Raithatha* and did not follow it. That decision was handed down on 17 December 2014, and was affirmed on appeal,[14] the Court of Appeal holding that the Judge had been correct to hold that the bankrupt's uncrystallised pension rights did not fall to be assessed as part of his income for the purposes of section 310 of the Insolvency Act 1986.

13. Thus, the Income Payments Agreement, concluded in November 2014, was concluded only a month before the first instance decision in *Horton* was handed down (17 December 2014). So far as the circumstances in which the Income Payments

[12] [2012] 1 WLR 3559 at [37].

[13] [2014] EWHC 4209.

[14] [2016] EWCA Civ 989.

Agreement came to be concluded are concerned, the Judge made the following findings of fact:

(1) The Respondents were pressing the Appellant to sign the Income Payments Agreement. There was nothing improper in this, as the Judge found, but the time of the Appellant's discharge from bankruptcy was approaching, and the need to either have an income payments agreement concluded with the Appellant or an income payments order made by the court clearly weighed on the Respondents' minds.[15]

(2) The Respondents urged the Appellant to take legal advice, and made clear that he was not obliged to agree to an income payments agreement (albeit that an application for an income payments order would likely follow a refusal to agree).[16]

(3) The Appellant's state of mind is described by the Judge in the following terms:

> "23. When the trustees intimated a claim on his pensions he had the opportunity to take legal advice. He decided not to do so for various reasons. He could not see how he would fund the litigation if he wanted to contest [the Respondents'] application. He thought seeking legal advice was pointless because having read the *Raithatha* case himself and various articles online he thought any solicitor he saw would advise him that the court could make such an order. His discharge was only a few weeks away and he did not want to do anything to disrupt that happening. He had found his earlier litigation experience bruising and did not want to be in a fight.
>
> 24. He could have taken legal advice and explored funding options but he chose not to do so. Had he done so, he may have argued that he shouldn't acquiesce to [the Respondents'] demand. He may have been able to argue that *Raithatha* was controversial. He may have sought to distinguish that case from his on the grounds that the size of his pension pot was much smaller.
>
> 25. Having read the case and various articles on-line, he had questions in his mind about the demand from [the Respondents]. On the balance of probabilities, I find he had doubts about whether the court would make an order, not whether it could. He had it in mind that he might challenge it in the future. He said: "I had it in mind I might have the potential to revisit it when in a position to do so" and "to see whether the legal basis was correct or not"."

(4) The position of the Respondents was that (according to the First Respondent, who gave evidence) "he thought *Raithatha* was good law…[He] was aware that the law was not conclusively settled."[17]

14. Summarising the position, it would appear that both the Appellant and the Respondents proceeded on the basis that *Raithatha* was good law (albeit that this was the only decision on the point, and one which had not been taken beyond the first instance), and that (were an application to be made for an income payments order) the court would not

[15] Judgment at [27].

[16] Judgment at [27].

[17] Judgment at [34].

refuse such an application on the grounds of jurisdiction, but might very well decline to make an order because of the particular circumstances of the Appellant or make an order different to that which the Appellant and the Respondents contemplated the court might make.

D. SETTING ASIDE THE INCOME PAYMENTS AGREEMENT AND A CLAIM IN UNJUST ENRICHMENT

(1) The nature of the Appellant's claim

15. I have found the Income Payments Agreement to be a contract.[18] Where payments have been made pursuant to a valid contact, a claim in unjust enrichment to recover such payments will fail, unless the contract pursuant to which those payments were made is set aside.[19] Thus, the relevance of the mistake alleged by the Appellant is that it is potentially a reason for setting aside the Income Payments Agreement which, if set aside, will result in the recovery of payments made under the contract, as having been made without basis – the ostensible basis for the payments, the agreement, having fallen away.

16. This matters because the test for setting aside a contract on grounds of common mistake is different from the test for recovering a payment made by reason of mistake. For instance, as I shall come to describe, absent misrepresentation or fraud, a contract can only be set aside by reason of the common mistake of the parties to the contract, whereas in a purely restitutionary claim, it is the payer's state of mind that matters.

(2) Setting aside contracts for common mistake: the general rules

17. *Great Peace Shipping* concerned a mistake of fact, not a mistake of law, but nevertheless constitutes the starting point for any analysis as to when a contract may be set aside on grounds of common mistake.[20] Five elements must be satisfied:[21]

(1) There must be a common assumption as to the existence of a state of affairs.

(2) There must be no warranty by either party that that state of affairs exists.

(3) The non-existence of the state of affairs must not be attributable to the fault of either party.

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[18] See Section B above.

[19] See Mitchell, Mitchell & Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th (ed), Chapter 3 and specifically [3-01]. See also Judgment at [29] to [30], and the authorities there cited. Although it does not matter for purposes of this appeal – since the Judge was clearly alive to the point – the claim as pleaded by the Appellant was in unjust enrichment. Quite rightly, the Appellant's legal representative and the Judge ensured that the Appellant's case before her was put on the proper basis.

[20] The approach of the majority *Kleinwort Benson* was to eliminate the legal distinction, previously drawn, between mistakes of "fact" and mistakes of "law". As Lord Goff said at 375: "…the mistake of law rule should no longer be maintained as part of English law…English law should now recognise that there is 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." The law, therefore, is clear. However, in terms of analysing the facts – in particular the states of mind of the persons concluding the contract – the distinction, at least in some cases, continues to matter.

[21] [2002] EWCA Civ 1407 at [76].

(4) The non-existence of the state of affairs must render performance of the contract impossible.

(5) The state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual venture is to be possible.

(3) Compromise agreements and *Brennan v. Bolt Burdon*

18. Compromise agreements – by which I mean an agreement whereby a pre-existing dispute between parties is settled by agreement – are contracts like any other.[22] The difference between a compromise agreement and other contracts is that – unlike with other contracts – the parties reach a *consensus ad idem* in relation to a matter on which they disagree. The nature of that disagreement will, of course, vary from case-to-case, but oftentimes, the parties' individual expectations, and so the compromise, will be informed by their individual assessment of what a court might do were the matter to be litigated. Inevitably, this involves reaching a view not on what the facts are or what the law is, but on how the court (often a particular court) will determine certain factual and/or legal questions.

19. It is the overtness of such disagreements which as a matter of fact, if not as a matter of law, renders compromises different to other contracts. Not only is there a public interest in the finality of litigation[23] but, more importantly for present purposes, the parties will be approaching the compromise not from a common perspective but actually from a divergent one. It is precisely this divergence which the compromise resolves, not by determining it (that is for the court, which *ex hypothesi* is not involved as an arbiter of the divergence, if there is a compromise) but by reaching an accommodation which both sides find acceptable.

20. The difficulties thrown up by compromise agreements – particularly where the compromise is based upon a view of the law that is later overturned – is most clearly seen in *Brennan v. Bolt Burden*,[24] where the Court of Appeal had to consider the operation of the doctrine of common mistake in the context of a compromise agreement concluded in circumstances where the law had changed:

(1) The claimant had a claim for damages for personal injury, and a claim form was issued. The defendant[25] applied to strike the claim form out as being out of time, and as a consequence of this decision the claimant agreed with the defendant to compromise the action, in return for the defendant agreeing that each side would bear its own costs. The case upon which the judge had relied to reach her decision was subsequently overruled, whereupon the claimant appealed the decision that the claim form had not been served in time. That appeal was allowed, and the claimant withdrew her offer to compromise the claim. The defendant applied to

[22] Foskett, *Foskett on Compromise*, 9th ed, at [1-01].

[23] A point I attach minimal weight to in the present context: there is a public interest in parties being held to their contracts, even if they are not compromises.

[24] [2004] EWCA Civ 1017.

[25] There were, in fact, several defendants, the claimant having different claims against each. For simplicity, I shall refer to a single defendant.

stay the proceedings on the ground that there was a binding contractual compromise. Deputy Master Eastman held that the compromise was void because of a common mistake of law and dismissed the application. The defendant appealed to the High Court (Morland J), who dismissed the appeal. The defendant appealed to the Court of Appeal, on a second appeal. The Court of Appeal allowed the appeal.

(2) The Court of Appeal emphasised that the same rules of common mistake applied to compromises as they did to other contracts, but emphasised the element of the existence of a pre-existing dispute that I have described in paragraphs 18 and 19 above. Thus, in [13], Maurice Kay LJ cited with approval two passages (at first instance and in the Court of Appeal) from *Huddersfield Banking Co Limited v. Henry Lister & Son Limited*,[26] a case to which it will be necessary to return. In that case, Williams J said:[27]

> "…if the arrangement come to was a compromise of doubtful rights and a give-and-take arrangement, parties to it could not afterwards have the compromise set aside because upon obtaining fuller information they thought they had made a bad bargain…"

Kay LJ stated:[28]

> "A compromise takes place when there is a question of doubt and the parties agree not to try it out, but to settle it between themselves by a give-and-take arrangement. I quite agree that if this was a case of that kind it would be extremely difficult to interfere with the order…"

(3) At [17], after a review of the authorities, Maurice Kay LJ identified the following propositions:

(a) As with any other contracts, compromise agreements (including consent orders) may be vitiated by a common mistake of law.

(b) It is, initially, a question of construction as to whether the alleged mistake has that consequence.

(c) Whilst a general release executed in a prospective or nascent dispute requires clear language to justify an inference of an intention to surrender rights of which the releasor was unaware and could not have been aware, different considerations arise in relation to the compromise of litigation which the parties have agreed to settle on a give-and-take basis.

(d) For a common law mistake of fact or law to vitiate a contract of any kind, it must render the performance of the contract impossible.

(4) All three judges in the Court of Appeal were troubled by the suggestion that, simply because a decision on which a party to a compromise had relied had been overruled, there was *ipso facto* a "common mistake". Thus:

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[26] [1895] 2 Ch 273.

[27] At 278.

[28] At 285.

(a) At [22], Maurice Kay LJ stated:

> "…There is a real difference between the situation where the compromise is agreed in ignorance of significant facts and the law which would be applicable to them…and the situation in which the compromise is agreed with no misapprehension of the facts at all…, just an erroneous assumption about the law. This is not to reintroduce the distinction between mistake of fact and mistake of law. It is to require that, where a party wishes to reserve his rights in the event of subsequent judicial decision in a future case to which he is not a party, it is he who should seek and secure a term to that effect, not his opponent who should have to stipulate for protection notwithstanding the possibility of such a subsequent decision…"

(b) Bodey J stated:[29]

> "Once the position is (a) that a common mistake of law may vitiate a contract and (b) that the law may be changed retrospectively by judicial declaration of the law (conceptually creating a common mistake subsequent to the date of the contract, which was not a mistake judged according to the law as declared at the time of the contract) then an inevitable tension arises between, on the one hand, allowing the contract in question to be re-opened on the basis of the artifice of the common mistake of law and, on the other hand, adhering to the fundamental principle of contract law that parties should be held to their agreements."

He then referred to the statements in *Kleinwort Benson* of the importance of protecting "the stability of closed transactions" and recognising "the defences of compromise and settlement", as well as the defence of "accord and satisfaction".[30] He concluded:[31]

> "Those passages alone serve to satisfy me for my part that the answer to the question: "Should the claimant's claim…succeed so as to release her from her agreement to discontinue the proceedings?" should be "No". It is the very essence of such "closed transactions" as are referred to by Lord Goff and Lord Hope that both sides recognise the risk that their opinions as to the point of law in question may not be right and that law which appears settled may be redeclared differently with retrospective effect, thereby rendering erroneous a former interpretation of the law which had seemed to be sound. It is trite to say that the law is neither fixed nor static. Rather it develops by evolution…and the parties to a compromise should not, in my view, be treated as ignorant of that fact."

(c) Sedley LJ stated:

> "62. The overarching problem is the problem of public policy to which Lord Goff and Lord Hope drew attention in the passages of the *Kleinwort Benson* case [1999] 2 AC 349, 382, 412, cited at [14] above by Maurice Kay LJ. We are concerned here with a compromise of extant litigation. What is to be done when anticipated or threatened or imminent litigation is compromised on the basis of a mutual mistake of law will have to await a case in which that is what has occurred. At that point the wisdom

[29] At [28].

[30] At [30].

[31] At [31].

> of Lord Goff's remark about the debatable nature of the scope of "settlement of an honest claim" will become very clear.
>
> 63. The possibility that extant litigation will be compromised on the basis of a mistake as to the current state of the law which is both mutual and non-negligent is not great. The typical case is going to be – as here – a shift in the understanding of the law subsequent to the compromise. It is not because mistakes of law have been added to mistakes of fact as grounds for undoing an agreement that this is now problematical. It is because the process is now required, by the majority decision of their Lordships' House, to incorporate the fiction that the law always was as it now (or at least for the time being) is. Were it not for this, the present problem would not have arisen. Instead we are forced to address it, as Lord Goff and Lord Hope anticipated we would be, by carving out a major exception almost at the birth of the new rule on what are essentially grounds of practicality and public policy – an exception which, for reasons I have mentioned, is necessarily fuzzy-edged and so destined to generate more uncertainty and more litigation.
>
> 64. But, like Maurice Kay LJ and Bodey J, I see no choice in the present case. The law must be taken to have been what it was only later declared to be, but the putative mistake created by this shift cannot be allowed to undo a compromise of litigation entered into in the knowledge both of how the law now stood and of the fact – for it is always a fact – that it might not remain so. While I am not happy about translating such knowledge into an implied term that the settlement is to stand notwithstanding any future change in the understanding of the law, I have less difficulty in recognising it as part of the matrix of fact in which a litigation compromise is cast."

(4) Synthesis

21. The Court of Appeal in *Brennan v. Bolt Burdon* were plainly concerned that the effect of *Kleinwort Benson*, in holding that the law could be changed retrospectively by a later judicial declaration of the law, would be to create a form of common mistake of the most artificial sort (in that the "mistake" only arose by way of subsequent judicial decision and did not subsist at the time of the agreement) that could create the prospect of wide-ranging attacks on contracts in general, but on compromise agreements in particular.

22. Without in any way seeking to undermine the holding in *Kleinwort Benson* that there was no difference between mistakes of law and mistakes of fact and the "declaratory" theory of the common law espoused by the House of Lords, the Court of Appeal sought to identify mechanisms whereby the ability of a party to a compromise agreement to cause that agreement to be re-opened might be restrained. All three members of the Court of Appeal identified different mechanisms for this. Thus:

(1) Maurice Kay LJ appeared to suggest that a party to a compromise agreement could only seek to set that agreement aside where there had been a reservation of rights by that party in respect of that particular point.[32]

(2) Bodey J wanted the fact that that the law was neither fixed nor static, but developed by evolution, to be attributed to the parties to the compromise.[33]

(3) Sedley LJ considered that a term should be implied into compromise agreements, such that the agreement would stand notwithstanding any future change in the understanding of the law.[34]

(4) Maurice Kay LJ was also, plainly, attracted by an argument of public policy, but that argument was not pursued by counsel:[35]

> "In deciding the appeal on these grounds, I have remained within the parameters of the submissions of counsel, Mr Norman having disavowed a simple submission to the effect that a compromise in the course of litigation, entered into on professional advice, should never be vitiated by subsequent judicial decision in a case to which the instant litigants are not parties, unless the compromise contains a suitable express provision. For my part I suspect that there is scope for a substantive exception to the ambit of mistake of law as a matter of policy in such circumstances and that it could live with what was said in the *Kleinwort Benson* case but, as we have heard no submissions about such an approach, this is not the case in which to say anything further about it."

23. Although Mr Morgan, QC, counsel for the Respondents, teetered on inviting me to consider such a public policy argument, I discouraged such an invitation, for essentially two reasons.

24. First, and this is no criticism whatsoever, neither party had, in their (very helpful) written submissions, said very much about a public policy exception. That, I strongly suspect, is because there is a distinct lack of such material. It seemed to me that – if the public policy point were to be addressed at all – this is a matter for a higher tribunal.

25. Secondly, I am not sure that, when a settlement agreement is fully and properly construed, taking account of the entire factual matrix, including express and implied allocations of risk and the difference between mistake and misprediction (a distinction alluded to by Bodey J, and which I shall expand upon), there is very much room for a public policy exception to operate in the context of compromise agreements. It seems to me that questions of mistake of law in the context of compromise agreements can be dealt with within the framework of the existing rules.

26. The difference between "mistakes" and "mispredictions" is one that their Lordships in *Kleinwort Benson* were well-alive to, and it is a distinction that has been considered in a number of cases concerned with unjust enrichment where the "unjust" factor is mistake: *Marine Trade SA v. Pioneer Freight Futures*;[36] *BP Oil International Limited*

[32] See the passage quoted at paragraph 20(4)(a) above.

[33] See the passage quoted at paragraph 20(4)(b) above.

[34] See the passage at [64], quoted at paragraph 20(4)(c) above.

[35] At [23].

[36] [2009] EWHC 2656 (Comm).

v. Target Shipping Limited;[37] and *Jazztel plc v. Revenue and Customs Commissioners*.[38] The first two cases were cited by the Judge; the third provides a distillation of what these cases said. At [30] in the third case, two points were made:

> "*(i)* Mistakes must be distinguished from mispredictions. A misprediction is a present belief or assumption about a future state of affairs, which is subsequently falsified; whereas a mistake involves the vitiation of the claimant's judgment at the time the enrichment is conferred. Put another way, a mistake operates only as regards the present or the past, whereas a prediction, by definition, involves the future. Whereas mistake constitutes a ground for restitution, misprediction does not. See Goff & Jones, paras 9-06–9–09; Burrows , A Restatement of the English Law of Unjust Enrichment , 1st ed (2012) ("Restatement"), pp 67–68; *Dextra Bank & Trust Co Ltd v Bank of Jamaica*, [2002] 1 All ER (Comm) 193.
>
> *(ii)* Mistakes can co-exist with an element of doubt. By "doubt" is meant the claimant's conscious appreciation that the facts or law may not be as he or she believes them to be. See Goff & Jones, paras 9-18, 9–21 and 9–24–9–25; Restatement, p 68. For example, a claimant may (wrongly) believe that he or she is legally obliged to make a payment, whilst at the same time appreciating that there is an argument that he or she is not in fact obliged to make the payment at all. Such doubts are not inconsistent with mistake, provided the doubt does not overwhelm the mistake…"

27. The difference between a mistake and misprediction – particularly where the alleged mistake co-exists with an element of doubt – can be extremely difficult and is, no doubt, very fact-sensitive. But the distinction is an important one, for it is only in cases of mistake that restitution is permitted and (although the authorities I have cited are cases in restitution) vitiation of a contract for common mistake can occur.[39]

28. The distinction between a mistake and a misprediction is particularly acute where "mistakes" of law are concerned. Taking the definition of mistake from the decision of the Court of Appeal in *Great Peace Shipping* as "a common assumption as to the existence of a state of affairs" that is wrong, it is clear (as the Court of Appeal appreciated only too well in *Brennan v. Bolt Burdon*) that "mistakes" arising by virtue of a subsequent decision of a court, reversing a decision below, can only be mistakes by virtue of the retrospective "declaratory" theory of the common law espoused in *Kleinwort Benson*. But that does not mean to say that whenever there is a reversal of an earlier decision, there is a mistake.[40] There will be some decisions – perhaps many – which make new law but which are susceptible of one, if not more, levels of appeal. In such a case, as Bodey J stated,[41] the parties to a compromise cannot be unaware of the fact that the law may very well develop in a different direction to that articulated by the judge at first instance.

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[37] [2012] EWHC 1590 (Comm).

[38] [2017] EWHC 677 (Ch).

[39] It does not appear to me that a misprediction can constitute a mistake as defined in *Great Peace Shipping*: see paragraph 18(1) above.

[40] *Kleinwort Benson* holds that the English common law is "declared" in the manner described by Lord Goff; and that there is no difference between mistakes of law and mistakes of fact. But it does not hold that in each and every that the previous law is "declared" to be wrong, there is a mistake.

[41] See paragraph 20(4)(b) above.

29. The present case is an excellent case in point. So far as I understand it, the decision in *Raithatha* was a decision on a new point, made at first instance. Although permission to appeal was given – itself revealing – the appeal was not taken forward. Two or so years later, another first instance judge reached a different conclusion in *Horton*, as he was perfectly entitled to do (the decision in *Raithatha* was persuasive only, and clearly did not persuade). The law is redolent with first instance decisions going in different directions, awaiting an authoritative holding of the Court of Appeal. In this case, the uncertainty did not last long: the Court of Appeal decided that *Horton* was right and *Raithatha* wrong. But, to take a hypothetical example, it is impossible to suggest that the parties entering into an income payments agreement of the sort here in issue, but after *Horton* at first instance and before the outcome in *Horton* on appeal, made a mistake. They clearly will have done no such thing, but reached an agreement based upon their assessment of which way the Court of Appeal would go in deciding between two inconsistent first instance decisions.

30. In cases where it is asserted that a compromise agreement should be set aside on grounds of this sort of mistake of law, it seems to me that the following process must be undertaken:

(1) The compromise agreement must be construed so as to understand its true meaning and effect, including as to any implied terms which may or may not exist. Naturally, that will involve examining the "factual matrix", which in such cases will involve particular consideration of the nature of the dispute that the parties thought they were settling. To the extent that that dispute turns on points of law, it will be necessary to consider quite carefully the points at issue, including the status of any judicial decision being relied upon by the parties. To take a crude example, there is all the difference in the world between an agreement where the parties are considering a first instance decision determining a novel point of law (at one extreme) and an established rule of law, asserted and re-asserted by many courts, including the highest courts (at the other extreme).

It may be that such an assessment results in a construction of the contract where it is found that one or other party has assumed the risk of the law changing in the future, whether by way of an express or an implied term. If so, then the inquiry is at an end. The answer to the effect of a mistake will be found in the risk allocation adopted by the parties to the compromise agreement.

(2) In those cases where the contract does not provide the answer, it will be necessary to consider the nature of the change in law relied upon by the party seeking to set aside the compromise agreement, and ask "Does this retrospective change in the law give rise to a common mistake, or did one or both of the parties simply make a misprediction about the course of future legal events?" Reverting to my crude example in the preceding sub-paragraph, a mistake will more likely arise where a well-established and unquestioned rule of law is dramatically overturned than where a single decision on a new and difficult point is overruled. The latter case, particularly if, *pace* Bodey J, the parties to a compromise should not be treated as ignorant of the fact that the common law develops (a view I entirely agree with), is a case of misprediction.

(5) The present case

31. The Judge concluded that the Income Payments Agreement was a compromise agreement. At [56] of the Judgment, she said:

> "There was a potential dispute between the parties in this case. [The Respondents] told [the Appellant] that following *Raithatha* the court could order him to make payment from his pensions. He [the First Respondent] said he wanted him to agree to such payments otherwise he would apply to the court. He made it clear that solicitors were instructed. [The Appellant] gave various reasons that led him to agree to sign the [Income Payments Agreement]. In my judgment, there was a compromise of the potential dispute which may have given rise to litigation if [the Appellant] had not acquiesced to the agreement. This is not a situation where there was no give-or-take as in the *Hudderfield Banking* case. In that case, there was a dispute as to fact in respect of the subject-matter of the contract. In this case, the subject-matter of the contract was the payment of income from [the Appellant's] pensions. The trustee said he was entitled to seek [the Income Payments Agreement]. [The Appellant] raised certain issues, but for a variety of reasons he has articulated he decided to enter into the agreement. The parties decided to settle the issue between themselves and not go to court. The consideration was the forbearance of the trustee not to bring proceedings. I find that this was a compromise."

32. I consider that this is a conclusion that was open to the Judge on the facts as she found them. Indeed, it is difficult to see that any alternative finding was possible. The fact is that the Appellant's agreement to the Income Payments Agreement headed off an application that would otherwise have been made by the Respondents. The Respondents' ability to apply to court for an income payments order was compromised.

33. The Appellant, relying on *Huddersfield Banking Company Limited v. Henry Lister & Son Limited*,[42] sought to contend that there was insufficient "give and take" for the Income Payments Agreement to constitute a compromise agreement. In *Huddersfield*, a bank (the mortgagee of certain premises) had agreed – by way of a consent order – that equipment appearing to be chattels and not fixtures, might be sold by a debenture holder. There was no dispute about this between the parties, and the agreement resolved no such dispute. For this reason, Vaughan Williams J – with whom the Court of Appeal agreed – set aside the agreement:[43]

> "As regards the other matter, relied on as a ground for not giving relief, I agree that if the arrangement come to was a compromise of doubtful rights and a give-and-take arrangement, parties to it could not afterwards have the compromise set aside because upon obtaining fuller information they thought they had made a bad bargain. But having regard to the evidence, I am of opinion that this arrangement was not a compromise or give-and-take arrangement of the sort I have referred to. The arrangement was not that one side should give way as to some of the machines and the other side as to the rest of them; and that being so, I have nothing further to dispose of before I deal with the question whether the machines were included in the mortgage."

34. The distinction between *Huddersfield* and the present case is that in this case, as the Judge found, the prospect of a hearing and finding resulting in an income payments order was avoided. The Judge was quite right to hold that the Income Payments Agreement was a compromise agreement.

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[42] [1895] 2 Ch 273.

[43] At 278. See, to similar effect, Lindley LJ at 282 and Lopes LJ at 283.

35. Given the findings of fact made by the Judge as summarised in paragraphs 13 and 14 above, it is plain that there was no common assumption between the parties as to the jurisdiction of the court to make an income payments order. Both parties were aware that *Raithatha* was a first instance decision on a novel point of law. It was entirely open to the Appellant to contend – without concluding an Income Payments Agreement – that there was no jurisdiction in the court to make the order sought by the Respondents. Had he done so, I have no doubt that the Respondents would have made the application, and the outcome would have been whatever it was: it may be that the Appellant would have prevailed. But that is not what happened, because (as I find, based upon the Judge's findings) there was no common assumption between the parties as to the court's jurisdiction. Rather, each made an assessment – a prediction – of the likely outcome were an application to the court to be made, and they concluded the Income Payments Agreement on that basis.

36. It follows that the first, and primary, requirement for setting aside a contract on grounds of common mistake does not exist in the present case, and the Judge's decision must be affirmed on that ground alone.

(6) Impossibility

37. The requirement that the agreement be impossible to perform by reason of the mistaken common assumption stems from the decision in *Great Peace Shipping* itself. It is plain that the Income Payments Agreement was not impossible to perform in this literal sense.

38. However, there is some law to suggest that the requirement is not one of actual impossibility, albeit that it is unclear precisely how that requirement is to be framed.[44] The Judge dealt with the point briefly in the following way:[45]

> "On this point, I find that [the Respondents] must succeed also. In *Kyle Bay v. Underwriters*…Neuberger J quoted Steyn J, who in turn was quoting from the *Great Peace* case thus: "…the mistake must render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist…". In this case, the [Income Payments Argeement] could still be performed and was not radically different from what the parties agreed. The substance of the agreement remained an [income payments agreement] whereby the [Appellant] agreed to allow part of his pension to be treated as his income to avoid the trustee making an application to the court. There was therefore an intelligible basis for their agreement. Whichever test is applied, whether as articulated by Maurice Kay LJ and Bodey J or by Sedley J, I find that performance of the contract was still possible and that [the Appellant's] claim fails on this basis."

39. I agree, and would also dismiss the appeal in this ground. But my primary basis for doing so – as with the Judge – was as set out above, namely that there was no mistaken common assumption at all.

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[44] See *Brennan v. Bolt Burden* [2004] EWCA Civ 1017 at [22] and [66]. Also, *Kyle Bay Limited v. Underwriters Subscribing*, [2007] EWCA Civ 57 at [23]*ff*.

[45] At [61].

E. CHANGE OF POSITION

40. Given the conclusions I have reached, I consider that it is unnecessary to decide whether – were I and Judge to be wrong – a change of position defence would arise. The Judge considered change of position briefly on a contingent basis, but I do not consider that it is necessary for me to do so for the purposes of this appeal.

F. DISPOSITION

41. For the reasons I have given, the appeal must be dismissed.