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Case Comment

The Great Peace and precedent

S.B. Midwinter

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Cases: Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2002] EWCA Civ 1407; [2003] Q.B. 679 (CA (Civ Div))
Miliangos v George Frank (Textiles) Ltd [1976] A.C. 443 (HL)
Solle v Butcher [1950] 1 K.B. 671 (CA)
Young v Bristol Aeroplane Co Ltd [1944] K.B. 718 (CA)

*L.Q.R. 180* ONE aspect of the Court of Appeal's decision in the *Great Peace* case, supra ("Great Peace") that has not attracted much attention, but which is nevertheless of considerable practical and legal importance, is the question of whether either Toulson J. or the Court of Appeal had the power to declare *Solle v Butcher* [1950] 1 K.B. 671 bad law. It is a question dealt with briefly in the Court of Appeal's judgment, and it is submitted with respect that the court, having overlooked previous authority on the subject, in fact reached a highly questionable conclusion.

The Court of Appeal held that both it and Toulson J. were able to choose not to follow *Solle*. In support of this finding, Lord Phillips of Worth Matravers M.R. cited two cases, of which the most significant was *Noble v Southern Railway Company* [1940] A.C. 583 in which Lord Wright expressed his view (at p.598) as follows: "What a court should do when faced with a decision of the Court of Appeal manifestly inconsistent with the decisions of this House is a problem of some difficulty in the doctrine of precedent. I incline to think it should apply the law laid down by the House and refuse to follow the erroneous decision." This statement was applied by Lord Lane C.J. in *Holden & Co v Crown Prosecution Service* [1990] 2 Q.B. 261. In the *Great Peace*, Lord Phillips M.R. expressed some doubts as to whether this authority went far enough to support a finding that *Solle*, which had been followed in several subsequent cases, is not good law but concluded that the court had no other option but so to find.

What is perhaps surprising is that the Court of Appeal did not consider *L.Q.R. 181* the two “classic” authorities on this subject, *Young v Bristol Aeroplane Co* [1944] K.B. 718, CA and *Miliangos v George Frank (Textiles) Ltd* [1976] A.C. 443.

In the former of these, Lord Greene M.R. set out the exceptional circumstances in which the Court of Appeal might be entitled to regard itself as not bound by its earlier decisions. These are threefold and, as Lord Greene M.R. recognised, the first two are not really exceptions to the general rule at all. The first is where there are two earlier Court of Appeal decisions that are themselves irreconcilable—the court faced with this situation must clearly choose one to follow and hence one to ignore. The second is where the Court of Appeal decision, though not expressly overruled, is inconsistent with a subsequent decision of the House of Lords. Again, the reasoning is clear: the House of Lords cannot be expected to overrule every decision that is inconsistent with its judgment, so the overruling must in some cases be implied.

The third exception is where the earlier judgment was *per incuriam*. This requires inadvertence; it applies where the court on the earlier occasion was unaware of some relevant authority or legislation that would have had an impact on its judgment had it been made aware of it.

The Court of Appeal in *Solle* cannot be said to have been unaware of *Bell v Lever Brothers*. It is cited in the judgments. Denning L.J. specifically addressed the implications of the case. The problem is that Denning L.J. analysed those implications inaccurately and erroneously failed to follow a case by which he should have held himself bound.
The courts' approach when faced with this situation, in which the Court of Appeal fails to follow an earlier judgment of the House of Lords with which it is irreconcilable, was explored by the House of Lords itself in *Miliangos v Frank*. That case involved the question of whether judgments could be obtained in a currency other than sterling. In *Re United Railways of Havana and Regla Warehouses Ltd* [1961] A.C. 1007, the House had answered this question in the negative. In a later case, *Schorsch Meier GmbH v Hennin* [1975] Q.B. 416, faced with a very different world in which the strength and value of sterling could no longer be said to be guaranteed, the Court of Appeal (including Lord Denning M.R.) had refused to follow the earlier authority on what, as the House in *Miliangos* held, were fairly weak legal grounds. Thus when the question came before Bristow J. at first instance in *Miliangos* itself he was faced with a dilemma. Which to follow? He held himself bound by the earlier House of Lords case. The Court of Appeal, again including Lord Denning M.R., held itself bound by its own earlier decision and reversed Bristow J.

In the House of Lords, Lord Simon of Glaisdale firmly supported the Court of Appeal's interpretation of the law. He noted the opinion of Lord Diplock in *Baker v The Queen* [1975] A.C. 774 at p.788 that it was not open to a judge at first instance to hold a Court of Appeal judgment non-*L.Q.R. 182* binding on the grounds that it was *per incuriam*, and held that Bristow J. should have regarded himself as bound by the Court of Appeal authority, saying (at p.478): “Any other course is not only a path to legal chaos but in effect involves a subordinate court sitting in judgment on a decision of a superior court.”

A first instance judge should assume that the Court of Appeal has successfully distinguished the earlier House of Lords authority and must not engage in a review of the correctness of the decision of a superior court. As Lord Simon noted, this has a practical advantage in that, if the first instance judge makes clear that he or she feels bound by an authority that is itself in breach of the doctrine of precedent, the case should qualify for the “leap-frog” procedure to the House of Lords where the point can be determined without the need for a wasteful trip to the Court of Appeal. Should the case come before the Court of Appeal, it too should refuse to review the merits of an earlier decision taken at the same level of authority.

Lord Cross of Chelsea disagreed with Lord Simon. He pointed out that the sort of behaviour engaged in by Lord Denning could not have been foreseen in *Young v Bristol Aeroplane*, and concluded that Bristow J. acted correctly. None of the other members of the panel expressed a view on this question.

It would appear from this to be at least arguable that both Toulson J. and the Court of Appeal in *Great Peace* were bound to follow *Solle*. Their decision not to do so, particularly at first instance level, involves an inversion of the usual role of the courts that has the potential to cause serious confusion and injustice. The solution suggested by Lord Simon, the invocation of the leap-frog procedure, would have prevented the problem from arising and perhaps have provided the litigants with a more satisfactory authoritative resolution to their dispute.

If a similar case should come before the Court of Appeal now, then following the *Young v Bristol Aeroplane* principles the court will be free to choose which authority to follow. There is no reason (other than the obvious merit of the decision) for it to choose *Great Peace* over *Solle*. The position for first instance judges is even more difficult, and given the problems with *Great Peace* set out here, it may be safest for them to continue to follow the earlier authority.

The irony is, of course, that *Great Peace* itself would appear to have been decided *per incuriam*. The decision brings great benefits to the law of contract, but at a cost to the judicial process as a whole. It is to be hoped that the situation can be rectified before an unseemly judicial confusion results.

S. B. MIDWINTER.1


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1. Barrister.

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