

Standing Decisions and Privy Precedents: Principles of *Stare Decisis* Applicable to Judgments of the Privy Council

Background

The doctrine of *stare decisis*, a Latin term meaning 'to stand by things decided', is a fundamental principle of common law legal systems. It ensures consistency and predictability in the law by obligating courts to follow the legal precedents established by previous decisions. This principle is not only a cornerstone of judicial decision-making in domestic courts but also plays a significant role in the judgments of the Judicial Committee of the Privy Council ("JCPC"), which serves as the highest court of appeal for many Commonwealth countries and British Overseas Territories, including the British Virgin Islands (the "BVI").

This article is intended to cover the hierarchy of the BVI legal system, culminating in the JCPC, as well as the principles of *stare decisis* applicable in the BVI to decisions of the JCPC.

History and Hierarchy of the BVI Legal System

In 1967, the enactment of the West Indies Act saw the Organisation of Eastern Caribbean States (the "OECS") – at the time comprising Anguilla, Antigua, Dominica, Grenada, Saint Vincent, Saint Kitts &

Nevis and Saint Lucia – establish a new 'status of association' with the United Kingdom. Through the West Indies Act and the subsequent West Indies Associated States Supreme Court Order, the High Court and the Court of Appeal in each of the OECS fused into what is now known as the Eastern Caribbean Supreme Court. The BVI was the first associate (non-founding) member of the OECS in 1984 followed by Anguilla in 1995.

The Eastern Caribbean Supreme Court has two divisions: the High Court of Justice and the Eastern Caribbean Court of Appeal (the "ECCA"). The ECCA serves the Eastern Caribbean Member States and Territories¹ (the Member States), including the BVI. It is an itinerant court, travelling to each of the Member States to hear both criminal and civil appeals from subordinate courts (which, in the BVI, are the High Court Civil Division, the High Court Commercial Division and the Magistrates Court).

Annually, the ECCA typically sits three times in the BVI, although the court will also accommodate urgent appeals outside of its scheduled sitting dates (in which circumstances it will hear a BVI appeal during a sitting that is otherwise designated for one of the other Member States).

¹ Comprising Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Montserrat, Saint Kitts and Nevis, Saint Lucia and Saint Vincent and the Grenadines as Full Members;

and Anguilla, the BVI, Guadeloupe and Martinique as Associate Members.

Where a litigant meets the requisite qualifying criteria to pursue an appeal against a decision of the ECCA, the appeal is moved before the JCPC as the BVI's final appellate court.

The JCPC

The JCPC consists predominantly of Justices of the Supreme Court of the United Kingdom and senior judges from the Commonwealth of Nations. It serves as the highest appellate court not only for the BVI, but also for many Commonwealth countries, as well as the United Kingdom's Overseas Territories, Crown Dependencies, and military sovereign base areas². Interestingly, it also hears occasional appeals from a number of ancient and ecclesiastical courts, including the Church Commissioners, the Arches Court of Canterbury, the Chancery Court of York, prize courts and the Court of Admiralty of the Cinque Ports.

The JCPC serves some, but not all³, of the Member States which look to the ECCA as its primary Court of Appeal.

As such, the JCPC will deliver judgments resulting from appeals in jurisdictions which have nuanced, or completely different, legal frameworks. An appeal to the JCPC arising from BVI proceedings is unlikely, for example, to see it apply the same legal principles as an appeal from the courts of Tuvalu or Kiribati.

The question often arises whether decisions of the JCPC on appeal from one jurisdiction are binding in other JCPC jurisdictions, or even in England and Wales.

² Anguilla, Bermuda, the BVI, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Saint Helena, Ascension, Tristan da Cunha, Turks and Caicos, Pitcairn Islands, British Antarctic Territory, British Indian Ocean Territory, South Georgia and the South Sandwich Islands, Akrotiri and Dhekelia, Isle of Man, Jersey, Guernsey, Alderney, Sark, Antigua and Barbuda, the Bahamas, Grenada, Jamaica, St Kitts and Nevis, St Vincent and the Grenadines, Tuvalu, Cook Islands, Niue, Brunei Darussalam, Mauritius, Trinidad and Tobago, and Kiribati.

Principle of Stare Decisis as it relates to the JCPC

Binding Precedent

Decisions of the JCPC bind all courts in the jurisdiction from which the relevant appeal came. A decision from the JCPC on appeal from the BVI is therefore binding on the BVI courts.

The JCPC is itself bound by any decision of the United Kingdom Supreme Court, when applying the law of England and Wales⁴.

JCPC decisions will also bind the courts of other JCPC jurisdictions where the same point of law arises for decision. This will be the case where, as very often, both jurisdictions apply English common law to the point, and there is no reason to suggest any difference between them in that regard.⁵

A decision of the JCPC will not be binding where, for example, a point decided under common law arises in a jurisdiction like Mauritius which applies the Mauritian Code Civil to the point, or in a jurisdiction where the common law differs on the point from the approach taken in the context of the earlier decision⁶.

In *Convoy Collateral Ltd v Broad Idea International Limited and Anor*⁷, the ECCA was tasked with determining whether a decision of the JCPC on appeal from the Hong Kong final Court of Appeal was binding on the BVI courts, or whether it was simply persuasive. The JCPC, at the time, served both the BVI and Hong Kong as their final appellate court. Justice of Appeal Webster (as he then was), delivering the judgment of the ECCA, held that the legal framework in respect of the point of law in

³ Dominica replaced the JCPC as its final appeal court in 2015 by its Constitution of Dominica (Amendment) Act, 2014; and Saint Lucia replaced it in 2023 by its Constitution of Saint Lucia (Amendment) Act, 2023.

⁴ *Willers v Joyce* [2016] UKSC 43, at [12]

⁵ See *Mance*, 'Privy Council Practice' (1st Edn.) (2017), at [5.06]

⁶ *Idem*.

⁷ BVIHMAP2016/0030 (Judgment 1 April 2020)

question was substantially the same across both jurisdictions and, hence, the decision of the JCPC on appeal from the Hong Kong final Court of Appeal was binding upon the BVI courts (including the ECCA, sitting in the BVI).

Persuasive Precedent

Judicial authority from another common law jurisdiction, while not binding, can constitute persuasive precedent if it is sufficiently analogous, and may guide the court's decision-making process.

For the BVI, decisions from the JCPC on appeal from other jurisdictions which do not engage an identical (or substantially identical) legal principle are still often highly persuasive, particularly when the legal principle involved is similar, or where there is a paucity of relevant case law in the BVI.

When assessing the binding nature or persuasive value of a JCPC decision from another jurisdiction, the BVI courts will consider, among other things, the following:

- (a) **Similarity of law.** The more closely the legal framework, principle or proposition aligns with that of the BVI, the more persuasive the decision is likely to be. Where that framework, principle or proposition is identical (or substantially so), the decision will be binding.
- (b) **Novelty of the legal issue.** In cases where the BVI courts have not yet had the opportunity to consider and decide upon a particular issue, a decision from the JCPC on appeal from a different jurisdiction is likely to provide valuable guidance and will be highly persuasive.
- (c) **Jurisprudential consistency.** If there is a consistent line of authority from the JCPC on a particular legal issue, even if those decisions

are on appeal from jurisdictions other than the BVI, that consistency is likely to be highly persuasive.

Exceptional Jurisdiction to Direct the Courts of England and Wales

In appropriate cases, the JCPC is empowered⁸ to issue a direction, known as a *Willers v Joyce* direction, to resolve an issue of English law that has been left unresolved by the English senior courts.

This exceptional jurisdiction was exercised for the first time by the JCPC in its landmark recent decision, on an appeal originating from the BVI, in the case of *Sian Participation Corp (in Liquidation) v Halimeda International Ltd*⁹. By its judgment, the JCPC held that a prior decision of the England and Wales Court of Appeal¹⁰ (the "EWCA decision") was wrongly decided. At that time, the practice of subordinate courts in England and Wales was to follow the EWCA decision. Recognising the need to correct this, the JCPC directed the courts of England and Wales to discontinue their adherence to the EWCA decision, on the basis it was reached *per incuriam*.

Conclusion

The JCPC is a unique final appellate court serving a wide array of jurisdictions, institutions and legal frameworks. It hands down judgments industriously, with no less than 47 reported decisions published during 2023¹¹. The number and diversity of jurisdictions served, compounded by the large number of decisions handed down, can create a measure of uncertainty when it comes to assessing the precedential value of its judgments.

⁸ See *Willers v Joyce* [2016] UKSC 43

⁹ [2024] UKPC 16; see also: <https://maples.com/en/knowledge-centre/2024/7/sian-of-the-time-privy-council-rejects-salford-estates-approach-to-arbitration-and-insolvency>

¹⁰ Namely *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575

¹¹ <https://www.jcpc.uk/decided-cases/2023.html>

While the doctrine of *stare decisis* dictates that only decisions of the JCPC on appeal from the BVI are binding upon its courts, or decisions on appeal from other jurisdictions which engage the same (or substantially the same) point of law, the principles established in wider JCPC decisions can also be highly persuasive under certain circumstances. It therefore remains for the local courts to interpret and apply the test in the circumstances of each case, leaving room for potential ambiguity in some instances.

The BVI courts in any event look to these wider decisions for guidance, particularly when they elucidate relevant legal principles, reflect a consistent approach to an issue, or fill gaps in BVI jurisprudence. This practice underscores the importance of the JCPC's role in shaping BVI law, and highlights the interconnectedness between common law jurisdictions within the wider Commonwealth.

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