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*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 03/24851/A03

Delivered: 05/10/2023

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Between:

DANIEL McATEER and AINE McATEER

Defendants/Appellants

and

SANJEEV GURAM and ANOOP GURAM

Plaintiffs/Respondents

Mr McAteer appeared as a Litigant in Person
Mr Maxwell (instructed by Mills Selig, Solicitors) for Mr Sanjeev Guram

Before: Keegan LCJ and Scoffield J

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] The simple question in this case is whether the Court of Appeal has jurisdiction to hear an appeal from the order of Master Redpath of 7 January 2013 in Chancery proceedings. It is unnecessary for us to explain the entire history of this case, or the related litigation, which is well documented in other judgments, particularly the most recent decision of the court in *McAteer & Anor v Guram & Anor* [2022] NICA 32.

[2] For present purposes, this court is only considering whether the order of Master Redpath, against which the appellants are seeking to pursue an appeal, arose from a referral to him under the Rules of the Court of Judicature (Northern Ireland) 1981, Order 36 ('Trials before Masters and Referees') or under Order 44 ('Proceedings under Judgments and Orders: Chancery Division').

[3] The Chancery Judge declined to hear the appellants' appeal on the basis that, since Master Redpath had proceeded under Order 36, the correct forum for the

appeal was the Court of Appeal. This court raised the question of whether Order 44 was in fact the correct route, with the appeal then being to the High Court. We invited submissions from both parties on this question, which we have considered. At the outset we also note that Mr McAteer disputed the respondents' standing in these proceedings. We do not need to determine the substance of that claim for the purposes of this adjudication on jurisdiction. We were content to hear from Mr Maxwell, on behalf of one of the respondents, without prejudice to the objection made to his standing, in order that the court could be assisted by arguments on both sides, particularly in circumstances where Mr McAteer was acting as a litigant in person for the appellants.

Which rule?

[4] The significance of the distinction between Order 36 and Order 44 is that, where a matter is referred under Order 36, "an appeal shall lie to the Court of Appeal from any judgment, order or decision of the Master (Chancery) given or made on the hearing or determination of any cause, matter, question or issue ordered to be tried before him under Order 36 rule 1" (see Order 58, rule 3). However, where accounts or inquiries are conducted under Order 44, subject to a limited qualification in respect of time for appeal (which is not relevant for present purposes), Order 58, rule 1 applies to the master's order as it applies to *any* judgment, order or decision of a master.

[5] Order 58, rule 1 provides:

"Except as provided by rules 2 and 3, an appeal shall lie to a judge in chambers from any judgment, order or decision of a master ..."

The procedure followed below therefore determines the correct forum for the defendants' appeal. This is a critical question in any case given the difference between an appeal from the Master to the High Court which is generally a re-hearing and an appeal to the Court of Appeal which is more circumscribed and directed towards errors of law.

[6] In previous proceedings we note that Girvan LJ had expressed the view (on which the appellants relied) that any appeal from the order of Master Redpath would go to a judge of the High Court.

[7] When the respondents appeared before Huddleston J, however, after submissions which seem to have arisen late in the day, he was persuaded that the correct forum for the appeal was the Court of Appeal. He therefore dismissed the appeal. His order of 20 June 2023 contains the following operative provisions:

"IT WAS Ordered that the Appeal be dismissed on the following grounds:

1. That the appeal against the Master's decision on an account and enquiry (which had been referred to him by the CANI [Court of Appeal in Northern Ireland]) being a matter to which O 36(1) applied was properly a matter in respect of which the appeal lay to the CANI pursuant to O 58 r 3.
2. That the substance of the issues raised in the appeal were in any event subsumed under the terms of a Tomlin Order entered into between the appellant and the Bank which they were not seeking to challenge but which (by virtue of its terms) acknowledged that settlement was in full and final settlement in respect of all matters between them as Bank and customer AND that no utility flowed from the appeal.
3. That the appeal therefore be dismissed."

[8] It is readily apparent that there are several differences between the Order 36 and Order 44 procedures which we will explain. Under Order 36, in any cause or matter (other than a proceeding by the Crown) if the question in dispute consists wholly or partly of matters of account, the court may at any time order the whole cause or matter or any question or issue of fact arising therein to be tried before a master, or before a referee or other arbitrator respectively agreed on by the parties. This requires an order of the court ordering certain matters (which should be specified in the order) to be tried by another person. Where such an order is made, that order should be lodged with the referee within 14 days, who should then fix the date of the trial: see Order 36, rule 3.

[9] Notwithstanding the reference to those matters being "tried" by the referee, Order 36, rule 2 makes clear that, where such a reference is made, the procedure will be that, unless the court otherwise orders, further consideration of the cause or matter shall stand adjourned "until receipt of the referee's report." If the court departs from this usual approach, it should give directions to that effect: see Order 36, rule 4(5). The referee is obliged to make a report, which should be referred to the court and served on the parties: see Order 36, rule 4(1). The referee may in his report submit any question arising therein for the decision of the court or make a special statement of facts from which the court may draw inferences: Order 36, rule 4(2).

[10] Importantly, the above procedure envisages the matter generally coming back to the judge for further decision-making on foot of the referee's report. When the report is received, the court may adopt it in whole or in part; vary it; require an explanation from the referee; remit further issues for further consideration by the referee or another referee; and/or decide the question originally referred to him,

either with or without additional evidence: see Order 36, rule 4(3). Order 36, therefore, allows a judge to hive off certain issues for trial by another person (who may or may not be a master) but subject to the court's power to reject the content of the referee's report in disposing of the proceedings. In our experience, this is a power which is used relatively rarely.

[11] Two other means of matters of account being referred to a master of the High Court are set out in Orders 43 and 44. Order 36, rule 1 is expressly "without prejudice to Orders 43 and 44." In other words, it is recognized that they provide separate means of referring certain matters to a master which operate independently of the Order 36 procedure.

[12] Order 43 in particular allows the court to make a summary order for an account to be taken (see rule 1(3)) or to direct any necessary accounts or inquiries to be taken or made (see rule 2(1)). Such an order will be made upon application by a party by way of summons. There is no suggestion that the Order 43 mechanism was invoked in the present case. Usually, a summary order will be made towards the start of the proceedings. A direction for enquiries or accounts can, however, be made at any stage of the proceedings. Sometimes this will be after judgment; but it may also be used as an interlocutory proceeding in order to clarify matters at issue within the proceedings. Where the court directs the taking of an account or the making of inquiries, it should give directions as to how this should occur: see Order 43, rule 3.

[13] The third route by which accounts might be required to be taken is under Order 44. Unlike Order 43, which applies to any proceedings before the High Court, the Order 44 procedure is limited to proceedings in the Chancery Division. As the title of the Order ('Proceedings under judgments and orders: Chancery Division') suggests, it permits a judge in Chancery proceedings to order certain ancillary proceedings to be conducted where the court has given a judgment (which, by virtue of Order 44, rule 1, includes references to an order). By virtue of rule 3(1), the court can give directions which make it necessary to proceed in chambers under the judgment. Where it does so, the court may also give further directions for the conduct of those proceedings, which can include (although is not limited to) the manner in which any account or inquiry is to be prosecuted. Rules 5 to 8 of Order 43 apply to particular classes of proceedings under judgments and are not relevant for present purposes.

[14] The outcome of proceedings under a Chancery judgment pursuant to Order 44 will be an order from the master. That is clear from Order 44, rule 11(1), which provides as follows:

"The result of proceedings before a master under a judgment shall be stated in the form of an order."

Subject to any direction of the master under paragraph (3) of that rule or otherwise, an order under rule 11 “shall have effect as a final order disposing of the cause or matter in which it is made.” It is also to have immediate binding effect on the parties to the cause or matter: see rule 11(4). In light of the fact that the master’s order will be dispositive, provision is made for appeal against the master’s order by Order 44, rule 12(1):

“... Order 58 rule 1 shall apply to an order under this Order as it applies to any judgment, order or decision of a master.”

[15] The discussion above highlights the key differences between the Order 36 and Order 44 procedures. The Order 36 procedure requires an order referring a matter for trial to a referee (who may be a master) and the referee making a report back to the court, with the judge then generally conducting a further stage of hearing in which he or she decides what to do with the report as part of the trial of the cause or matter. The Order 44 procedure will follow from a judgment where the matter is then sent to the master to give effect to matters left outstanding in the judgment and the master’s further order will generally be final. The master’s decision is expressed in the form of an order and (subject to any direction to the contrary) will have effect as a final order.

[16] Although there is some flexibility in both procedures where directions are given to modify the usual approach, under Order 36 the matter will generally come back to the judge for further deliberation and a judgment; whereas under Order 44, the judge’s involvement will generally have concluded with the judgment and the master will be expected to dispose of the outstanding matters referred to him under the judgment.

[17] In the present case, Master Redpath’s order dated 7 January 2013 refers to enquiries having been “directed by the Order dated 20 June 2008”, the date of the substantive judgment. It goes on to refer to the Master having read “the documents recorded on the court file commencing with the said Order and the Judgement of even date therewith and the documents in the case”, as well as having heard counsel. The Master’s order then notes that the enquiries stood for judgment before declaring what balance was due from the appellants to the respondents. The Master also made a decision on the costs of the enquiries. The appellants have sought to appeal against that order.

Conclusion

[18] Mr Maxwell is correct to say that the order made by Deputy Judge Peter Smyth QC in June 2008 does not make clear which provision the judge was purporting to invoke in sending the further accounting exercise to the master. It would have been preferable if this had been examined and then expressly adverted to in the judge’s order.

[19] However, we consider that there are a number of factors which indicate that the power being exercised by the judge was (or was intended to be or is most consistent with) that under Order 44, rather than the referral power under Order 36. Those factors include the following:

- (a) The referral to the master was made at the time of the judgment. The most natural provision of the rules to be invoked in that regard is the specific provision which allows for proceedings under a judgment, that is to say, a quantification exercise giving effect to the findings made in the judgment, where the judge had determined the issues of fact and liability. (Although the written judgment is wrongly headed in the Queen's Bench Division, the judge's order directing the accounts and inquiries is correctly headed as having been made in the Chancery Division.)
- (b) The judge's order commences, "Upon the trial of this action and counterclaim ...". It proceeds on the basis of the trial having been conducted, rather than aspects of the case having been referred for trial under Order 36.
- (c) Relatedly, the judge's order does not adjourn the proceedings, as one would have expected to be the case if he proceeded under Order 36. Nor is there any reference to the master acting as a referee or to his producing a referee's "report". It was not envisaged that the matter would come back before the judge, with even the costs of the account and inquiry being specified as being in the discretion of the Master (Chancery).
- (d) Rather, the order for accounts and inquiries to be taken and made follows upon the substantive judgment of the court (namely the declaration that the plaintiffs were induced to enter the contract to sell the Roebuck Inn by the actual undue influence of the first appellant and the order that the contract, conveyance and lease should be set aside). The accounts and inquiries to be taken and made concerned the outworking of those findings. That is also reflected in the wording of the master's short written ruling on the matter, which (at para [1]) states that, "This Account and Enquiry arises from the decision of Mr P D Smyth QC sitting as a Deputy Judge of the High Court delivered on 20 June 2008."
- (e) Detailed directions were given as to the accounts and enquiries, consistent with the giving of such directions under Order 44, rule 3(1).
- (f) The understanding of the parties, including that of Master Redpath, appears to have been that he would issue an order - as he did - which would be dispositive of the accounting exercise which had been referred to him, rather than a report which would require further substantive consideration by the trial judge. That is much more consistent with the Order 44 procedure than

the Order 36 procedure. It is also consistent with the judge's order that the relevant payment should be "determined by the Master (Chancery) ..."

[20] Mr McAteer's submissions have referred to the fact that there are two versions of the order made by the judge on 20 June 2008. They are materially identical in most respects. However, the version filed on 23 June 2008 did appear to contemplate the judge determining the precise figure to be paid after the accounts and inquiries had been undertaken and certified by the master (albeit that this would involve only a very simple arithmetical calculation using figures which had already been certified by the master). In contrast, the version filed on 27 February 2009 was amended to remove reference to the judge making the final determination on this issue. The final sum due (if any) was simply to be determined by the master. We proceed on the basis either that the judge realized that the initial version of the order was incorrect and did not reflect his intention; or that he revisited the issue of the appropriate means of concluding the decision and decided that it was unnecessary for the matter to come back to him for final resolution. In either event, we view the later filed version of the order as superseding the earlier version and note that it is that version (which did not require any referral back to the judge) which seems to have been given effect.

[21] One other matter referred to by Mr Maxwell is that the Order 44 procedure is for judgments which require to be implemented in chambers. The White Book (1999 Edition) refers to Order 44 dealing with procedure under Chancery judgments "which require to be implemented in chambers, particularly orders for accounts and inquiries" (see section 44/0/2). On the other hand, the master's order of 7 January 2013 refers to the proceedings before him having been conducted in open court (so that he found it unnecessary to certify for counsel's attendance). Nonetheless, we do not consider that determinative. To our mind most of the indicators point to the Order 44 procedure having been used. Accounts and inquiries, due to their nature, will often be conducted in chambers. The fact that the master may have chosen to deal with them in open court in this case does not, in our view, point strongly towards the matter having been referred to him under Order 36.

[22] Insofar as there is any doubt about the process which was to be followed or was followed in this case, we consider that any doubt should be resolved in favour of the process which permits a litigant the usual right of appeal they would expect in challenging a decision of a master, namely a right of appeal to a judge of the High Court (with, as necessary, a further appeal on a point of law to the Court of Appeal). In an Order 44 circumstance, an appeal from an order is to a judge of the High Court under Order 58, rule 1, rather than to the Court of Appeal.

[23] Having conducted an analysis of the litigation history and the purpose of the competing rules we conclude that the better, and correct, view is that the master proceeded under Order 44. In light of the foregoing, we conclude that the judge was in error in determining that he had no jurisdiction to consider the proposed appeal

against the master's order which the defendants were seeking to pursue before him and that the correct forum for the appeal was the Court of Appeal.

[24] We acknowledge that there was an alternative basis upon which Huddleston J dismissed the appeal, expressed second in his order, namely that he considered that it was an improper attempt to re-open a matter which had already been compromised by the appellants in a settlement reached with the bank. Given the way the case progressed at the lower court on submissions only, with a focus on jurisdiction, that cannot be a binding conclusion.

[25] Accordingly, we will set aside the judge's order dismissing the appeal and remit the matter for consideration by the High Court. Given the clear view expressed by Huddleston J in relation to the merits of the appeal, which will have to be examined in the course of the further hearing of the appeal before the High Court, we consider the fairest course to be to remit the matter for consideration and determination by a different judge of the High Court. We reject Mr McAteer's suggestion that this court should simply proceed to deal with the appeal in substance and substitute a new order for that of Master Redpath. Not only would that be inappropriate if this court is not in fact the correct forum for the appeal, as we have explained, but we also are not persuaded that the substance of the appeal is necessarily as straightforward as Mr McAteer has suggested.

[26] We will hear from the parties as to any question of costs.