Correspondence

PRECEDENT AND THE COURT OF APPEAL

Dear Sir,

It was to be expected that the first number of a new legal journal would carry some reference to Lord Denning, and in fact your first number has three sets of such references – those of Dias, at pp. 11, 12, 14, and 16; of Furmston, at pp. 46-47; and of Hazel Carty in her article 'Precedent and the Court of Appeal: Lord Denning's views explored'. By a fortunate chance, the contention examined in that article, that the Court of Appeal can properly depart from its own previous decisions, is refuted, out of the mouth of Lord Denning himself, in a passage quoted by Furmston.

The passage, from Lord Denning's judgment in *Bremer v Mackprang* [1979] 1 Lloyds Rep 221, reads:

'In *Toepfer v Cremer* . . . the trade set the Court an examination paper with many questions to answer. We did our best, but recently our papers were marked by the House of Lords, see *Bremer v Vanden Arvenne-Izegem PVBA*. They only gave us about 50%. The House of Lords are fortunate in that there is no one to examine them or mark their papers. If there were, I do not suppose they would get any higher marks than we.'

This difference between the House of Lords and the Court of Appeal is crucial. Before its declaration of changed policy in 1966, the House of Lords was regarded as bound by its own previous decisions, but it must have been generally recognised that the declaration in *London Tramways v LCC* [1898] AC 735, could only be a declaration of intent, because (in Lord Denning's metaphor) there was no one to mark the examination papers of the House of Lords. A rule that the Court of Appeal is bound by its own previous decisions is a real rule because the House of Lords marks the examination papers of the Court of Appeal.

It is to this quite simple practical question of enforcement that attention should be directed, rather than to the classification of the rule of precedent as a rule of law or a rule of procedure. When Diplock LJ spoke of the 1966 statement as loosening the self-imposed fetters of the House of Lords and added that:

'as concerns the binding effect on the Court of Appeal of its own decisions, our fetters too are self-imposed' (*Boys v Chaplin* [1968] 1 All ER 283,296, quoted by Carty at p. 74),

he missed the point. The fetters may have been first taken up for itself by the Court of Appeal in *Young v Bristol Aeroplane Co* [1944] KB 718; by the time Lord Diplock came to join in the decision in *Davis v Johnson* [1979] AC 264, at pp. 322-8, the key to the fetters was held

by the House of Lords, and the fetters were being held firmly in place.

To make the position rather clearer by abandoning metaphor, let us imagine a case in which there is no doubt that the facts bring it within 'the rule in *X v Y*', where *X v Y* is a decision of the Court of Appeal. The Court of Appeal decides not to follow *X v Y*, and gives judgment for the plaintiff. The defendant of course appeals to the House of Lords: he will surely be granted leave. The defendant's first line of argument before the House of Lords will be that the Court of Appeal has accepted that the case falls within the rule in *X v Y* and that the Court of Appeal has erred in not following that case. If the plaintiff confined himself to answering that argument, the defendant would win his appeal, because the House of Lords would uphold the rule that the Court of Appeal is bound by its own decisions. If, however, *X v Y* were a decision of the House of Lords, and the House decided in the instant case not to follow it, although accepting that the facts in the instant case were indistinguishable, the losing party could do nothing more effective than writing criticisms for the legal press.

Of course the appellant's argument before the House of Lords would not be confined to that first line. Both parties would argue the question whether the House of Lords should overrule *X v Y*, and the result would be that the House would hear all over again the arguments which had convinced the Court of Appeal. If we had an ideal legal system, perhaps the hearing in the Court of Appeal could consist of no more than a quickly-reached agreement between counsel and the Court that the case should go to the House of Lords for argument on whether *X v Y* was rightly decided. As it is, there is indeed a social argument for Lord Denning's unorthodoxy: if an irregular decision of the Court of Appeal favours the party who seems to have the merits, the other party may well accept the irregularity rather than face the cost of appealing. (This may be part of the explanation for the absence of an appeal to the House of Lords in *Harbutt's Plasticene*.) The argument was put by Lord Denning in his dissenting judgment in *Farrell v Alexander* [1976] QB 359, where the merits were to his mind clearly with the plaintiffs:

'These ladies do not qualify for legal aid. They must go to the expense themselves of an appeal to the House of Lords to get the decision revoked [*sic*]. The expense may deter them and thus an injustice will be perpetrated. In any case I do not think it right to compel them to do this when the result is a foregone conclusion.'

The answer to the argument in that particular case is that the result of the appeal to the House of Lords was not a foregone conclusion. In the Court of Appeal Lawton and Scarman LJJ were far less certain than Lord Denning that the decision which he wanted to disregard was wrong, and when the House of Lords reversed the Court of Appeal's decision, it was with the dissent of Lord Russell of

Killowen: [1977] AC 59. Nevertheless, the 'foregone conclusion' principle will occasionally justify a decision which departs from a nominally binding precedent, which may even be a decision of a higher court. The clearest possible example of the application of the principle was given by Cairns J (as he then was) in *Anderson v Rhodes* [1967] 2 All ER 850, when he followed *Hedley Byrne* in preference to *Candler v Crane, Christmas & Co* and said (at p. 857):

'An academic lawyer might be prepared to contend that the opinions expressed by their lordships [in *Hedley Byrne*] about liability for negligent misrepresentation were obiter, and that *Candler v Crane, Christmas & Co* is still a binding decision. In my judgment that would be an unrealistic view to take.'

Yours faithfully,

DAFYDD JENKINS

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