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United Kingdom Supreme Court

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Summary

Trinity Term
[2016] UKSC 44
On appeal from: [2015] EWHC 1315

JUDGMENT

Willers (Appellant) *v* Joyce and another (in substitution for and in their capacity as executors of Albert Gubay (deceased)) (Respondent) (2)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Mance
Lord Kerr
Lord Clarke
Lord Wilson
Lord Sumption
Lord Reed
Lord Toulson

JUDGMENT(2) GIVEN ON

20 July 2016

Heard on 7 March 2016

Appellant *Respondent*

John McDonnell QC
Hugo Page QC
Adam Chichester-Clark
(Instructed by De Cruz Solicitors)

Bernard Livesey QC
Paul Mitchell QC
(Instructed by Laytons)

LORD NEUBERGER: (with whom Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Reed and Lord Toulson agree)

1. The appeal in *Willers v Joyce* raises an important issue, namely the status of decisions of the Judicial Committee of the Privy Council ("the JCPC") in the courts of England and Wales. In her clear and informative judgment, the Deputy Judge, Miss Amanda Tipples QC, explained that there was a House of Lords decision, *Gregory v Portsmouth City Council* [2000] 1 AC 419, whose reasoning would lead her to strike out the claim, but that there was a more recent decision of the JCPC, *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2014] AC 366, whose reasoning would lead to a different conclusion. She concluded, on the basis of earlier decisions of the first instance and appellate courts of England and Wales, that the position was as follows. If there was a decision of the House of Lords (or the Supreme Court) which was binding on her as a first instance judge, she could "only follow [a] decision of the Privy Council" to the opposite effect "if, for all practical purposes, it is a foregone conclusion that the Supreme Court will follow the decision of the Privy Council" - [2015] EWHC 1315 (Ch), para 26.

2. She then explained that, as a first instance judge, she was, at least in principle, "bound by *Gregory v Portsmouth* and, in accordance with the doctrine of precedent, [could] not follow *Crawford v Sagicor*", and therefore she should hold that the instant claim must fail - para 7. However, in the light of authority, she accepted that she could take a different course "if, for all practical purposes, it is a foregone conclusion that the Supreme Court will follow the decision of the Privy Council in *Crawford v Sagicor*" - para 26. However, she did not consider that such an outcome was a foregone conclusion and accordingly she struck out the claim - paras 69 to 71.

3. Before us, the parties disagree whether the Deputy Judge adopted the right approach to the House of Lords decision in *Gregory v Portsmouth* and the later JCPC decision in *Crawford v Sagicor* as to the extent to which they were persuasive or binding so far as she was concerned.

4. In a common law system, where the law is in some areas made, and the law is in virtually all areas developed, by judges, the doctrine of precedent, or as it is sometimes known *stare decisis*, is fundamental. Decisions on points of law by more senior courts have to be accepted by more junior courts. Otherwise, the law becomes anarchic, and it loses coherence clarity and predictability. Cross and Harris in in their instructive *Precedent in English Law* 4th ed (1991), p 11, rightly refer to the "highly centralised nature of the hierarchy" of the courts of England and Wales, and the doctrine of precedent is a natural and necessary ingredient, or consequence, of that hierarchy.

5. The doctrine is, of course, seen in its simplest and most familiar form when applied to the hierarchy of courts. On issues of law, (i) Circuit Judges are bound by decisions of High Court Judges, the Court of Appeal and the Supreme Court, (ii) High Court Judges are bound by decisions of the Court of Appeal and the Supreme Court, and (iii) the Court of Appeal is bound by decisions of the Supreme Court. (The rule that a Circuit Judge is bound by a decision of a High Court Judge is most clear from a "Note" included at the end of the judgment in *Howard De Walden Estates Ltd v Aggio* [2008] Ch 26).

6. The position is rather more nuanced when it comes to courts of co-ordinate jurisdiction.

7. Until 50 years ago, the House of Lords used to be bound by its previous decisions - see eg *London Tramways Co Ltd v London County Council* [1898] AC 375. However, that changed in 1966 following the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, which emphasised that, while the Law Lords would regard their earlier decisions as "normally binding", they would depart from them "when it appears right to do so". The importance of consistency in the law was emphasised by Lord Wilberforce in *Fitzleet Estates Ltd v Cherry* [1977] 1 WLR 1345, 1349, when he explained that the *Practice Statement* should not be invoked to depart from an earlier decision, merely because a subsequent committee of Law Lords take a different view of the law: there has to be something more. Having said that, the *Practice Statement* has been invoked on a number of occasions in the past half-century, most recently in *Knauer v Ministry of Justice* [2016] 2 WLR 672, where, at paras 21-23 it was emphasised that, because of the importance of the role of precedent and the need for certainty and consistency in the law, the Supreme Court "should be very circumspect before accepting an invitation to invoke the 1966 *Practice Statement*".

8. The Court of Appeal is bound by its own previous decisions, subject to limited exceptions. The principles were set out by the Court of Appeal in a well-

known passage (which was approved by the House of Lords in *Davis v Johnson* [1979] AC 264) in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, 729-730:

> "[The Court of Appeal] is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule … are … (1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam."

9. So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary: see *Patel v Secretary of State for the Home Department* [2013] 1 WLR 63, para 59. I would have thought that Circuit Judges should adopt much the same approach to decisions of other Circuit Judges.

10. The question to be addressed in this appeal is the effect of decisions of the JCPC. Although the function of the JCPC has varied somewhat since its creation by the Judicial Committee Act 1833, this case is concerned with its function as the final appellate court for a number of Commonwealth countries, the 14 British Overseas Territories, the Channel Islands and the Isle of Man. In that capacity, the JCPC advises the monarch on the disposal of appeals or (in the case of republics) determines the disposal of appeals. Accordingly, the JCPC is not a court of any part of the United Kingdom.

11. Having said that, the JCPC almost always applies the common law, and either all or four of the five Privy Counsellors who normally sit on any appeal will almost always be Justices of the Supreme Court. This reflects the position as it has been for more than 100 years, following the Appellate Jurisdiction Act 1876, which created the Lords of Appeal in Ordinary (ie the Law Lords), who thereafter constituted the majority of the Privy Counsellors who sat in the JCPC, until the creation of the Supreme Court in October 2009.

12. Three consequences have been held to follow from this analysis, at least as a matter of logic. First, given that the JCPC is not a UK court at all, decisions of the JCPC cannot be binding on any judge of England and Wales, and, in particular, cannot override any decision of a court of England and Wales (let alone a decision of the Supreme Court or the Law Lords) which would otherwise represent a precedent which was binding on that judge. Secondly, given the identity of the Privy Counsellors who sit on the JCPC and the fact that they apply the common law, any decision of the JCPC, at least on a common law issue, should, subject always to the first point, normally be regarded by any Judge of England and Wales, and indeed any Justice of the Supreme Court, as being of great weight and persuasive value. Thirdly, the JCPC should regard itself as bound by any decision of the House of Lords or the Supreme Court - at least when applying the law of England and Wales. That last qualification is important: in some JCPC jurisdictions, the applicable common law is that of England and Wales, whereas in other JCPC jurisdictions, the common law is local common law, which will often be, but is by no means always necessarily, identical to that of England and Wales.

13. In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, 108, Lord Scarman, giving the advice of the JCPC said "[o]nce it is accepted … that the applicable law is English", the JCPC "will follow a House of Lords decision which covers the point in issue". As he explained, the JCPC "is not the final judicial authority for the determination of English law. That is the responsibility of the House of Lords in its judicial capacity". On the other hand, when the issue to be determined by the JCPC is not a point of English law, the JCPC is not automatically bound by a decision of the Law Lords (or the Supreme Court) even if the point at issue is one of common law, not least because the common law can develop in different ways in different jurisdictions (although it is highly desirable that all common law judges generally try and march together). This is well illustrated by the decision of the JCPC in the Hong Kong case of *Mercedes-Benz AG v Leiduck* [1996] AC 284, where the majority refused to follow the House of Lords decision in *The Siskina* [1979] AC 210.

14. In *In re Spectrum Plus Ltd (In liquidation)* [2005] 2 AC 680, the House of Lords had to consider a point on which the Court of Appeal had expressed one view in two cases (*Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyds Rep 142 and *In re New Bullas Trading Ltd* [1994] 1 BCLC 485), and the JCPC had expressed the opposite view in a subsequent New Zealand appeal (*Agnew v Comr of Inland Revenue* [2001] 2 AC 710). In *Spectrum Plus* at first instance, the trial judge followed the JCPC decision, but the Court of Appeal held that he has been wrong to do so, as he was bound by the earlier Court of Appeal decisions, and they reversed him on the ground that they were equally bound.

15. Although the House of Lords reinstated the trial judge's decision, in *Spectrum Plus* and overruled the Court of Appeal decisions in *Siebe Gorman v Barclays* and in *New Bullas*, the majority of the Law Lords made it clear that the trial judge was wrong in not regarding himself as bound by those decisions and in treating himself as entitled to follow the more recent decision of the JCPC. Thus, at para 93, Lord Scott said that the Court of Appeal had "correctly" said that the trial judge's "test was in conflict with the Court of Appeal's decision in *In re New Bullas* … and concluded that the rules of binding precedent enabled neither [the judge] nor a subsequent Court of Appeal to rule that that case had been wrongly decided". Lord Walker expressed himself more elliptically at para 153, where he said that the trial judge "was correct on every point in his judgment except one, which does not present any obstacle to your Lordships (that is as to the relative authority as precedents of the *New Bullas* and *Agnew* cases)". Lord Nicholls, Lord Steyn and Lord Brown agreed with the opinions of both Lord Scott and Lord Walker.

16. There is no doubt that, unless there is a decision of a superior court to the contrary effect, a court in England and Wales can normally be expected to follow a decision of the JCPC, but there is no question of it being bound to do so as a matter of precedent. There is also no doubt that a court should not, at least normally, follow a decision of the JCPC, if it is inconsistent with the decision of a court which is binding in accordance with the principles set out in paras 5, 8 and 9 above.

17. The difficult question is whether this latter rule is absolute, or whether it is subject to the qualification that it can be disapplied where a first instance judge or the Court of Appeal considers that it is a foregone conclusion that the view taken by the JCPC will be accepted by the Court of Appeal or Supreme Court (as the case may be). There are decisions of the Court of Appeal which support such an approach - see eg *Doughty v Turner Manufacturing Co Ltd* [1964] 1 QB 518 in the civil field and *R v James and Karimi* [2006] QB 588 in the criminal field (both of which are well-established authorities which I am not calling into question). Nonetheless, I have concluded that it is more satisfactory if, subject to one important qualification which I deal with in paras 19 and 20 below, the rule is absolute - ie that a judge should never follow a decision of the JCPC, if it is inconsistent with the decision of a court which is otherwise binding on him or her in accordance with the principles set out in paras 5, 8 and 9 above.

18. First, particularly given the importance of the doctrine of precedence and "highly centralised nature of the hierarchy" of the courts of England and Wales, the doctrine should be clear in its terms and simple in its application. Secondly, as the very careful judgment of Ms Tipples QC in the present case shows, there can be much argument and difference of opinion as to whether it is "a foregone conclusion" that the Court of Appeal or Supreme Court will follow a

particular JCPC decision which is inconsistent with an earlier decision of the domestic court. If there is a strict rule, there need be no such argument. Thirdly, even apart from this second point, there should be no more delay or cost in having a strict and clear rule rather than a more flexible rule. Thus, if the first instance judge follows the decision of a superior court in this jurisdiction, she can grant a "leapfrog certificate", and, if it is appropriate, the Supreme Court can then decide to consider the issue directly. It is hard to see why, if such a course is appropriate, it would be beneficial in terms of time or costs for the issue to be considered by the Court of Appeal. Having said that, there may well be case where the Supreme Court will consider that it would benefit from the views of the Court of Appeal, and in such a case it can refuse to entertain the appeal pursuant to the certificate.

19. Having said that, I would adopt a suggestion made by Lord Toulson which may, in terms of strict logic, be inconsistent with the above analysis, but which is plainly sensible in practice and justified by experience (and is therefore consistent with Oliver Wendell Holmes's view of the common law). There will be appeals to the JCPC where a party wishes to challenge the correctness of an earlier decision of the House of Lords or the Supreme Court, or of the Court of Appeal on a point of English law, and where the JCPC decides that the House of Lords or Supreme Court, or, as the case may be, the Court of Appeal, was wrong. It would plainly be unfortunate in practical terms if, in such circumstances, the JCPC could never effectively decide that courts of England and Wales should follow the JCPC decision rather than the earlier decision of the House of Lords or Supreme Court, or of the Court of Appeal. In my view, the way to reconcile this practical concern with the principled approach identified in paras 17 and 18 above is to take advantage of the fact that the President of the JCPC is the same person as the President of the Supreme Court, and the fact that panels of the JCPC normally consist of Justices of the Supreme Court.

20. The JCPC's current Practice Direction, in JCPC PD 3.1.3 and 4.2.2, already requires an applicant, or an appellant, to say whether an application for permission to appeal, or an appeal, will involve inviting the JCPC to depart from a decision of the House of Lords or the Supreme Court (and to give particulars). This should be expanded to apply to decisions of the Court of Appeal of England and Wales.

21. In any case where the Practice Direction applies, I would hold that the following procedure should apply from now on. The registrar of the JCPC will draw the attention of the President of the JCPC to the fact there may be such an invitation. The President can then take that fact into account when deciding on the constitution and size of the panel which is to hear the appeal, and, provided that the point at issue is one of English law, the members of that panel can, if they think it appropriate, not only decide that the earlier decision of the House of

Lords or Supreme Court, or of the Court of Appeal, was wrong, but also can expressly direct that domestic courts should treat the decision of the JCPC as representing the law of England and Wales. This is, I accept a modification of the observations of Lord Scarman giving the judgment of the Board in *Tai Hing*. However, it seems to me to be not only convenient but also sensible that the JCPC, which normally consists of the same judges as the Supreme Court, should, when applying English law, be capable of departing from an earlier decision of the Supreme Court or House of Lords to the same extent and with the same effect as the Supreme Court.

22. I have not referred to the position in the courts of Scotland or of Northern Ireland, which were (understandably) not discussed in argument, but, at least as at present advised, the position would seem to me to be as follows. The traditional view in Scotland has been that, subject to some possible exceptions, judgments of the House of Lords in English appeals are at most highly persuasive rather than strictly binding, and I find it impossible to see how decisions of the JCPC on English law can have greater authority than that. As for Northern Ireland, given that the common law applies in the same way as it does in England and Wales, I would have thought that precisely the same principles should apply as they do in England and Wales.

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