JUDICIAL PRECEDENT IN THE CARIBBEAN: A NOTE ON *ATTORNEY-GENERAL OF ST. CHRISTOPHER v REYNOLDS*

by

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This note is occasioned by the recent West Indian case of ***A.G. of ST. CHRISTOPHER v REYNOLDS***[1] where the Privy Council commented on the operation of the doctrine of binding precedent. The specific question which the Board was considering was whether the West Indies Associated States Court of Appeal[2] was correct in holding itself bound in the Reynold's Case by its two previous decisions ***Charles v Phillips and Sealy***[3] and ***Herbert v Phillips and Sealy***.[4] In answering this question the Privy Council expressly approved and applied the reasoning in ***Young v Bristol Aeroplace Co. Ltd.***[5] that, save for three exceptions there stated[6] but which are irrelevant to the present case, the Court of Appeal is bound by its own decisions on points of law. Much of what the Privy Council had to say on the doctrine of precedent, however, is of more than passing interest.

In asking their Lordships to consider the question of ***stare decisis*** in the Court of Appeal, the A.G. referred them to a passage of Isaacs J. in ***Australian Agricultural Co. v Federated Engine-Drivers and Firemen's Association.***[7] In this case, Isaacs J. said:

> "The oath of a Justice of this Court is 'to do right to all manner of people according to law.' Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conveive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right ... In my opinion, where the prior decision is manifestly wrong ... it is the paramount and sworn duty of this Court to declare the law truly."

Lord Salmon, who delivered the judgement of the Board, responded to this dicta by saying that the basis upon which Isaacs J.'s opinion rested was unsound. If Isaacs J. were right, then since the judicial oath is taken not only by judges of the High Court but by all judges, any puisne judge sitting at first instance who concluded that a judgement of the High Court, or for that matter, of the Board, was wrong in law, would also be bound by his oath to disregard that judgement. If this became the accepted practice of the courts, Lord Salmon stated, the law would become so uncertain that no one could ever know what the law was or where he stood. This would certainly be very much contrary to the public good. For these reasons, Lord Salmon concluded

that so long as there is an appeal from a Court of Appeal to their Lordship's Board or to the House of Lords, the Court of Appeal should follow its own decisions on a point of law and leave it to the final appellate tribunal to correct any error in law which may have crept into any previous decisions of the Court of Appeal. Neither the Privy Council nor the House of Lords is now bound by its own decisions, and it is for them, in the exceptional cases in which the Board or the House of Lords has plainly erred in the past, to correct those errors, just as it is for them alone to correct the errors of the Court of Appeal.[8]

Except for its forcefulness – intermediate appellate courts are bound even where the prior decision is "manifestly wrong" – this reasoning merely endorses the orthodox view of the operation of ***stare decisis:*** Lower courts are bound to apply the principles of law laid down by courts higher than themselves in the judicial heirarchy and intermediate appellate courts cannot, apart from three exceptions laid down in ***Young v Bristol Aeroplace Co. Ltd.,***[9] depart from its previous rulings.

On the face of it, the references in this judgement to the "...House of Lords...correct[ing] the errors of the Court of Appeal"must mean the English Court of Appeal because Salmon L.J. said "So long as there is an appeal from their Lordship's Board ***or to the House of Lords,*** the Court of Appeal should follow its own decisions on a point of law and leave it to the ***final appellate tribunal*** to correct any error in law ..." The House of Lords is the "final appellate tribunal" for England only; and there is no appeal from Commonwealth courts to that tribunal. Lord Salmon's references to the House of Lords may further be explained on the ground that since the reasoning being applied re ***stare decisis*** at the appellate court level was derived from an English case: ***Young v Bristil Aeroplane Co.***, pronouncements on the correctness of that case is undoubtedly of some relevance to the operation of predecent in the English context. Clearly, in the ***Reynold's Case*** the Privy Council most certainly was not saying that the House of Lords can correct the errors of Commonwealth Courts.

It must be noted that the Privy Council's holding that the West Indies Associated States Court of Appeal (WIASCA) was correct in ***Reynolds' Case*** to hold itself bound by its previous decisions – ***Charles v Phillips***[10] ***and Sealy*** and ***Herbert v Phillips and Sealy***[11] – does not throw any light on the question whether a Court of Appeal sitting on an appeal from one territory, island or state is bound by previous decisions handed down by it in an appeal from another territory, island or state where it also presides. In ***Reynolds' Case,*** the two cases which the WIAS Court of Appeal held itself bound to follow were, like ***Reynold's Case*** itself, appeals from the High Court of St. Kitts. Had any of these cases been on appeal from one of the other islands from which appeals go to the WIAS Court of Appeal,[12] the opinions of the Privy Council as to their binding force would have been more elucidative of exactly how the doctrine of precedent operates. Both the Privy Council and the WIAS Court of Appeal sit on appeals from more than one territory and the Privy Council's view on the authority of a case arising on an appeal from one territory in a later appeal arising from another territory would undoubtedly have had more profound implications than the narrow issue of ***stare decisis*** considered in ***Reynolds.*** An opinion in such a case would have had relevance not only for the operation of ***stare decisis*** in the WIASCA but also, by analogy, re the authority of Privy Council decisions on appeal from one territory in other territories where appeals lie to the Privy Council.

In ***Wigley v Bellot***[13] – a St. Kitts' appeal – the Court of Appeal of the Windward and Leeward Islands[14] held itself bound by its earlier decision in ***Wason v Nanton***[15] – a St. Vincent appeal. Whether this approach was correct, much less its juridical basis, was ***not*** decided by the Privy Council in the ***Reynolds' Case*** because, there, all the cases being considered were appeals from the St. Kitts High Court.

In the East African appeal of ***Bakhshuwen v Bakhshuwen***[16] the Privy Council expressed the view that on a question of Mohammedan law, its decisions on appeals from India bound the East African Court of Appeal. This case has been subjected to severe academic criticism[17] and one writer[18] has refuted its general applicability on the ground that it deals with a Privy Council decision on a special point of Islamic law and is therefore "peculiar"

An important new twist added to the doctrine of ***stare decisis*** by the Privy Council in the ***Reynolds' Case,*** however, is contained in its general statement that its opinion as to the binding force of decisions, is ***not*** itself binding! Lord Salmon said:

> "The opinion of their Lordship's Board and of the House of Lords on this question [whether the Court of Appeal was right in considering itself to be bound by its two previous decisions] can however, be only of persuasive authority. No doubt it would be treated with great respect but it cannot be of binding authority because the point can never come before this Board or the House of Lords for decision. Indeed if a case came before either in which the Court of Appeal had refused to follow one of its own previous decisions on a point of law, the appeal would have to be dismissed if the final appellate tribunal concluded tht the previous decision was wrong."[19]

In this statement, Lord Salmon is echoing precisely, views he has previously expressed in the House of Lords in ***Davis v Johnson.***[20] There the House of Lords unanimously reaffirmed expressly and unequivocally the correctness of the views expressed in ***Young v Bristol Aeroplane Co.***[21] In his judgement in the House of Lords, Lord Salmon stated that in the nature of things, however, the point could never come before the House of Lords for decision or form part of its ***ratio decidendi.*** The House decides every case that comes before it according to the Law. If as in the instance case, the Court of Appeal decides an appeal contrary to one of its previous decisions, the House, much as it may deprecate the Court of Appeal's departure from the rule that the Court is bound by its own decisions, save for the three exceptions enumerated in ***Young,*** will nevertheless dismiss the appeal if it comes to the conclusion that the decision appealed against was right in law.[22]

Both in ***A.G. of St. Christopher v Reynolds***[23] and ***Davis v Johnson,***[24] Lord Salmon reasons thus:

1. Only rulings or principles in a judgement which form part of the ***ratio decidendi*** of a decision are binding;[25]

2. Opinions as to the operation of the doctrine of ***stare decisis*** can never form part of the ***ratio decidendi*** of a case before a final appellate tribunal; they are always ***obiter dicta*** – higly persuasive dicta perhaps - but mere dicta nonetheless.

3. The reason for this is that such a tribunal always bases its decision on what ***is*** the ***correct*** view of the law, and not on what the lower court should have decided.

4. Being ***obiter dicta***, i.e. not part of the ***ratio decidendi***, opinions as to ***stare decisis*** by a final appellate tribunal do not bind lower courts.

Conclusions

The importance of the ***Reynolds'*** decision lies not so much in what it says, but in what it fails to say. While purporting to deal with the question of the doctrine of precedent in the Caribbean, the Privy Council fails to provide principled guidance as to how the doctrine of precedent in general should operate in the Caribbean. Since, according to Lord Salmon, pronouncements as to how the doctrine operates are always ***obiter dicta*** anyway and since the A.G. specifically requested a pronouncement on the matter, the Privy Council should not have passed up the opportunity to provide guidance in this area of the law which is in dire need of rationalisation in the Caribbean. Indeed, the Privy Council adopted precisely an approach that is causing concern in the Caribbean context: it mechanically applied an English case ***(Young v Bristil Aeroplane Co. Ltd.)*** across the board to the ***stare decisis*** issue before it and consequently failed to address the wider and more important questions. Their Lordships told us merely what we already knew: that the Court of Appeal is bound by its previous decisions on appeal from the same court. Far more fundamental questions were left unanswered. The price that will be paid for the absence of in-depth analysis of this matter in ***Reynolds Case*** is that the doctrine of ***stare decisis*** will continue to function in the Caribbean context without an underlying coherent and principled rationale.

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Gratitude is hereby expressed to Mr. Andrew Burgess (Lecturer in the Faculty of Law, Cave Hill) for his informed commentary and untiring assistance to the writer throughout the writing of this article.

3. ***THE ATTORNEY RULE***

"If the facts are against you, argue the law. If the law is against you, pound the table and yell like hell."

FOOTNOTES:

A.G. v REYNOLDS

1. [1979] 3 All E.R. 129 (P.C.)
2. The independence Constitutions of ***Dominica*** (s.8, sched. 2 to The Commonwealth of Dominica Constitution Order 1978); ***St. Lucia*** (s.8, sched. 2 to The St. Lucia Constitution Order 1978); and ***St. Vincent*** (s.8, sched. 2 to The St. Vincent Constitution Order 1979) provide that the Supreme Court established by the West Indies Associated States Supreme Court Order 1967 shall be styled the Eastern Caribbean Supreme Court unless Parliament otherwise provides. These changes in nomenclature effected by these independence Constitutions are purely formal and do not affect the substantive operation of the Court. It should be noted that the Court established by the W.I.A.S. Supreme Court Order 1967 also hears appeals from Montserrat and the British Virgin Islands which are still British Colonies. Local legislation in these territories incorporates the Courts Order into their laws. Antigua and St. Kitts-Nevis are the only remaining Associated States.
3. (1967) 10 W.I.R. 423.
4. (1967) 10 W.I.R. 435.
5. [1944] 2 All E.R. 293 (C.A.).
6. These are (i) it may choose between two conflicting decisions of its own; (ii) it must refuse to follow a decision of its own which, although not expressly overruled, is inconsistent with a decision of the House of Lords; (iii) it is not bound to follow a decision of its own given ***per incuriam.***
7. (1913) 17 C.L.R. 261, 278–9.
8. See [1979] 3 All E.R. at 140.
9. [1944] 2 All E.R. 293.
10. (1967) 10 W.I.R. 423.
11. (1967) 10 W.I.R. 435.
12. The W.I.A.S.C.A. hears appeals from St. Kitts-Nevis, Antigua, Montserrat, B.V.I., Dominica, St. Lucia, St. Vincent.
13. (1965) 9 W.I.R. 197.
14. This court was the predecessor to the W.I.A.S.C.A.
15. (1965) 9 W.I.R. 197.
16. [1952] A.C. 7.
17. Prof. Bartholome (1952) 1 I.C.L.Q. 398 – one ground of criticism being that there is no Constitutional relationship between the East African Court of Appeal and the Privy Council when hearing appeals from India.
18. A.D. Burgess (1978) May W.I.L.J. 26, 30.
19. Salmon L.J. [1979] 3 All E.R. at 139–140.
20. [1978] 1 All E.R. 1132.
21. Supra note (5).
22. See [1978] 1 All E.R. 1132, at 1152.

23. Supra note (8).
24. Supra note (23).
25. This view finds support in R. Cross' renowned book, ***Precedent in English Law*** (1977) at p. 38.