Precedent value of Chancery Masters' decisions

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Role of Chancery Masters

The Masters of the Chancery Division of the High Court have always played an important role in getting Chancery litigation trial-ready. Traditionally associated with such matters as case management conferences, procedural applications under the CPR, and the approval of compromises, their decisions were often of vital importance for the parties, but of little wider significance. After all, how much value could a decision on, say, whether to exercise discretion to extend time for the service of witness statements have, in cases with a completely different factual and procedural context?

But that picture has become out-dated. Pursuant to CPR rule 2.4, an act of the High Court may be performed *"by any judge, Master, Registrar in Bankruptcy or District Judge of that Court"*, subject to any contrary enactment, rule or practice direction. The principal source of such limitations is Practice Direction 2B, which excludes such matters as search and freezing orders (paragraph 2), and orders which relate to the liberty of the subject, or to appeals from Masters and District Judges. In relation to Chancery matters specifically, though, the jurisdiction of Masters is almost unlimited (save for the specific exceptions for Patents Court business and company law derivative actions in paragraph 7B). This is contrasted with the position of District Judges, who are excluded from a whole range of everyday Chancery matters, such as trustees' applications for *Beddoe* relief, and Variation of Trusts Act 1958 applications, unless they have the consent of the local Supervising Judge. This "anything goes" approach to the jurisdiction of the Chancery Masters is bolstered by modern practice: as the Chancery Guide makes plain (at paragraphs 14.3 and 14.4),

Masters can and do deal with the whole range of Part 7 and Part 8 claims, including both applications and trials, and it is expected that all applications with Masters can deal with (other than interim injunctions, which are normally heard in the applications court by a High Court Judge) will be listed in the first instance before a Master.

The result is that the Chancery Masters now decide a wide range of cases, not only at the interlocutory stage, but also in making final orders after trial. At the same time, the electronic "reporting" of judgments which would never previously have been formally reported in any series of law reports, however minor or specialist, means that more decisions of Chancery Masters than ever before are making their way onto Westlaw, BAILII and the like. Any lawyer researching a point of law is now likely to come across these decisions. But what precedent value do they have? Should they be cited before other courts? Does anyone have to follow them?

Rules of precedent

The rules of precedent in the English courts are relatively well-understood at the highest levels. Decisions of the Supreme Court bind all lower courts, and generally itself too, subject to an exceptional power to depart from its own previous decision. Court of Appeal decisions bind all lower courts and also itself, subject only to narrow and well-known exceptions set out in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. Below the Court of Appeal, the position has always been less clear.

The High Court is not strictly bound to follow its own previous decisions, but they are highly persuasive: *"the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong"* (Halsbury's Laws of England, Civil Procedure, vol 11, para 32).

Whether the County Court was bound to follow a first-instance High Court decision (as opposed to one made on appeal from the County Court) was open to dispute until the Court of Appeal's decision in *Howard de Walden Estates Ltd v Aggio* [2007] EWCA Civ 499. The Court of Appeal held that even though both courts exercised the same first instance jurisdiction, they were not co-ordinate courts (as one High Court Judge is to another): the High Court is a superior court, and the County Court is an inferior court, and so the latter is bound by the former's decisions (see paras 86 to 95).

Masters' decisions: within the High Court

So where does that leave Chancery Masters (and indeed, Queens Bench Masters too)? No consistent position clearly emerges from the disparate case law.

In *Randall v Randall* [2014] EWHC 3134 (Ch) Deputy Master Collaço Moraes held that *"a decision of a Master and a Judge of the High Court are of the same standing in terms of the doctrine of precedent"* since *"[t]hey both are judges of the High Court exercising the same jurisdiction"* (at para 82), and it was therefore open to him to choose which of two earlier High Court judgments to follow, in circumstances where one was a decision of a Master and the other a decision of a Circuit Judge sitting as a High Court Judge (though nothing turned on that judge not being a High Court Judge).

This was followed by Master Matthews in *Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 874 (Ch). He noted that in the past *"the 'off the cuff' view of most High Court judges would have been that masters were obviously inferior to, and therefore bound by the decisions of, judges"* (at para 39) but considered that *"the world has moved on"* (para 40), including in the abolition of the right to a rehearing before a Judge of an application previously made to a Master. He also noted that in *Howard de Walden Estates Ltd* the Court of Appeal had expressed itself in terms of the inferiority of the County Court to the High Court, and not in terms of the status of the individual judges involved (paras 42-43). However, on appeal ([2016] EWHC 3844 (Ch)) David Foxton QC, sitting as a Deputy High Court Judge, took the opposite view, and concluded that *"the fact that a High Court judge and a master sit in the same court, namely the High Court, is not determinative of the question of whether the doctrine of precedent applies as between them"* (para 61) and that *"the decision of a High Court judge in terms of its clear ratio is binding on a master, absent either conflicting decisions of another judge at the same level of the High Court judge, or obviously of superior courts"* (para 67).

Two later decisions of Master McCloud – *Paxton Jones v Chichester Harbour Conservancy* [2017] EWHC 2270 (QB) and *Abdule v Foreign and Commonwealth Office* [2018] EWHC 692 (QB) – followed the decision of Master Matthews without reference to David Foxton QC's different view, with Master McCloud in the latter case referring to *"the relationship of equality between judgments of puisne judges and Masters at first instance"* (para 82).

Given the state of the case law, the status of Chancery Masters' decisions cannot be regarded as settled once and for all, and it would plainly be desirable for the Court of Appeal to address this (as it did in *Howard de Walden Estates* in relation to the County Court). The position is of course exacerbated by the fact that the decision of a higher court on a question of precedent is extremely unlikely to form part of the *ratio* of that court's decision. If a Master's decision on a point of law is appealed to a High Court Judge (including for present purposes a Circuit Judge or Recorder sitting as a High Court Judge under section 9(1) of the Senior Courts Act 1981, or a lawyer sitting as a Deputy High Court Judge under section 9(4)), and it is said that the Master went wrong by failing to follow a previous decision of a different High Court Judge, the appeal will not be allowed or dismissed by reference to precedent alone. The Court hearing the appeal has to decide itself whether, on the substantive point of law, it will follow the earlier decision when (as explained above) it is not strictly bound to. If the appeal is allowed, it is because the appeal court agrees that the law is as stated in the earlier decision, and the Master made an error of law in reaching a different conclusion. If the appeal is dismissed, it is because the appeal court thinks that the earlier decision was wrong and declines to follow it, notwithstanding that it might be said that the Master ought to have followed it anyway as a matter of precedent. In either case the *ratio* is the appeal court's reasons for finding the substantive law to be as it is. Its views on how the Master should have treated the earlier decision can only ever be *obiter dicta*.

Nevertheless, it is likely that for practical purposes the decision of David Foxton QC in *Coral Reef* was correct, and will be followed in future – not least since it is cited and explained in the *White Book* notes to CPR rule 2.4 (so it is unlikely now to be overlooked) and is treated there as authoritative. This must be right as a matter of practical justice: the organisation of the judicial system in England and Wales is the result of an organic process, and no special significance can really be attributed to the fact that Master and Judges both hold judicial office in relation to the same court. As David Foxton QC pointed out (*Coral Reef* para 61), the fact that appeals from Masters' decisions are heard by High Court Judges surely makes clear their relative status. It would be peculiar if decisions of High Court Judges on appeal from Masters were binding, and other decisions were not – and would be inconsistent with the approach taken in *Howard de Walden Estates*, which refused to draw that distinction between High Court decisions at first instance and those on appeal from the County Court.

This does not mean that the decisions of Chancery Masters have no value except to the parties. True it is that they are probably now bound to follow the decisions of High Court Judges, whilst such Judges are not bound to follow Masters' decisions. But they can still have great practical significance. As Master Matthews noted in *Coral Reef, "no High Court judge, having had cited to him or her the reasons for a decision of a master that was in point, would today simply ignore them"* (para 46). David Foxton QC did not dissent from this, pointing out that *"judgments of masters are now sometimes cited on particular issues and are likely to have particular weight when the master is a specialist in the relevant area"* (para 58). Masters' decisions may not bind, but they can still inform and persuade.

Furthermore, since it is always open to a High Court Judge to decline to follow a previous decision of a High Court Judge because it is wrong, the practical position when appearing before a High Court Judge is not very much different between the previous decisions of Judges and Masters. Both are likely to be followed if the present tribunal agrees with them, and to be departed from if it does not!

Masters' decisions: the County Court

The case law does not address the question of whether Masters' decisions bind judges sitting in the County Court. It is at least arguable that combined effect of *Howard de Walden Estates* and CPR rule 2.4 is to make Masters' decisions binding in the County Court, on the basis that (i) the County Court, as an inferior court, is bound by the decisions of the High Court, as a superior court (as explained above), (ii) when Masters make decisions they do so in the exercise of the jurisdiction of the High Court, and (iii) the special considerations which arise as between Masters and High Court Judges do not arise as between the High Court and County Court as separate courts.

However, that would be a rather surprising practical conclusion. Circuit Judges are not usually seen as hierarchically inferior to Masters (and indeed Master Matthews, who decided *Coral Reef* at first instance, was subsequently appointed as a Specialist Circuit Judge). That this is the commonly-held view is borne out by the arrangements for judicial salaries: Circuit Judges and Masters receive the same salary, with the Senior Master and the Chief Master paid a little more, and Senior and Specialist Circuit Judges more still. Circuit Judges are also seen primarily as trial judges, with a

relationship to the District Judges of their courts not dissimilar to the relationship between High Court Judges and Masters (albeit that in Chancery matters the jurisdiction of District Judges is rather more limited, as explained above). Most tellingly, appeals from Circuit Judges are heard by High Court Judges (and Deputies), and not by Masters, pursuant to CPR Practice Direction 52A, paragraph 3, which expressly distinguishes Masters and Judges for this purpose.

Whilst *Howard de Walden Estates* did not advert to this point, it probably does leave the common-sense conclusion open as a matter of law: the Court of Appeal referred expressly (at para 89) to the decisions of High Court Judges and Deputy High Court Judges, to make the point that the latter would be equally binding in the County Court. The Court of Appeal must surely therefore be taken to have intended not to decide anything about the status of Masters' decisions. Indeed, it may simply be that it would not have occurred to anyone to argue that Masters' decisions should be binding.

Without authority the position is unclear, but it seems likely that Masters' decisions should be afforded the same treatment in the County Court as before a High Court Judge: as helpful and persuasive authority, often with the benefit of particular expertise in the subject matter, and not too lightly to be departed from (and especially in matters more often seen by Chancery Masters than by most judges of the County Court e.g. in relation to probate), but not binding as a matter of precedent.

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