COMMENT

AUTHORITY OF ENGLISH APPELLATE COURTS' JURISPRUDENCE BEFORE AUSTRALIAN SUPREME COURTS

Until 1962, Australian courts, including the High Court of Australia, considered pronouncements of English appellate courts on general principles of law as binding upon themselves.[1] Such English appellate judicial pronouncements were indeed accepted as binding by the Australian courts in preference to their own, albeit that both may have related to the same legal rules and principles. This was especially so in relation to the judicial pronouncements of the House of Lords.[2] Nevertheless, when in 1962, Dixon C.J. in speaking for himself as well as for his four other brother judges on the High Court of Australia in the case of *Parker* v. *The Queen* declared as follows: 'Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions in cases decided here; but having carefully studied Smith's[3]

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1 E.g., the decision of the majority of the High Court of Australia (comprising Rich, Dixon and Williams J.J.) in *Waghorn* v. *Waghorn* (1942) 65 C.L.R. 289, on appeal from the Supreme Court of New South Wales, at pp. 293, 297 and 305 respectively. The decision of the English Court of Appeal purported to have been followed by the High Court of Australia was that in *Earnshaw* v. *Earnshaw* [1939] 2 All E.R. 698. Indeed, the latter English decision was followed by the Australian High Court in preference to the latter's own previous decision in *The Crown Solicitor for the State of South Australia* v. *Gilbert and Another* (1937) 59 C.L.R. 322.

2 In its decision in *Piro* v. *W. Foster & Co. Ltd.* (1943-1944) 68 C.L.R. 313, the High Court of Australia in considering an appeal from the Supreme Court of South Australia, maintained that, where there was a clear conflict between a decision or pronouncement of the House of Lords on general points of the common law and that of the High Court of Australia, the latter court and other courts in Australia should, as a general rule, follow that of the former. (See particularly the judgments of Latham C.J., Rich, McTiernan and Williams J.J. at pp. 320, 325-326, 335-336, and 341 respectively).

3 *D.P.P.* v. *Smith* [1961] A.C. 290. This was the case in which the much criticised decision of the House of Lords in relation to intention or the mental element in murder, was handed down. There the House of Lords laid down the rule that, where a person unlawfully and voluntarily did something to someone which occasioned the death of the latter, then it did not matter whether or not such a person contemplated that his act should occasion death to another, he ought to take the probable consequences of his action and be legally liable. In so deciding, the House of Lords considered as the only test available in those circumstances, what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result. It is noteworthy that, before that decision of the House of Lords, the High Court of Australia had had occasion to lay down in the case of *Stapleton* v. *The Queen* (1952) 86 C.L.R. 358 at p. 365 that: 'The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous.'

case I think that we cannot adhere to that view or policy';[4] it became recognised that, decisions of the House of Lords, let alone those of the English Court of Appeal, could no longer be deemed to be binding on the highest court of appeal in Australia.[5]

But, granting the latter to have become a well-established principle in the jurisprudence of the High Court of Australia as far as the doctrine of *stare decisis* is concerned, are the various individual Supreme Courts of the Australian States and the Australian Northern and Capital Territories equally bound by the Parker declaration or practice statement? Since the decisions of the High Court of Australia on various aspects of the law are binding on the Supreme Courts of the individual States and on the Supreme Court of the Northern and the Capital Territories of Australia in particular areas and on specific matters or issues, it may be logical to argue that pronouncements of the House of Lords on general principles of the law which conflict with those of the High Court of Australia, are not binding on those Supreme Courts, However, the actual jurisprudential position is by no means clear at the present moment. This is perhaps borne out by the fact that, as an editorial in the Australian Law Journal had occasion to suggest: '... presumably, a position will develop in which State Supreme Courts will be bound only by decisions of the High Court and the Privy Council and will be free to disregard decisions of other English courts, including those of the House of Lords'.[6]

It is the main aim here to consider whether, from the actual pronouncements of the Supreme Courts of the individual States and the Capital Territories of Australia, decisions or pronouncements on general points of law made by the English Court of Appeal and by the House

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It was therefore no surprise that, Dixon C.J. in making his revolutionary declaration rejecting the bindingness of the decisions or the pronouncements of the House of Lords, took the trouble to point out in the Parker case that: 'There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept ... I wish there to be no misunderstanding on the subject. I shall not depart from the law on the matter as we have long since laid it down in this Court and I think that *Smith's* case [1961] A.C. 290 should not be used in Australia as authority at all.' (1962-1963) 111 C.L.R. 610 at p. 632.

4 (1962-1963) 111 C.L.R. 610 at p. 632. The case itself concerned an appeal from the Supreme Court of New South Wales sitting as a Court of Criminal Appeal to consider the question, whether an issue of provocation reducing a crime of murder to manslaughter should have been left to the jury by the trial judge. It is noteworthy that, by a majority of three (namely, Taylor, Menzies and Owen J.J.) to two (namely, Dixon C.J. and Windeyer J.), it was held that, upon the evidence available at the time before the trial judge, there was no case of provocation reducing the crime of murder to manslaughter which would have been fit to be left to the jury.

5 See e.g., an editorial in the Australian Law Journal entitled: 'Australia and the English Courts', (1963-1964) 37 *A.L.J.* 1-2; A. L. Goodhart, 'The High Court of Australia and the House of Lords', (1963) 79 *L.Q.R.* 313-314; C. Howard, 'Australia and the House of Lords — *Parker* v. *The Queen*', (1963) *Crim. L.R.* 675-677; L. H. Leigh, note in (1965) 28 *M.L.R.* 104-109; F. K. H. Maher, P. L. Waller and D. P. Derham, *Cases and Materials on the Legal Process*, (1966), at p. 56.

6 (1963-1964) 37 *A.L.J.* 1 at p. 2.

of Lords are in any way treated as binding by the former on themselves. It may be convenient to consider the attitude of the Australian Supreme Courts to the pronouncements of the English Court of Appeal on general points of law first before proceeding to consider their attitude to pronouncements of the House of Lords on general legal principles.

AUTHORITY OF ENGLISH COURT OF APPEAL DECISIONS

It would somehow seem that, so far only the Supreme Courts of New South Wales and Queensland have tended to treat pronouncements of the English Court of Appeal on general points of law as binding upon themselves. Thus, in the case of *Pettigrew* v. *Klumpp and Klumpp*,[7] the majority of the Full Court of the Supreme Court of Queensland treated the decision of the English Court of Appeal in relation to the question of an estate agent's entitlement to commission under certain circumstances, as binding authority for it to follow. Indeed, Webb C.J. maintained thus: 'It seems to me that the appellant's agreement with the respondent as to his commission is concluded by the reasoning in *James* v. *Smith* a decision of the English Court of Appeal given in 1921, but first reported in [1931] 2 K.B. 317. But for this decision, I should be inclined to hold, on the authority of *Bond* v. *Dawson* [1923] St.R.Qd 63, that the appellant was entitled to his commission.'[8] Even more forthrightly, Macrossan S.P.J. stressed as follows: 'Certain decisions of courts in New Zealand and Victoria, and a decision of this Court in *Bond* v. *Dawson* [1923] St. R.Qd 63 were cited to us in which it would appear that views were expressed as to the obligations of commission agents employed to find a purchaser of land which were in conflict with those expressed by Banks, Scrutton and Atkin L.JJ. in *James* v. *Smith* [1931] 2 K.B. 317. It would perhaps be sufficient for me to say that if there were a conflict between the decisions referred to, we should follow the decision of the Court of Appeal on this matter.'[9]

The Full Court of the Supreme Court of New South Wales also considered itself bound by the decision of the English Court of Appeal in *James* v. *Smith*, when the former came to pronounce on a similar issue touching the commission of an estate agent in the case of *Turnbull* v. *Wightman*.[10] In a somewhat similar vein, there is O'Bryan J. of the Full Court of the Supreme Court of Victoria in the case of *Scott* v. *Willmore & Randell*,[11] although the learned Supreme Court judge purported to distinguish the decision of the English Court of Appeal in the *James* v. *Smith* case, but stated as follows: 'Although the decisions of the Court of Appeal are not binding authority on us, this Court will generally follow such decisions in preference to previous contrary decisions of its own'.[12]

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7 [1942] St. R. Qd. 131.
8 Ibid, at p. 134.
9 Ibid, at p. 137.
10 [1945] 45 S.R. (N.S.W.) 369.
11 [1949] V.L.R. 113.
12 Ibid, at p. 130.

Yet, interestingly enough, in the very recent case of *R.* v. *Evans & Gardiner (No. 1)*,[13] Lush J., sitting in the Supreme Court of Victoria had this to say about the above statement of O'Bryan J. in the *Scott* case: 'It may be that the passage of years has altered the relationship between the Full Court and the Court of Appeal in England, but I should think it likely that the observation was still true if the House of Lords is substituted for the Court of Appeal'.[14]

From all the foregoing, although it is arguable that, as far as the Supreme Courts of New South Wales and Queensland are concerned, the decisions or pronouncements on general points of law by the English Court of Appeal would appear to be treated as of binding authority, the same cannot be said of the Supreme Court of Victoria at the present moment. However, since the relevant decisions of the Supreme Courts of New South Wales and Queensland were made in the 1940's, it may be wondered whether that same view of those Supreme Courts still holds in the 1970's. The situation is by no means clear. Nevertheless, if one were to assume that the pronouncement of Lush J. in the Supreme Court of Victoria when considering the case of *R* v. *Evans & Gardiner (No. 1)* were representative of the attitude that each of the other Supreme Courts in the various Australian States and Capital Territories would adopt in relation to the jurisprudence of the English Court of Appeal, it could be fairly stated that all such Supreme Courts would no longer consider themselves bound by the decisions of the English Court of Appeal. However, this does not in any way detract from the fact that the decisions of the latter would usually be accorded the necessary respect on their own respective merits.

AUTHORITY OF HOUSE OF LORDS DECISIONS

If one were to assume that the pronouncement of the Full Court of the Supreme Court of New South Wales in the Turnbull case[15] were representative of what would be endorsed by all the individual States and Capital and Northern Territories Supreme Courts, then the decisions or the pronouncements of the House of Lords on general points of law would be treated as of binding authority, at any rate up until the 1940's. Equally, if the pronouncement of Lush J. in the Supreme Court of Victoria in the *R* v. *Evans & Gardiner (No. 1)* case[16] were to be treated as reflecting what the other individual Supreme Courts in Australia would endorse, then even as of now, decisions of the House of Lords on general points of law would be of binding authority before those Supreme Courts.

In the *Turnbull* case, Jordan C.J. in delivering the judgment of the Full Court of the Supreme Court of New South Wales in relation to the

13 [1976] V.R. 517.
14 Ibid, at pp. 518-519.
15 *Supra.*
16 *Supra.*

question of an estate agent's commission, had occasion to state as follows: 'The whole subject has, however, recently received exhaustive examination by the House of Lords in the case of *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108, and, having regard to the speeches in that case, especially those of Lord Russell of Killowen and Lord Romer, I am of opinion that the views which have been pressed upon us in reliance upon the earlier authorities are no longer tenable'.[17]

Similarly, in *R* v. *Evans & Gardiner (No. 1)* Lush J. in delivering his judgment as the only judge sitting in the Supreme Court of Victoria, considered it likely that the decisions of the House of Lords would be binding on the Supreme Court of Victoria by contending thus: 'This is perhaps the more likely to be correct if the pronouncement of the House of Lords is made in an area of the common law of very wide application. It will, of course, be borne in mind that I am speaking of a situation in which the reports of the [Australian] High Court are silent. It may be that that in the situation in which I am placed it is open to a trial judge to say that it can be assumed that the Full Court eventually will follow Lynch's case and that it is open to the trial judge to do so now.'[18]

The stand taken by Lush J. in *Evans & Gardiner* may be better understood if the circumstances of the situation there were considered at this juncture. The circumstances were that, before the case of *Evans & Gardiner* came before the Supreme Court of Victoria, the Full Court of the latter Court had already decided in the case of *R* v. *Harding*[19] that duress provided no defence to a charge of murder at common law, whether such murder was first degree or second degree. But then, the pronouncement of the Full Court of the Supreme Court of Victoria in the Harding case was made just before the House of Lords pronounced in the case of *Lynch* v. *D.P.P.*,[20] an appeal case from Northern Ireland, that duress constituted a defence to a charge of murder in the second degree. Since therefore, Lush J. in the *Evans & Gardiner* case, had to decide whether he was bound by the decision of the Full Court of the Supreme Court of Victoria in *Harding* or that of the House of Lords in *Lynch*, the learned Victorian Supreme Court judge considered that of the latter as having binding authority in preference to that of the former.

Granting that, somehow on the authority of the pronouncement of Lush J. in the *Evans & Gardiner* case, the Supreme Court of Victoria, whether or not it is sitting as a Full Court, is bound by decisions of the House of Lords, and that by analogy, the other Australian Supreme Courts may take the same stand, the conditions under which the decisions of the House of Lords on general points of law would have authoritative force need to be carefully examined.

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17 [1945] 45 S.R. (N.S.W.) 369 at p. 372.
18 [1976] V.R. 517 at p. 519.
19 [1976] V.R. 129.
20 [1975] A.C. 653; [1975] 1 All E.R. 913; [1975] 2 W.L.R. 641.

CONDITIONS UNDER WHICH HOUSE OF LORDS DECISIONS MAY BE BINDING

Two main conditions were considered by Lush J. in *Evans & Gardiner* as essential, if an Australian Supreme Court were going to feel bound by the decisions of the House of Lords on general issues of law. Those conditions being, first of all, that the pronouncements of the House of Lords should have been made in an area of the common law of very wide application; and, secondly, that there should exist a situation in which the reports of the High Court of Australia are silent on such common law area.

Whilst the first condition would not seem to require much elaboration, the second one does require some explaining. After all, as far as the first condition is concerned, it is quite clear that pronouncements of the House of Lords on purely statutory provisions in England could not possibly be treated even in the circumstances envisaged by Lush J. in the *Evans & Gardiner* case, to have any binding force whatsoever before the Australian Supreme Courts. Indeed, by treating the pronouncements of the High Court of Australia as of more binding authority than those of the House of Lords under the second condition, a position unlikely to be different from the views of the other Australian Supreme Courts, Lush J. would appear to have treated the pronouncements of the House of Lords on common law principles and rules as not exactly binding on Australian Supreme Courts. Obviously the declaration made by Dixon C.J. in the *Parker* case, as endorsed by the other members of the Australian High Court in that same case, must have weighed heavily in the calculations of the learned Victorian Supreme Court judge in elaborating on his statements in the *Evans & Gardiner* case. Indeed, implicit in the observations of Lush J. in the latter case, is the idea that, should a pronouncement of the Australian High Court on some general principles of law conflict with that of the House of Lords in any particular field of activity governed by the common law, that of the former should prevail. Consequently, pronouncements of the House of Lords on general principles of the common law would seem to have conditional or partial binding authority *vis-a-vis* the Australian Supreme Courts.

On the assumption that the formulation by Lush J. in the *Evans & Gardiner* case may be endorsed by the other Australian Supreme Courts, it would seem to follow that the latter may have adopted a modified attitude towards the bindingness of the legal pronouncements of the House of Lords on general principles of the common law. On the one hand, the High Court of Australia does not consider itself bound by such pronouncements of the House of Lords. On the other hand, while purporting to defer to such pronouncements, the Australian Supreme Courts are unequivocal in preferring to follow the common law pronouncements of the Australian High Court, even if the latter should conflict with similar common law pronouncements by the House of Lords. This is quite understandable, since the High Court of Australia occupies the

apex of the Australian judicial hierarchy whereas the Australian Supreme Courts occupy an intermediate position within that hierarchical system of courts. However, one should not lose sight of the fact that the usual built-in devices into the common law system of *stare decisis*, such as distinguishing, *Obiter dicta, per incuriam*, and the like could easily be resorted to by the Australian Supreme Courts where they happen to be enamoured of some legal pronouncement of the House of Lords which may outwardly conflict with that of the Australian High Court, with a view to applying the former. Obviously, for the latter situation to arise, the personal choices of the individual judges of the various Australian Supreme Courts should be a factor to consider.

BINDINGNESS OF HOUSE OF LORDS DECISIONS ON AUSTRALIAN SUPREME COURTS AN UNWARRANTED ANACHRONISM

Long before the somehow revolutionary declaration made by Dixon C.J. in the *Parker* case, one writer, in particular, was highly critical of the idea that English appellate judicial decisions should be treated as of binding authority at all in the Australian courts, including, of course, the Australian High Court.[21] Parsons was not convinced of the then current justification advanced for supporting the treatment of English appellate judicial decisions as of binding authority in Australia. Indeed, he was inclined to view the idea that the application of those English common law decisions made for general uniformity in the application of the common law, as particularly unconvincing. The reason being that Australian conditions and circumstances were different from those of England. That being the case, it has been argued that there could be no need for treating English appellate judicial decisions on general points of the common law as binding on Australian courts. These strictures would seem to have somehow contrasted with the stand taken by another Howard, who considered at that time that, in the absence of a decision of the Judicial Committee of the Privy Council to the contrary, Australian courts were bound by the judicial pronouncements on general points of law made by the House of Lords.[22]

More recently, it has been argued that the changed attitude on the part of the Australian High Court in the *Parker* case towards House of Lords precedents is a reflection on the judicial standards of the latter.[23] Consequently, it has been inferred that the pronouncements on general points of the common law made by English appellate courts, including

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21 R. W. Parsons, 'English Precedents in Australian Courts', (1948-1950) 1 *U.W.A.L.R.*, 211-218.

22 Z. Cowan, 'The Binding Effect of English Decisions Upon Australian Courts', (1944) 60 *L.Q.R.* 378 at p. 382.

23 L. H. Leigh, *loc. cit.*, at p. 109.

those of the House of Lords, have now been 'reduced to the same category of persuasiveness as those of any other common law jurisdiction'.[24]

Since, from time to time, certain decisions and pronouncements of the House of Lords on general points of the common law tend to become so controversial, and indeed unacceptable whether on principle or in logic, with the result that they have not commanded the respect or the support of legal writers nor of courts or tribunals in other common law jurisdictions of the Commonwealth, it would seem hardly rational to treat such judicial decisions of the House of Lords on general points of the common law as of binding authority on any common law court other than the English. This would seem to be so heedless of the geographical location and the varied conditions or circumstances in which non-English common law courts operate. Added to that, since local conditions and circumstances in the other common law countries may differ from those in England, it would seem neither rational nor expedient to consider the judicial pronouncements of the House of Lords on general points of the common law as binding on such other common law courts. Consequently, it would be näive to view the refusal of these courts to follow rigidly decisions of the House of Lords on general points of the common law, as being symptomatic simply of blind or short-sighted nationalism. Indeed, for Australian and other courts of the various common law jurisdictions of the Commonwealth to treat decisions and pronouncements of the English appellate courts on general points of the common law, including those of the House of Lords as of persuasive effect only, should not mean that such decisions and pronouncements would be treated with scant regard. On the contrary, where necessary, they may be adopted and applied by courts in the other common law jurisdictions of Commonwealth.

However, in the latter situation, any adoption by other common law courts of the decisions and the pronouncements of the House of Lords in particular, and of English appellate courts generally would have to be on the rational and the practical basis that their adoption and application would depend entirely on their respective merits. Indeed, it is arguable that an approach or attitude of that kind may not be all that different from that adopted by the Australian courts towards English appellate judicial decisions or pronouncements before the declaration made by Dixon C.J. in the *Parker* case. After all, the various devices, such as distinguishing, *obiter dicta*, *per incuriam*, and the like, built into the system of binding judicial precedents in the common law jurisdictions to ensure a more flexible working of that system, could easily be invoked

24 C. Howard, *loc. cit.*, at p. 677. Cf. Derham, Maher and Waller, *An Introduction to Law*, (2nd Ed. 1971), at p. 36 where it is stated that '... the Australian courts, although not strictly bound to follow decisions of the English courts other than the Privy Council, have accorded English decisions the greatest respect and have often followed the English Court of Appeal and the House of Lords almost as though their decisions were imperatively binding in Australia'.

by common law courts in other jurisdictions to avoid applying grossly unfair judicial decisions, not only of the House of Lords, but also those of superior courts within their own respective jurisdictions. Nevertheless, the political significance of the stand taken by the Australian courts, especially the stand taken by the High Court of Australia in the *Parker* case, in not treating decisions or pronouncements of the House of Lords on general points of the common law as of binding authority, could hardly be underestimated. Thus, there is much to be said for the judiciary in Australia having full confidence in itself and in its own judicial decisions and pronouncements as being rationally and practically based. After all, Australian judicial decisions, in a number of areas relating to the general principles of the common law, have been and continue to be highly respected in the other common law jurisdictions of the Commonwealth. Moreover, it is arguable that a strong belief by the Australian judiciary in its own decisions and pronouncements on the law generally, and on the common law in particular, is essential if justice in accordance with prevailing local conditions and circumstances is not only to be done, but seen to be done.

CONCLUSION

Although, from the foregoing examination, it would seem that some vestiges remain whereby decisions and pronouncements of the House of Lords on general points of the common law may be deemed to be binding on Australian Supreme Courts, yet the fact that the latter acknowledge the superiority of the decisions and the pronouncements of the High Court of Australia on general and particular aspects of the common law, would appear to have toned down those vestiges. Consequently, it is fair to claim that the present jurisprudential position is, in effect, that decisions and pronouncements of the House of Lords on points of law of general importance to the development of the common law are of persuasive effect only, whether from the point of view of the High Court of Australia or from that of the various Australian Supreme Courts. This would seem to be highly desirable and would not seem to detract from the respect and weight that need to be attached to a number, if not most, of the decisions and the pronouncements of the House of Lords and of the English Court of Appeal.

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