highly uncomfortable bedfellows. The approach preferred in Singapore may encourage the airing of spurious claims in a way Lord Sumption's approach (or even Lord Briggs's approach) would not, as parties increasingly see their way to court to assert their rights in alleged oral accords. That was why some had welcomed the *Rock Advertising*-type of reasoning: see, for example, Morgan [2017] C.L.J. 589, 608–09; O'Sullivan (2019) 135 L.Q.R. 1, 6. Nevertheless, one cannot immediately conclude that the English approach is comparatively advantageous, for that now promotes greater forensic battles over estoppel (as commentators had predicted): see, for example, *K Learning Academy Ltd. v Secretary of State for Education* [2020] EWCA Civ 370; *In re High Street Rooftop Holdings Ltd.* [2020] EWHC 2572 (Ch), [2020] Bus. L.R. 2127; Davies [2018] C.L.J. 464, 466; D. Foxton, "The Boilerplate and the Bespoke" in C. Mitchell and S. Watterson (eds.), *The World of Maritime and Commercial Law* (London 2020), 275. So, returning to our opening prophecy, and unlike other controversies originating from decisions such as *Transfield Shipping Inc. v Mercator Shipping Inc.* [2008] UKHL 48, [2009] A.C. 61 and *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467, the present issue is less a matter of philosophical divergence among common law jurisdictions than one of courts proceeding from different directions towards a unitary goal: to strike an appropriate balance between doctrinal integrity, commercial expectation and the expedient resolution of disputes.

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MISTAKE OF LAW AND LIMITATION PERIODS

Test Claimants in the Franked Investment Income Group Litigation v HMRC [2020] UKSC 47, arose in the course of the long running Franked Investment saga. The test claimants argued that the differences between their tax treatment and that of wholly UK-resident groups of companies breached EU Treaty provisions, guaranteeing freedom of establishment and free movement of capital. They sought repayment by HMRC of the tax wrongly paid, together with interest, dating back to the UK's entry to the EU in 1973. Large elements of these claims were therefore time-barred and this gave rise to argument over the application of section 32(1)(c) Limitation Act 1980 to claims for restitution of money paid under a mistake of law and in particular over the question of discoverability of the mistake. Section 32(1)(c) provides that where the action is for relief

from the consequences of mistake time begins to run when the mistake was reasonably discoverable.

Supreme Court was split 4:3. The majority judgment was given by Lords Reed and Hodge with whom Lords Lloyd-Jones and Hamblen agreed. The majority rejected the view that section 32(1)(c) should not apply to payments by mistake of law (at [242]–[243]). The fact of the mistake was integral to the cause of action and so the natural construction of the provision is that payments by mistake of law should be covered by the paragraph. The majority pointed out that there has not – except in tax cases, where the matter has been remedied by legislation – been a surge in stale claims being resurrected and a change of position defence would in any case be available (at [232]).

In deciding how section 32(1)(c) should operate, they discussed two major House of Lords decisions. In *Kleinwort Benson v Lincoln City Council* [1999] 2 A.C. 349 the House of Lords removed the mistake of law bar, deciding that a payment made by mistake of law could be recovered just like one made by mistake of fact. Section 32(1)(c) applied to such payments. It was further held that the mistake could not have been reasonably discovered until there was a definitive ruling on the matter, which in the context of swaps cases – and *Kleinwort Benson* was such – came when *Hazell v Hammersmith LBC* [1992] 2 A.C. 1 decided that the contracts were ultra vires the local authorities and void. The criticism usually levelled at this view of when the mistake in *Kleinwort Benson* became discoverable, and the majority allude to this in *Test Claimants* at [155], is that there will be no closure; the limitation period might be extended indefinitely, and this is a far greater risk in cases of mistake of law – and particularly retrospective mistakes of law – than mistakes of fact. The second case discussed was *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, [2007] 1 A.C. 558. It involved a claim that DMG had not been able to make a group income election – unlike domestic UK-based companies. That election would have delayed the payment of tax, but since the bank was unable to make such an election, it was forced to pay tax at an earlier stage than it would otherwise be obliged to. That was incompatible with EU law and DMG sought restitution of the money as having been paid by mistake of law. The House of Lords again considered the application of section 32 (1)(c). DMG itself argued that the true state of affairs could not have been reasonably discovered until the decision in *Hoechst* [2001] E.C.R. I-1727 was handed down, establishing the incompatibility with EU law. This was accepted as the point when time began to run for limitation purposes by the majority in *DMG*.

Lords Reed and Hodge highlight why this is wrong at [174], describing what they call a paradox. Whether you call it a paradox or not there is certainly an important inconsistency in saying on the one hand that when A makes a payment in 2000, believing the hypothetical case of *Smith v*

Smith to require it, only for that case to be overruled by (the equally hypothetical) *Jones v Jones* in 2015, a mistake was made in 2000, but, for the purposes of limitation to say – and this is how Lords Reed and Hodge characterise the argument at [174] – that the change in the law brought about by the 2015 decision should be treated as occurring in 2015, and the mistake was discoverable only at that time.

Lords Reed and Hodge conclude that the mistake is discoverable prior to the overruling decision. They are correct. I have previously expressed the view (D. Sheehan, "What Is a Mistake?" (2000) 20 L.S. 538, 560) that the date of the overruling decision cannot be the first possible date of the mistake's reasonable discoverability but that it is possible to discover the error earlier. On the Dworkinian view of law that I took, there is always a right answer to any question of law found by a process of interpretation. A judge identifies the best interpretation of the law by asking how well it fits past case law and whether it puts that case law in the best moral light. If the best interpretation is contrary to a given decision that decision is wrong. Critically, it must be possible to go through this process of deciding that the original decision is wrong before the overruling decision is handed down. Otherwise, counsel cannot ever formulate an argument to persuade a later court to overrule an earlier decision because the later court would paradoxically already have had to make that decision.

The majority also makes the point that it is unrealistic to make discoverability dependent on the happenstance of when a suitable claim to challenge the prior law is brought (at [178]). At [185]–[186], they say that Lord Brown's approach in *DMG* is to be preferred as being more in line with the approach to fraud under section 32(1)(b) Limitation Act 1980. That approach is that time starts to run when the claimant should have appreciated he had a claim worth running. As the majority point out in *Franked Investment*, the purpose of section 32(1)(c) is to ensure that the claimant is not disadvantaged by the operation of a limitation period where he is unaware of the circumstances leading to his having a cause of action (at [193]). That purpose is fulfilled by starting time running at the point the claimant should have realised he had a worthwhile claim, not when he realised it was certain to succeed. This is well summarised by the majority at [213], is consistent with the position with regard to mistakes of fact and, they argued, deals neatly with the problem that there could be no finality if limitation periods could be extended indefinitely. Lords Reed and Hodge went on to say, however, (at [255]–[256]) that should it become necessary to decide at what point the claimants should have realised there was a worthwhile claim for restitution to be made, this would be remitted to the High Court. They left open the question of how the court would decide that factual question.

Lords Briggs and Sales, with whom Lord Carnwath agreed, held by contrast that the potential for disruption in allowing section 32(1)(c) to apply to

mistakes of law, particularly those identified by retrospective application of judicial decision, was too great. They gave the example (at [291]) of the invitation to the Supreme Court in *Rock Advertising Ltd. v MWB Business Exchange Centres Ltd.* [2018] UKSC 24, [2019] A.C. 119 to overrule *Foakes v Beer* (1884) 9 App. Cas. 605, which could have unsettled over a century's worth of payments. By changing the law to bring in a claim for payments by mistake of general law – as opposed to mistake as to private rights in *Cooper v Phibbs* (1867) L.R. 2 H.L. 149 – the minority argued a new state of affairs that was not within the intention and purpose of Parliament was created (at [274]). The minority went so far as to say at [287] that on a purposive construction of the Limitation Act 1980 the provision could not have been intended to cover mistakes of general law as the language is not apt to do so. It seems, however, incorrect to say that section 32(1)(c) cannot apply to mistakes of law; the natural construction of the language, as we have seen, does not allow for that interpretation and it re-introduces the mistake of law/fact distinction that caused so many problems prior to the abolition of the mistake of law bar. That said, there will be a complex exercise of examining evidence to decide when time starts to run on the majority's view. If that proves too complex, a solution might be one I proposed in 2000 that the mistake was reasonably discoverable when made because it was possible to construct the argument that the original decision was wrong then. If this finds no favour, legislation may be needed.

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BUILDING UNEXPECTEDLY ACCEDES TO LAND

IN *School Facility Management Ltd. v Christ the King College* [2021] EWCA Civ 1053, Christ the King College was desperate to open a sixth form. The only problem was that the college could not afford a building to teach sixth-formers in. So instead of paying the full cost of a building up front, the college entered a "Hire Contract" with some builders. The builders built a modular building for the college. In return, the college agreed to pay an annual payment for 15 years and then dismantle and return the building. The building opened in 2013 and the college made its first four annual payments. Then in 2017 the college stopped paying. The builders sued.

At first instance, Foxton J. gave two careful judgments which repay close reading ([2020] EWHC 1118 (Comm), [2020] P.T.S.R. 1913; [2020] EWHC 1477 (Comm), [2020] 1 W.L.R. 4825; noted [2021] L.M.C.L.Q.