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Computer Retrieval – Drawing The Line?

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The Master of the Rolls in England, Sir John Donaldson, said recently that he feared the use of a proliferation of useless materials from computers in presentations before the Court. He was probably echoing what Lord Diplock had to say for the House of Lords in *Roberts Petroleum Ltd. v. Bernard Kenny Ltd. (in liquidation)*.¹ In a lengthy per curiam speech, Lord Diplock in that case commented on the use sought to be made in the House of Lords and the Court of Appeal of previous unreported Court of Appeal judgments. The transcripts of shorthand notes of oral judgments rendered by judges of the Court of Appeal have been preserved in library space since 1951 and, since 1980, are included in a computerized data base available to practitioners. Lord Diplock strongly urged that the practice of citing such judgments should be discouraged. In this he was supported unanimously by his brethren.²

The Court of Appeal, said Lord Diplock, was there to decide the dispute between the parties and thus legal principles and previous authorities are tailored to meet the particular facts of each case. Decisions may also have involved agreements made by counsel as to the applicable law of a particular aspect. Against this background Lord Diplock felt that if a decision had not found its way into the generalized series of law reports³ or into a specialized series of reports, it was most unlikely to assist the House of Lords in its deliberations.

In the *Roberts Petroleum* case itself, Lord Diplock found that he gained nothing from the transcripts of four unreported cases before the Court. None, he said, laid down any principle of law not found in cases already reported. The result, he concluded, of having the transcript cited, was merely an unnecessary extension of the length of the hearing of the case.

Lord Diplock's comments should have been anticipated. In England there are a number of data bases with varying functions that may be called upon by the practitioner in preparing a case. The fact

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1. [1983] 1 All E.R. 564 (H.L.).

2. Lords Edmund Davies, Keith, Roskill and Brightman.

3. Such as the Weekly Law Reports or The All England Law Reports.

that previous unreported Court of Appeal decisions are now a part of a commercially operated data base is indicative of the breadth of the base and, presumably, the anticipated market. Four such transcripts were used in the Appeal to the House of Lords. It is also interesting that one such transcript had been the basis of a note in the Solicitors Journal before the *Roberts Petroleum* case came before the court.⁴

The solution to the problem, at least for the moment, from Lord Diplock's perspective, is a declaration that "the time has come" for the House of Lords to decline to allow unreported transcripts to be cited to that court unless leave to do so is given. And such leave would not be given only on the basis of:

"...counsel's giving an assurance that the transcript contains a statement of some principle of law, relevant to an issue in the appeal of this House, that is binding on the Court of Appeal and of which the substance, as distinct from mere choice, of phraseology, is not to be found in any judgment of that court that has appeared in one of the generalized or specialized series of reports."⁵

While one might have a good deal of sympathy with Lord Diplock's situation, the problem at hand is one that should be approached with some concern. The House of Lords approach is predicated on a reliance on the law reports' selection of cases and on the judgment of counsel not only that the transcript contains 'a statement of some principle of law' but also that it is 'binding on the Court of Appeal'! Thankfully, at least for the moment, all that is called for is an 'assurance' from counsel. Hopefully, Lord Diplock's solution is intended only as a warning to counsel not to 'pile-up' cited authorities to no purpose and if this is so then it can do no great harm. The attitude of the Court of Appeal is yet to be enunciated despite the concerns of the Master of the Rolls. Is that court burdened by previous unreported decisions of the trial courts and its own previous unreported utterances?

4. See 105 Solicitors Journal 281 — *Hudson's Concrete Products Ltd. v. D. B. Evans (Bilston) Ltd.*, [1961] C. A. Transcript 110.

5. *Supra* note 1 at p. 567.