A firm foundation?

Is the doctrine of precedent the "unwavering" foundation of common law ask Stuart Pickford & Vivien Yip

The doctrine of precedent is one of the first principles we learn in law school. It was described by the House of Lords in *Practice Statement (Judicial Precedent)* [1966] WLR 1234 in the following terms: "An indispensible foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules."

It is therefore hardly surprising that arguments regarding whether or not the court is bound by existing authority can play a critical part in the success of a case. This article looks at decisions this year which have raised novel points regarding the doctrine of precedent, starting with the Supreme Court's recent decision in *Willers v Joyce & Anor (as executors of Albert Gubay (deceased)) (No 2)* [2016] UKSC 44, [2016] All ER (D) 98 (Jul) on the status of decisions made by the Judicial Committee of the Privy Council (JCPC).

Willers v Joyce

The substantive issue in *Willers* was whether the tort of malicious prosecution is available in respect of civil proceedings.

The case arose following the discontinuance of proceedings brought by Langstone Leisure Limited against Mr Willers, in which it was alleged that he had breached his contractual and fiduciary duties in his capacity as a director of that company. Willers then commenced separate proceedings against Mr Gubay for damages for malicious prosecution, alleging that Gubay controlled Langstone and had caused the claim to be brought as part of a campaign to do him harm.

Gubay applied to strike out the claim on the basis that the tort of malicious prosecution of civil proceedings is unknown to English law.

Gubay relied on *Gregory v Portsmouth City Council* [2000] 1 AC 419, [2000] 1 All ER 560, in which the House of Lords considered whether the tort was capable of applying to the malicious institution of disciplinary proceedings. The court also considered whether the tort extends to civil proceedings generally—but concluded it did not. While this was technically *obiter*, as Lord Sumption noted in *Crawford Adjusters Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2013] 4 All ER 8, the issue had been fully argued and considered by both the Court of Appeal and the House of Lords: "There are dicta and dicta."

Willers argued that the court should follow the more recent decision in *Crawford*, where the JCPC held by a 3:2 majority that there is a tort of malicious prosecution of civil proceedings. His alternative argument was that *Crawford* should be seen as merely interpreting *Gregory* and therefore not inconsistent with it.

The judge at first instance acknowledged she was bound by the House of Lords' decision in *Gregory* and directed herself that *Crawford* could only be preferred "if, for all practical purposes, it is a foregone conclusion that the Supreme Court will follow the decision of the Privy Council in *Crawford* and the outcome will therefore be the same", which she did not consider it to be the case.

A "leapfrog" certificate was granted for Willers' appeal to go straight to the Supreme Court. It was heard before a panel of nine justices. In addition to the scope of the law of malicious prosecution, the Supreme Court also considered the following issue: "Whether the Courts of England and Wales should continue to treat decisions of the Privy Council, made by a board comprising solely of serving Supreme Court Justices who have heard full argument and made their decision on the basis of English law, as having no status as legal precedent in England and Wales."

Willers argued the time has come when a decision (to the extent it concerns the laws of England and Wales) of the JCPC, comprised of exactly the same justices as sit in the Supreme Court, should be treated in exactly the same way, for the purpose of the doctrine of precedent, as a decision of the Supreme Court; lower courts should be bound by such decision, not just free to follow it as they wish, although this was reserved as the fall-back position. It was also argued that, consistent with conferring on the JCPC the same status as the Supreme Court, it should be able to overrule decisions of the Supreme Court (or the House of Lords) in the same way as the Supreme Court is free to do so.

On 20 July 2016, the Supreme Court handed down two judgments, dealing with malicious prosecution and precedent respectively. In the latter, its unanimous view was that a judge of the Courts of England and Wales should not follow a decision of the JCPC, if it is inconsistent with the decision of a court by which the judge is otherwise bound—recognising that the JCPC is not part of the hierarchy of the UK court structure. It considered whether there should be an exception, based on the "foregone conclusion" test applied by the trial judge, but concluded that (subject to the exception below) the rule should be absolute.

The court nonetheless laid down one important exception: in an appeal to the JCPC that involves an issue of English law on which a previous decision of the House of Lords, Supreme Court or Court of Appeal is challenged, the JCPC can expressly direct that domestic courts should treat its decision as representing English law.

Lord Neuberger, who gave the only judgment on this issue, remarked that such approach "is plainly sensible in practice and justified by experience". It takes advantage of the fact that the JCPC panel normally consists of Justices of the Supreme Court and the JCPC will have advance notice of the issues to be argued before it and can therefore form an appropriate panel to hear the appeal.

This pragmatic approach was foreshadowed in *R v Jogee* [2016] UKSC 8, [2016] 2 All ER 1 and *Ruddock v The Queen* [2016] UKPC 7, [2016] 2 All ER 1, both criminal appeals concerned what is known as parasitic accessory liability in joint enterprise cases. *Jogee* was a domestic appeal to the Supreme Court and *Ruddock* was a Jamaican case on appeal to the JCPC. They were heard together by the same panel of justices and a conjoined judgment was given on 18 February 2016.


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Globe Motors v TRW Lucas Varity

In *Globe Motors v TRW Lucas Varity* [2016] EWCA Civ 396, [2016] All ER (D) 171 (Apr), the Court of Appeal was faced with conflicting earlier Court of Appeal decisions on the effect of a so-called "no oral variation" clause in an agreement. The question was rendered moot by the court's decision on other issues raised in the appeal but, having heard full argument on the point, the court took the opportunity to clarify the law on this important issue of principle.

In *United Bank Ltd v Asif* (unreported, 11 February 2000), the Court of Appeal accepted that the judge had been right to enter summary judgment on the basis that the effect of such a clause was that no oral variation could have any legal effect. *World Online Telecom v I-Way Ltd* [2002] EWCA Civ 413, [2002] All ER (D) 114 (Mar) also concerned a decision about summary judgment, but the Court of Appeal had concluded the question was sufficiently unsettled to be unsuitable for summary determination.

So, was the Court of Appeal in *Globe Motors* bound by *United Bank*? The decisions in *United Bank* and *World Online* were inconsistent, so the first exception to the rule in *Young v Bristol Aeroplane Co* [1944] KB 718, [1944] 2 All ER 293 was applicable—the court was not bound by either decision and could decide which to follow. The court in *World Online* appears to have acted in ignorance of the *United Bank* decision, which (again, applying *Young*) was a further reason why the court was free to decide which to follow. The court preferred *World Online*, noting that it had the benefit of both textbook and judicial support, whereas in *United Bank* the court had not considered any authority on the legal effect of such clauses.

Globe Motors was applied by the Court of Appeal in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, which has now became the latest binding authority on the issue.

Coral Reef Limited v Silverbond

In *Coral Reef v Silverbond* [2016] EWHC 874 (Ch), Master Matthews considered whether and how far he is bound by the decision of a High Court Judge.

He said he had no doubt that, in the past, the view of most High Court Judges would have been Masters were bound—but he added the world had moved on. Most of the old restrictions on the jurisdictions of Masters have been removed and they can hear more or less the same cases as High Court Judges.

He took the view that the standing of a precedent depends on the superiority of the court, not the seniority or status of the judge—a Master in exercising the jurisdiction of the High Court is bound by relevant decisions of the Court of Appeal and the Supreme Court, but is not bound by relevant decisions of High Court Judges (but a Master will usually follow such a decision as a matter of judicial comity).

Discussion

It is clear from this survey of recent cases that the application of the doctrine of precedent, so well-established and fundamental to the common law system, can still raise novel and difficult issues. There is a clear tension between certainty and keeping pace with development in the judicial system—between respecting the hierarchy on which precedent depends and it not becoming an obstacle to the development of the law.

Had *Jogee* and *Ruddock* been decided separately, it is difficult to see why the latter ought to have had less weight, notwithstanding that it was a decision on English law by Justices drawn from the Supreme Court bench. The Supreme Court's decision in *Willers* provides an answer to this problem which recognises the role of the JCPC in developing English law, without losing sight of its role as an overseas appellate court sitting outside the UK court structure. This, as Lord Neuberger describes it, is a reconciliation of a practical concern with a principled approach.

Quoting Dean Roscoe Pound, as cited by Lord Toulson in *Willers v Joyce and Anor (as executors of Albert Gubay (Deceased)) (No 1)* [2016] UKSC 43, the doctrine of precedent is "one of reason applied to experience": *The Spirit of the Common Law*, 1963 ed, pp 182-183. "Growth" he said "is ensured in that the limits of the principle are not fixed authoritatively once and for all but are discovered gradually by a process of inclusion and exclusion as cases arise which bring out its practical workings and prove how far it may be made to do justice in its actual operation." The doctrine of precedent is at the heart of striking the right balance between growth and certainty. **NLJ**

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