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Kwan Ho LAU
Singapore Management University, kwanholau@smu.edu.sg

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Precedent within the High Court

Kwan Ho Lau*

School of Law, Singapore Management University, Singapore
*Author email: kwanholau@smu.edu.sg

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Abstract
A number of Masters and a Registrar have recently indicated that, when exercising High Court jurisdiction, they are not bound strictly to follow prior decisions made by Judges in the High Court. This represents a notable departure from the position established by and within the High Court, where since the Judicature Acts of 1873 and 1875 an unquestioning obeisance of the Master and Registrar towards such decisions has been generally expected and offered. Delving into questions of power, authority and jurisdiction, and examining relevant legislation such as the Civil Procedure Rules, this paper constructs and analyses various arguments for and against recognising the co-equivalence of decisions of Judges, Masters and Registrars in the High Court.

Keywords: precedent; High Court; statutory interpretation

Introduction

Something has erupted in the High Court of Justice. A number of Masters and a Registrar have declared that they are not strictly bound, when exercising High Court jurisdiction, to follow the decisions of High Court Judges. The latest retort from the latter is that they are. That is unlikely to settle the matter, for the question goes to the obligation of one to follow the other. Issues of precedent are of course hardly foreign to a common law jurisdiction. The surprising thing is how long it took for this particular relationship to arise for scrutiny.[1]

Over 20 years ago, Professors MacCormick and Summers wrote that:

> It might be said that granting a trial judge power to depart from generally binding precedent only reinforces the already existing tendency in some places of some trial judges to become petty tyrants. Also such a power would signify that upper court precedent in the trial courts cannot be relied upon, either for out-of-court planning or for purposes of preparation for the trial of disputed facts. On the other hand, it could be argued that trial judges are closer to the facts and the parties, and thus are in a better position to feel the force of arguments in favour of departures, so to do justice or serve policy better. Moreover, it may be that allocation of initial power to depart to trial judges may ease the burden on the poor litigant. Obviously, this matter requires more intensive study than we can give it here.[2]

†I am grateful to Professor Goh Yihan and the anonymous reviewers for their comments which improved this paper. All errors are solely mine.

[1]The present debate at least does not centre around lucre, tenure or judicial independence. Interesting issues relating thereto were recently canvassed in Australia and Canada; see *Austin v Commonwealth of Australia* (2003) 215 CLR 185; *Masters' Association of Ontario v Ontario* (2011) 105 OR (3d) 196.

[2]DN MacCormick and RS Summers 'Further general reflections and conclusions' in DN MacCormick and RS Summers (eds) *Interpreting Precedents* (Aldershot: Ashgate, 1997) p 548.

An opportunity for one such study has presented itself through the efforts of the Masters and Registrars (collectively referred to herein as Masters for convenience, unless the context otherwise requires). This paper situates their claims against the statutory background and takes into account relevant developments in this and other jurisdictions. Although the issue might once have been thought straightforward, it now requires closer examination owing to legislative changes and the increased stature of the Master. It has come to prominence also because contemporary Masters decide a considerable number of matters, and they in turn must confront what seems an increasing wave of judgments handed down by a maximum statutory complement of 108 puisne High Court Judges,[3] not to mention the decisions of the Deputy High Court Judges, Circuit Judges and Recorders who variously sit as judges in the High Court.

1. History

Masters, according to guides issued by the Chancery Division and Queen's Bench Division (QBD), decide at case and costs management conferences as well as on urgent and interim applications, among other matters.[4] That description belies both the antiquity of their office as well as the sheer volume of pre- and post-trial work that they carry out in a judicial capacity. Indeed it would be impossible to embark on the present study without beginning with the historical status and position of the Master within the High Court.

Of this Master McCloud has provided an illuminating description.[5] As early as 1837, Masters were placed in the Court of Queen's Bench, Court of Common Pleas and Court of Exchequer to conduct the civil business of those courts.[6] Masters in Chancery – who had appeared on the scene much earlier[7] –

[3]Although the High Court is presently operating with less than that number of puisne Judges.

[4]*Chancery Guide 2016* (London: HMSO, 2016) paras 15.1–15.27; *The Queen's Bench Guide 2018* (London: Judiciary of England and Wales, 2018) para 9.1.1.

[5]*Abdule v Foreign and Commonwealth Office* [2018] EWHC 692 (QB) at [72]–[80]. Two of her predecessors had earlier expounded on the office as well (see AS Diamond 'The Queen's Bench Master' (1960) 76 LQR 504; IH Jacob 'The Masters of the Queen's Bench Division' (1972) 25 King's Counsel 6; IH Jacob 'The duties of a Master of the Queen's Bench Division' (1979) 45 Arbitration 26). See generally also LJ Silberman 'Masters and magistrates part I: the English model' (1975) 50 NYU L Rev 1070; LJ Silberman 'Masters and magistrates part II: the American analogue' (1975) 50 NYU L Rev 1297.

[6]It has been described that, before 1837, other court officials like clerks and prothonotaries did much of the work that would be performed by the common law Masters newly arrived on the scene: RW Bentham and JM Bennett 'The office of prothonotary' (1959) 3 Syd L Rev 47 at 53–54.

[7]For some historical and comparative accounts see *Lui Tao v Shu Yao Lee* [1950] VLR 488 at 493–499; WP Pain 'Masters in the Chancery Division of the High Court' (1897) 22 Law Magazine and Law Review (4th Series) 169; JC Fox 'The chief clerks in Chancery and their predecessors' (1913) 29 LQR 418; HE Bellew 'Masters in equity suits' (1925) 5 Boston U L Rev 221; B Ginsburg 'Masters in Chancery in Massachusetts' (1926) 6 Boston U L Rev 172; WL Carne 'A sketch of the history of the High Court of Chancery from its origin to the Chancellorship of Wolsey' (1927) 15 Georgetown LJ 426 at 454–458; HF Carey et al 'Masters in Chancery' (1933) 5 Illinois L Rev 476; 'Masters in the Chancery Division' (1933) 77 SJ 37; 'The office of Master' (1937) 81 SJ 225; M Berzon 'Masters in Chancery' (1939) 8 Law Society Journal 616; 'Extinct officials' (1940) 189 LT 178; 'Chamber procedure: ancient and modern' (1944) 94 LJ 229; R Strichartz 'Masters and their fees' (1949) 3 Miami Law Quarterly 403; JR Bryant 'The office of Master in Chancery: early English development' (1954) 40 American Bar Association Journal 498; JR Bryant 'The office of Master in Chancery: colonial development' (1954) 40 American Bar Association Journal 595; JR Bryant 'The office of Master in Chancery– development and use in Illinois' (1954) 49 Nw U L Rev 458; *Report of the Committee on Chancery Chambers and the Chancery Registrars' Office* (Cmnd 967) (London: HMSO, 1960) paras 5–25; RE Ball 'The Chancery Master' (1961) 77 LQR 331; RW Bentham and JM Bennett 'The development of the office of Master in equity in New South Wales' (1961) 5 Syd L Rev 504; CG Brettingham-Moore 'The office of Master' (1963) 1 U Tasmania L Rev 842; CP Jacobs *Proceedings in the Master's Office* (Melbourne: Law Book Co, 1969) pp 1–10; Irish Committee on Court Practice and Procedure *The Jurisdiction of the Master of the High Court* (Sixteenth Interim Report; Prl 2350) (Dublin: Stationery Office, 1972); JM Greaney 'Trials before Masters: a procedural and substantive primer for the practicing lawyer' (1978) 63 Massachusetts L Rev 195; PG O'Dea 'The role of the Registrar in Hong Kong' (1979) 5 New Zealand Recent Law 155; WC Lee 'The role of Masters in Supreme Court practice' (1981) 11 Queensland Law Society Journal 115; DI Levine 'Calculating fees of Special Masters' (1985) 37 Hastings LJ 141; LE Condon 'South Carolina's Master in equity: a modern solution to an old problem' (1991) 30(2) Judges' Journal 32.

fared worse, their office having been abolished in 1852.[8] In 1867, legislation gave the common law Masters such powers as controlled by rules of court, enabling them to transact business which a Judge in chambers could transact (save for matters relating to the liberty of a subject). Masters were later attached to the Supreme Court and could perform such business as directed by rules of court.[9] The Master's office continued through the Supreme Court of Judicature (Consolidation) Act 1925[10] and to the Supreme Court Act 1981.[11] Masters of the QBD were properly described nowadays as judges attached to the Senior Courts, QBD.

To this may be added a brief account of the Master in Chancery, who started out as amanuensis, disappeared as mentioned in 1852 but re-emerged later with some – but not all – of his original judicial functions, a number of these having been transferred to other bodies owing to legislative and policy changes.[12] A separate point is that the judicial officers sitting in the High Court today also include the Insolvency and Companies Court Judges (formerly known as Registrars in Bankruptcy), Costs Judges (otherwise known as Taxing Masters) and District Judges of the Family Division Principal Registry.

The genealogy of the Masters reveals that what jurisdiction, authority and function they initially had was devolved from the Judges, and only as prescribed by secondary legislation. Appeals from their decisions were directed to the Judges in chambers, who typically conducted a full rehearing of the matter. It was therefore little surprise then that decisions of puisne Judges were viewed as binding on the Masters under the doctrine of precedent.

It was reported in 1888 that a Bankruptcy Registrar considered himself bound by an earlier ruling of Cave J.[13] In 1896,[14] North J held that a Taxing Master had to follow a previous decision of Kay J (as he then was) when making an order under the Solicitors' Remuneration Act 1881.[15] This attitude persisted into the next century. In 1961, Master Ball wrote that although Chancery Masters inevitably had to make incidental decisions on law, they could not decide points of law; this is rendered less cryptic if he is taken to mean that the Masters could not *conclusively* decide them.[16] Other instances are found in *The Fairport*,[17] *Re National Employers Mutual General Insurance Association*[18] and *O'Brien v Seagrave*.[19]

This position was also presumed correct by counsel appearing in the High Court. In *Hamilton v Martell Securities Ltd*,[20] counsel had conceded in the court below that the Master was bound by a prior decision of a Deputy High Court Judge; on appeal, Vinelott J passed no adverse comment on this. More recently, counsel accepted in *Eli Lilly & Co Ltd v James*[21] – both at first instance and on appeal – that a decision of Gage J (as he then was) was binding upon a Master.

[8]See generally PI McMahon 'Field, fusion and the 1850s' in PG Turner (ed) *Equity and Administration* (Cambridge: Cambridge University Press, 2016).

[9]Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66), s 77. This Act also merged the courts of common law and equity.

[10]15 & 16 Geo 5 c 49.

[11]1981 c 54. Now retitled the Senior Courts Act 1981.

[12]E Heward *Masters in Ordinary* (Chichester: Barry Rose, 1990) pp 68–73.

[13]*Re Scharrer, ex p Tilly* (1888) 20 QBD 518 at 519.

[14]*Re Sanders' Settlement* [1896] 1 Ch 480 at 486.

[15]44 & 45 Vict c 44.

[16]RE Ball 'The Chancery Master' (1961) 77 LQR 331 at 345.

[17][1967] P 167 at 179 (Registrar bound by decision of Phillimore J).

[18][1995] BCC 774 at 775 (Registrar accepting binding effect of judgment of Milmo J).

[19][2007] EWHC 788 (Ch), [2007] 1 WLR 2002 at [9] (Master's reasons not binding on HHJ Mackie QC, sitting in the High Court).

[20][1984] Ch 266 at 270.

[21][2009] EWHC 198 (QB) at [12], [14] and [18].

2. Recent chronology

(a) Masters and registrars

The first express assertion that Masters are not strictly bound by decisions of High Court Judges appears to have occurred in 2014. In *Randall v Randall*,[22] Deputy Master Collaço Moraes opined that High Court Judges and Masters were judges of the High Court exercising the same jurisdiction, albeit that the Masters' jurisdiction was subject to certain restrictions.[23] Each of their decisions thus had the same precedential standing. The Deputy Master thought it of note that a Master had greater experience of certain types of disputes. His judgment was reversed on the merits in May 2016, but the Court of Appeal did not deal with the question on precedent.[24]

Master Matthews developed these foundations further in *Coral Reef Ltd v Silverbond Enterprises Ltd*.[25] He stated that the doctrine of precedent was based on the status of courts, not judges.[26] Moreover, the days when Masters were obviously inferior to Judges had passed; they were now usually specialists in their fields and issued valuable decisions.[27] His view, therefore, was that a Master exercising High Court jurisdiction was not strictly bound by decisions of High Court Judges, although one would usually follow them out of comity unless convinced that they were wrong.[28]

This is where the chronology becomes faintly complicated, with no less than nine distinct cases in the upcoming period. Master Matthews' decision in *Coral Reef* was given on 20 April 2016. The very next day, Mr Registrar Briggs, who would later become the Chief Insolvency and Companies Court Judge, adopts the same reasoning on precedent for Bankruptcy Registrars of the High Court.[29] In May 2016, Master McCloud appears to suggest that she can rule on arguments as to whether a previous judgment of Eady J was wrongly decided.[30] And shortly afterwards, in August 2016, Master Clark cites *Coral Reef* without disapproval.[31] All are decisions at first instance. During this period there is the Court of Appeal's ruling in *Randall*, but as mentioned it provides no assistance. Similarly, in September 2016, Snowden J does not touch the precedential issue when disposing of an appeal against the aforesaid decision of Mr Registrar Briggs.[32]

The next significant occurrence is in October 2016. Master Matthews' substantive decision in *Coral Reef* is upheld on appeal by David Foxton QC, sitting then as a Deputy High Court Judge.[33] Mr Foxton, however, *disagrees* with Master Matthews on the point of precedent. In his view a High Court Judge's decision does bind a Master. Unfortunately, the full transcript of Mr Foxton's judgment appears to have been unavailable when the precedential issue arises soon again in *Haastrup v Haastrup*[34] – this is December 2016 – where an unchastened Master Matthews does not resile from his opinion in *Coral Reef*. This initial delay is understandable, but it is remarkable that counsel still did not manage, as late as September 2017 and January 2018, to bring Mr Foxton's judgment to the attention of Master McCloud[35] and Sir David

[22][2014] EWHC 3134 (Ch), [2015] WTLR 99.
[23]At [82].
[24]*Randall v Randall* [2016] EWCA Civ 494, [2017] Ch 77.
[25][2016] EWHC 874 (Ch).
[26]At [43].
[27]At [45].
[28]At [51].
[29]*Aabar Block SARL v Maud* [2016] EWHC 1016 (Ch), [2016] BPIR 803 at [73].
[30]*Lokhova v Longmuir* [2016] EWHC 1977 (QB) at [8].
[31]*Lifestyle Equities CV v Sportsdirect.com Retail Ltd* [2016] EWHC 2092 (Ch), [2017] FSR 12 at [9]. In *Banks v Turner* (unreported 20 February 2018, High Court), HHJ Klein viewed Master Clark's citation of *Coral Reef* to be an apparent indication by the Master that she was able to depart from a High Court Judge's decision.
[32]*Aabar Block SARL v Maud* [2016] EWHC 2175 (Ch), [2016] Bus LR 1243.
[33]*Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 3844 (Ch), [2018] 4 WLR 104.
[34][2016] EWHC 3311 (Ch), [2018] WTLR 445 at [49].
[35]In *Jones v Chichester Harbour Conservancy* [2017] EWHC 2270 (QB) at [29].

Eady[36] respectively. Master McCloud has, more recently, twice reaffirmed the relevant holding of Master Matthews in *Coral Reef*.[37]

Mr Foxton's judgment was eventually reported in the Weekly Law Reports almost two years after its issuance.[38] By this time the count was as follows: three Masters (McCloud, Matthews and Collaço Moraes) and one Registrar (Briggs) claimed that they were not strictly bound to follow decisions of High Court Judges; one Deputy High Court Judge (Foxton) was set against this; and one retired High Court Judge (Eady) and one Master (Clark) had simply raised the proposition without endorsement or refutation. So it is four against one, and two on the side, all possessing great experience in the Senior Courts.[39]

(b) High Court Judges

What the Masters seek is admission to the existing system of precedent informing one High Court Judge's treatment of another Judge's decision. It is therefore necessary to recapitulate that briefly. A puisne Judge exercising High Court jurisdiction is not strictly bound by a decision of a Judge of equal jurisdiction, but will usually follow it out of comity unless convinced it is wrong.[40] Recognising that this freedom – as compared with the obeisance required of Judges vis-à-vis judgments of a higher court – occasionally results in conflicting decisions and uncertainty in the law at High Court level, a secondary rule has sprung into operation. If there are two inconsistent decisions issued by Judges of co-ordinate jurisdiction and the second decision was reached after full consideration of the first decision, a third Judge facing the point in question should follow the second decision; the exception is where the third is convinced that the second was wrong in not following the first. Unless this exception is in play, the third Judge will follow the later decision and any further consideration thereon is reserved for the Court of Appeal.[41]

Within this practice is observed what Professor Duxbury described as the capacity of the doctrine of precedent to simultaneously create constraint and confer discretion.[42] The constraint here exists to ensure that the law at High Court level is of reasonably certain content and, perhaps as importantly, of consistent application regardless of the Judge to whom the case is assigned. The archetype is *Re A E Farr Ltd*,[43] where Ferris J did not follow his earlier decision because another Judge had already considered and departed from it. It also tends to avoid the effect of litigants shouldering the increased costs of legal research and argument that conflicting precedents often generate.[44]

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[36]In *Kennedy v National Trust for Scotland* [2017] EWHC 3368 (QB), [2018] EMLR 13 at [29]. This decision was upheld on appeal without any discussion of the issue of precedent; see *Kennedy v National Trust for Scotland* [2019] EWCA Civ 648, [2019] EMLR 19.

[37]*Abdule v Foreign and Commonwealth Office* [2018] EWHC 692 (QB) at [82]; *JLE v Warrington & Halton Hospitals NHS Foundation Trust* [2018] EWHC B18 (Costs) at [23] (an appeal against this decision was allowed but without discussion of the issue of precedent; see *JLE v Warrington & Halton Hospitals NHS Trust Foundation Trust* [2019] EWHC 1582 (QB), [2019] Costs LR 829).

[38]At [2018] 4 WLR 104.

[39]In the later instalment of *Coral Reef Ltd v Silverbond Enterprises Ltd* [2019] EWHC 887 (Ch), Deputy Master Linwood did not mention the precedent issue at all. As for academic commentary, that has been relatively sparse. Master Matthews' first instance decision in *Coral Reef* has not generally elicited an adverse treatment, although this was mostly before Mr Foxton's judgment was formally reported (see S Pickford and V Yip 'A firm foundation?' (2016) 166 NLJ 16 at 17; J Sorabji 'Precedent and the Privy Council' (2017) 36 CJQ 265 at 269; J Bickford Smith 'Precedent and procedure: a practical view from the bar' (available at www.littletonchambers.com/precedent-and-procedure-a-practical-view-from-the-bar-952 (on archive)); contra G Vos (ed) *Civil Procedure: The White Book Service 2019* (London: Sweet & Maxwell, 2019) para 2.4.3).

[40]*R v Greater Manchester Coroner, ex p Tal* [1985] QB 67 at 81.

[41]*Colchester Estates (Cardiff) v Carlton Industries plc* [1986] Ch 80 at 85; *Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch 1 at 14; *In re Lune Metal Products Ltd* [2006] EWCA Civ 1720, [2007] Bus LR 589 at [9]–[10]; *Howard de Walden Estates Ltd v Aggio* [2007] EWCA Civ 499, [2008] Ch 26 at [90].

[42]N Duxbury *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008) p 183.

[43][1992] BCC 150 at 155.

[44]*Re Cromptons Leisure Machines Ltd* [2006] EWHC 3583 (Ch), [2007] BCC 214 at [5]. Nevertheless it is recognised that the same expense will possibly be incurred should the losing party challenge the decision in a higher court.

It seems that such a constraining quality would be acceptable to the Masters. Their push really is to have the same degree of *discretion*. On this the oft-cited justification for allowing co-ordinate Judges to disagree with each other is that:

> the only thing in a Judge's decision binding as an authority upon a subsequent Judge is the principle upon which the case was decided: but it is not sufficient that the case should have been decided on a principle if that principle is not itself a right principle, or one not applicable to the case; *and it is for a subsequent Judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle*.[45]

The right of every Judge of the High Court to state the law of the land is historically undoubted but even then it is attenuated by the concerns highlighted earlier.[46] As Professor Bell pointed out,

> If we consider that legal doctrine merely mediates social values, then the acceptability of judges having the final say on questions of law is also problematic … People are not willing to let an issue be definitive, and the argument that it has once been decided does not easily carry weight. On the other hand, the need to respect certainty and legitimate expectations based on the publicly declared decisions of community authorities such as courts provides us with justifications for the manner in which the ongoing debate about rightness should be conducted. *Precedent is an illustration not of the substantive closure of a debate, but of a procedural constraint on the way in which a contested issue can continue to be considered.*[47]

He noted that the extent to which such a procedural constraint (precedent) was acceptable depended on whether it was practical to carry the debate forward in other ways (such as through legislative means).[48] If this inquiry is renewed within the confines of the High Court, it is unquestionably relevant that any wayward ruling of a Master is usually correctable by recourse to a prompt appeal. Much of the remaining discussion tightens on whether this and other constraining factors should affect the Masters' attainment of the freedom to state 'the true principle'.

3. Discussion

It is suggested that a number of arguments may be enlisted in the debate on precedent within the High Court. It will be convenient to evaluate these possibilities under the following headings: the legislative permission and/or delegation to Masters to exercise High Court jurisdiction (the jurisdiction argument); the rank or stature of the judicial officer (the rank/stature argument); the route of appeal from the first instance decision (the routes of appeal argument); the standard of review adopted in an appeal against the first instance decision (the standard of review argument); and the modern availability and publication of written decisions (the publication argument).

(a) Jurisdiction

The Masters assert that they should not be bound by the decisions of High Court Judges when exercising High Court jurisdiction. That assertion entails treating decisions of Judges and Masters in the High Court as having equivalent formal status in the system of precedent. And that assertion, in the Masters' words, rests on two important premises: that the doctrine of *stare decisis* depends on the

[45] *Osborne to Rowlett* (1880) 13 Ch D 774 at 785 (emphasis added).

[46] By way of comparison, in some civil law systems where trial courts may reopen apparently settled points of law, it has been observed that this 'historically understandable stress on the need for every judge and court to exercise independent judgment rather than risk injustice under a kind of "cloak of superior orders" may in some settings lead to confusion, if literally dozens of precedents can be cited for the same point': MacCormick and Summers, above n 2, pp 538–539.

[47] J Bell 'Comparing precedent' (1997) 82 Cornell L Rev 1243 at 1262 (emphasis added). See also R Flowers 'Stare decisis in courts of co-ordinate jurisdiction' (1985) 5 Advocates' Quarterly 464 at 481 and 485–486.

[48] See also Z Bankowski et al 'Rationales for precedent' in MacCormick and Summers (eds), above n 2, p 492.

status of courts rather than judges, and that Judges and Masters are judges of the High Court exercising the same jurisdiction.[49]

Each premise may be unobjectionable when expressed as a statement in itself. But do they collectively lead to parity in treatment and precedential status of the decisions? It is right to observe, preliminarily, that discussion of the rules of *stare decisis* within the High Court has hitherto focused overwhelmingly on the relationships between Judge and Judge, between Judge and Divisional Court and between Divisional Courts.[50] Some caution is therefore warranted when extrapolating rules designed in other contexts for use in a scenario not previously contemplated. Indeed, before looking at the twin premises forming the predicate for their claim, we should situate the Masters within the legislative framework.

(I) LEGISLATIVE FRAMEWORK

The jurisdiction and powers exercisable by the Masters stem from legislation. Section 19(3)(b) of the Senior Courts Act 1981 provides that:[51]

> Any jurisdiction of the High Court shall be exercised only by a single judge of that court, except in so far as it is by rules of court made exercisable by a master, registrar or other officer of the court, or by any other person.

Section 68(1)(c) of that Act similarly states that rules of court may make provisions as to the cases in which the 'jurisdiction of the High Court may be exercised by masters, registrars, district registrars or other officers of the court', while the Civil Procedure Act 1997 provides that the Civil Procedure Rules (CPR) 'may provide for the exercise of the jurisdiction of any court within the scope of the rules by officers or other staff of the court'.[52] This leads to CPR 2.4(a): where the rules 'provide for *the court to perform any act* then, except where an enactment, rule or practice direction provides otherwise, that act may be performed in relation to proceedings in the High Court, by any judge, Master, Registrar in Bankruptcy or District Judge of that Court'.[53]

One instance where the Masters' jurisdiction has been abridged by practice direction[54] is para 3.1 of CPR Practice Direction (PD) 2B, pursuant to which they may not generally make orders or grant interim remedies relating to, inter alia: (i) the liberty of the subject; (ii) criminal proceedings; (iii) claims for judicial review; or (iv) appeals from other Masters. Other excluded areas include relief under the Human Rights Act 1998[55] and (unless the Chancellor of the High Court consents) any substantive orders in the Patents Court.[56] A question not fully answered is whether a further cordon has been placed around the High Court's inherent jurisdiction, something which rarely manifests within the CPR as an 'act' to be performed.[57]

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[49] *Randall v Randall* [2014] EWHC 3134 (Ch), [2015] WTLR 99 at [82]; *Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 874 (Ch) at [43].

[50] Notably, two detailed treatments in this field provide no coverage of the Master's plight: see R Cross and JW Harris *Precedent in English Law* (Oxford: Clarendon Press, 4th edn, 1991); Duxbury, above n 42.

[51] 1981 c 54.

[52] Civil Procedure Act 1997 (c 12) sch 1, para 2.

[53] Emphasis added. Compare this with r 2.5(1) of the Family Procedure Rules, which uses the phrase 'perform any *function*' (emphasis added). Note further that Registrars in Bankruptcy are covered by a third linguistic formula in the Insolvency (England and Wales) Rules 2016, SI 2016/1024, r 12.2(1). And the Admiralty Registrar has all the powers of the Admiralty Judge except where a rule or practice direction provides otherwise: CPR 61.1(4) (see generally also JA Kimbell 'The Admiralty Registrar: past, present and future' [2018] LMCLQ 413).

[54] Practice directions are generally made by the Lord Chief Justice or a nominated judicial office holder and with the agreement of the Lord Chancellor (Constitutional Reform Act 2005 (c 4), s 13 read with sch 2; Civil Procedure Act 1997 (c 12), s 5).

[55] 1998 c 42.

[56] CPR PD 2B, paras 7A and 7B.1(b).

[57] There is uncertainty here also because inherent jurisdiction may mean different things to different people (see eg IH Jacob 'The inherent jurisdiction of the court' (1970) 23 CLP 23 at 24), but the argument from legislative interpretation would, at its narrowest, be to preclude the Masters' exercise of any non-statutorily derived jurisdiction or power. For

There is also judicial influence in what Masters may do when exercising their jurisdiction; para 1.1B of CPR PD 2B states that any jurisdiction conferred upon the Masters under that Practice Direction is to be exercised in accordance with directions provided by the President of the QBD, the Chancellor, the Presiding Judges or the Chancery Supervising Judges.[58]

It is realised therefore that the powers and jurisdiction of High Court Masters are heavily subject to the prescriptions of legislation, rules, practice directions and directions from the senior judiciary. However, they do retain autonomy over the distribution of business among themselves, for the assignment and transfer of proceedings between individual Masters fall to the Senior Master of the QBD and Chief Master in Chancery.[59]

In relation to appeals, interim and final decisions of Masters at first instance in the High Court are generally appealable to a Judge.[60] A second appeal to the Court of Appeal is possible if permission to appeal is granted,[61] with the touchstone being the presence of an important point of principle or practice up for determination, or some other compelling reason.[62]

In summary, the imprimatur granted to the Masters under the CPR is broad and yet simultaneously circumscribed by enactments, rules and directions. It generally follows the conceptual arrangement in the old Rules of the Supreme Court (RSC). It is noteworthy, however, that the form that permission takes has changed. Under the former RSC Ord 32 rr 11 and 14, Masters in the QBD and Chancery Division were allowed to transact such business and exercise such authority and jurisdiction as High Court Judges in chambers could have transacted and exercised, apart from specified matters in the rules reserved to the Judges. The current authorisation in CPR 2.4 ('perform any act' of the court) has been much shortened from this. It will be the first marker in our path of reasoning.

(II) SUBORDINACY

The origins of the Masters, together with the manner in which they were conferred powers and jurisdiction under the RSC, led to a particular view of their office. Because the permissive language of the RSC was such that a Master could generally do only what a Judge in chambers could do, it left no room for a circularity problem to arise. Clearly the Judge came out ahead of the Master. Within this schema, the Master and Registrar were (as against the Judge) described in various jurisdictions as agent,[63] deputy,[64] delegate,[65] substitute[66] and juridical ancillary.[67] Occasional use of loose language aside, a sense of their being secondary in place and time is unmistakeably conveyed.

This subordinacy was not merely something customarily accepted among the Bench and Bar. It was a legal consequence of the foundational separation of Judges and Masters in the legislation. Even when a Master was exercising the powers and jurisdiction of a Judge as permitted for interlocutory

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cases considering the historical Canadian position see eg *Attorney-General for Ontario v Victoria Medical Building Ltd* [1960] SCR 32 at 43; *O'Connor v Mitzvah* (1977) 15 OR (2d) 812 at 815; *Re Peel Terminal Warehouses Ltd* (1978) 21 OR (2d) 857 at 861; *Matsushita Electric of Canada Ltd v Wacky Webster (London) Ltd* (1983) 42 OR (2d) 795 at 800; *Cooke v Cooke* (1985) 53 OR (2d) 43 at 47; *Bonaventure Systems Inc v Royal Bank of Canada* (1986) 57 OR (2d) 270 at 274. In the Antipodes see eg *Exell v Exell* [1984] VR 1 at 4–6; *Re Roslea Path Ltd* [2013] 1 NZLR 207 at [162]–[163]; P Twist 'The inherent jurisdiction of masters' [1996] NZLJ 351.

[58] In related vein, see *Dring v Cape Intermediate Holdings Ltd* [2018] EWCA Civ 1795, [2019] 1 WLR 479 at [142]–[147].

[59] CPR PD 2B, para 6.1.

[60] CPR PD 52A, paras 3.5, 4.3 and 4.3A; Access to Justice Act 1999 (Destination of Appeals) Order 2016, SI 2016/917, Art 4 (1); Insolvency Act 1986, s 375(2); Insolvency (England and Wales) Rules 2016, SI 2016/1024, r 12.59(2)(b); Practice Direction – Insolvency Proceedings, paras 17.2(5) and 17.4(9).

[61] CPR PD 52A, para 4.7.

[62] Access to Justice Act 1999, s 55(1); CPR PD 52C, para 5A.

[63] *H Clark (Doncaster) Ltd v Wilkinson* [1965] Ch 694 at 699.

[64] *Re Rolls Razor Ltd (No 2)* [1970] Ch 576 at 589.

[65] *Tidswell v Tidswell (No 2)* [1958] VR 601 at 605; *Sansom v Sansom* [1966] P 52 at 53; *Commonwealth of Australia v Hospital Contribution Fund of Australia* (1982) 40 ALR 673 at 684; *Tan Boon Heng v Lau Pang Cheng David* [2013] 4 SLR 718 at [14].

[66] *Herbs and Spices Trading Post Pte Ltd v Deo Silver (Pte) Ltd* [1990] 2 SLR(R) 685 at [11].

[67] *Actis Excalibur Ltd v KS Distribution Pte Ltd* [2016] SGHCR 11 at [18].

applications under the RSC, she did not sit in the same chair at the same level. She would be taking a first stab at the issue, while the Judge had the power to either affirm the decision or make it go all the way back to square one; for, according to *Evans v Bartlam*,[68] the powers and jurisdiction conferred upon the Master under the RSC were originally entrusted and always belonged to the Judge. A Singapore judge once referred to the distribution of court business among Judges and Registrars as a matter of internal organisation of judicial work,[69] the clear implication being that that was an administrative decision made to ease the court's burden. Dillon LJ gave a similar description of the former Companies Court.[70]

The vital question is whether all of this changed in England and Wales when the RSC were replaced by the CPR. Since then, Masters have progressively been permitted to hear more types of cases and exercise greater jurisdiction.[71] Significant as these developments may have been in improving the efficiency of the courts and the quality of justice, it is not clear (and there appears no sustained suggestion) that the introduction of the CPR transformed the Masters from exercising a jurisdiction delegated by the Judges into their exercising an originating jurisdiction (that is, a jurisdiction possessed by a court in its own right). Harking back to our first marker, has the notion of a delegated responsibility unravelled now that CPR 2.4 generally permits Masters to 'perform any act' in relation to High Court proceedings?

This phraseology dates to the CPR's inception. It was not preceded by any overt indication in the Woolf Reports[72] that something more than a delegated jurisdiction, much less an enhanced status or elevated jurisdiction, was thereby to be newly conferred on the Masters. That does not end the matter, for the High Court is a superior court of record whose Judges can lay down binding precedent and dis-apply existing High Court authority in the exercise of its jurisdiction; and, so the contention goes, because a Master can perform any act of the High Court, she stands similarly with the Judge in being able to set precedent and depart from existing authority. Whether this extended utility should be read into the words 'perform any act' is discussed later, but for the moment the point is that, even if Parliament were theoretically capable of amending the rules of *stare decisis*,[73] there is a conspicuous absence in r 2.4 and in the circumstances surrounding its birth of any express or implied intention that that provision was meant to enhance or elevate the status of, or the type of jurisdiction exercised by, the Masters. The introduction of r 2.4, it is suggested, has not as such changed the understanding of the Master's position as exercising a jurisdiction delegated from a High Court Judge.[74] That it is possible for a Master to exercise the powers and jurisdiction of a Judge and yet not truly be the co-ordinate of the latter provides the next marker in our analysis.

[68][1937] AC 473 at 478. See also Herring CJ's explanation in *Tidswell v Tidswell (No 2)* [1958] VR 601 at 605, which is interesting for perceiving the matter from the litigant's viewpoint, as well as the conceptualisation of the separation in terms of *stages* by Chan Sek Keong J (latterly Chief Justice of Singapore) when discussing the local District Court equivalent of an appeal from Master to Judge in *Herbs and Spices Trading Post Pte Ltd v Deo Silver (Pte) Ltd* [1990] 2 SLR(R) 685 at [11]. See also *Re Rolls Razor Ltd (No 2)* [1970] Ch 576 at 590–591.

[69]*Herbs and Spices Trading Post Pte Ltd v Deo Silver (Pte) Ltd* [1990] 2 SLR(R) 685 at [11].

[70]*Re Tasbian Ltd (No 2)* [1990] BCC 322 at 325.

[71]Incidentally this type of development seemed to have been predicted by Master Ball almost 60 years ago: RE Ball 'The Chancery Master' (1961) 77 LQR 331 at 354–355.

[72]H Woolf *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1995); H Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996).

[73]*Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 470–471; *Gilchrist v Revenue and Customs Commissioners* [2014] UKUT 169 (TCC), [2015] Ch 183 at [87]; RWM Dias 'Precedents in the House of Lords – a much needed reform' [1966] CLJ 153 at 154; PJ Evans 'The status of rules of precedent' [1982] CLJ 162 at 177–178; J Bell 'Sources of law' [2018] CLJ 40 at 67.

[74]At the peril of stating the obvious, a decision of a Master made in exercise of the High Court's jurisdiction is not necessarily equivalent to a decision of a High Court Judge for every other purpose, including of course the usual route of an appeal therefrom: the Master's decision is ordinarily appealable to a Judge, rather than to the Court of Appeal (as would have been the case were the first instance decision made by a Judge). For a perspective from New South Wales see *Tomko v Palasty (No 2)* (2007) 21 NSWLR 61 at [4] and [40].

(III) DISENTANGLING THE PREMISES

Let us then peer harder at the two main premises of the Masters' claim. The judicial position they occupy is unique. There is no other jurisdiction-sharing arrangement akin to the Judge-Master bond in the Senior Courts. Although both of them might sit in the same court, the true position – under the RSC and, it is suggested, also the CPR – was the existence of a singular jurisdiction belonging always to a High Court Judge, the exercise of which was merely delegated to the Master by legislation. It is difficult to devise an appropriate analogy between this relationship and the relationship existing between distinctly separate lower and higher courts,[75] each possessing original, appellate or supervisory jurisdiction *in its own right* (ie an originating jurisdiction).

In the first relationship, it is the Judge who possesses the originating jurisdiction and the Master a delegated jurisdiction. A Master's ruling on an interlocutory application is an effective order binding the immediate parties, but it is no less an order made in the exercise of *the jurisdiction of the High Court*, which, it bears repeating, belongs and is entrusted primarily to the Judge. This contrasts with the second relationship (between lower and higher courts), where each ruling of the judge or court, regardless of its merits, retains at least the quality of having been made in exercise of that judge's or court's own originating jurisdiction.

Two factors therefore differentiate these relationships. Factor one is that a single court (the High Court) features in the first relationship, whereas there are distinctly separate courts in the second relationship. Factor two is that, in the first relationship, the singular jurisdiction of the High Court is exercised by the Master as a delegated jurisdiction, unlike in the second relationship, where each of the lower and higher courts possesses its own originating jurisdiction. The relevance of these factors to the issue of precedent is examined shortly but some of the links drawn in the cases should first be decoupled.

The initial premise in the Masters' claim, that *stare decisis* is dependent upon the status of courts rather than judges, is chiefly intended to resolve precedential conflicts in the second type of relationship. *Stare decisis* among courts requires comparison of a stable and outwardly discernible quality of judgments. Using the status of the deciding judge ticks the discernibility box but not the stability box, because in the system to which we are accustomed judges of different age, rank and seniority can hear the same types of cases. But using the hierarchical position of the deciding court ticks both boxes. And in the second relationship, which is precisely one between lower and higher courts, it is proper to say that the court level should determine the relative precedential status of their decisions.

However, a statement that *stare decisis* depends on court level has little bearing on the first relationship (between Judge and Master), because not only do their decisions emanate formally from the same court, one of them is made under a delegated and not originating jurisdiction. To apply that premise to the Judge and Master relationship is thus unilluminating. The danger of overemphasising this is not unreal. In *Coral Reef*, varying weight was placed at first instance and on appeal on the *Howard de Walden* case.[76] Too much was made of it, considering that that case was solely about the relationship between the (superior) High Court and the (inferior) County Court. By taking cues from and extending its reasoning to determine the status of decisions of Masters – who sit in that very same superior court – the judges risked ignoring the context and pocketing the wrong ball altogether.

For the similar reason that it does not account for (or even allude to) the distinction between the Judge's originating jurisdiction and the Master's delegated jurisdiction, the second premise – that Judges and Masters are both judges of the High Court exercising the same jurisdiction – is liable to be regarded as a statement made *in vacuo*. One rescue attempt is to associate the Master with the Deputy Judge since both are able to exercise High Court jurisdiction; I consider this later, but in a

[75]Encompassing for this purpose the tribunals system, in which I consider for example the First-tier Tribunal and Upper Tribunal to be distinctly separate from each other.

[76]*Howard de Walden Estates Ltd v Aggio* [2007] EWCA Civ 499, [2008] Ch 26. See *Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 874 (Ch) at [40]–[43]; *Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 3844 (Ch), [2018] 4 WLR 104 at [62].

nutshell the comparison is, it is submitted, false. And if the saving assertion is that the Master as a functioning judicial agent should be taken similarly as the Divisional Court, that again would be a misapplication of the existing principles. The Divisional Court is one way in which the High Court may constitute itself, and it is indeed true that the Judges reversed course in 1984, when it was held in *R v Greater Manchester Coroner, ex p Tal*[77] that one Divisional Court did not strictly bind another Divisional Court in the exercise of its supervisory jurisdiction, thereby departing from *Huddersfield Police Authority v Watson*.[78] But the Divisional Court in every such case would have possessed its own originating jurisdiction. Judges of the High Court or above would be sitting. The Divisional Court depended on no power, authority or jurisdiction delegated or devolved from any other court or judge. The effect of its decisions upon itself was a matter within its interior ambit of action, and it could, if it wanted to, raise itself by its bootstraps. The Divisional Court's situation is therefore different from that of the Master and provides thin supporting ground for the latter's claim. Robert Goff LJ (as he then was) did say in *Tal* that:

> the principle applicable in the case of a judge of first instance exercising the jurisdiction of the High Court [is] that he will follow a decision of another judge of first instance, unless he is convinced that that judgment is wrong, as a matter of judicial comity; but he is not bound to follow the decision of a judge of equal jurisdiction.[79]

Those words, however, were directed towards resolving the bindingness of the Divisional Court's authorities on itself. They ought not to be read out of shape to encompass how decisions of Judges should be treated by Masters, even though each might variously be called a 'judge of first instance exercising the jurisdiction of the High Court' whose rulings are on occasion appealed directly to the Court of Appeal.

So how are the two premises applicable in the Master's context? The suggested answer is that the first premise is inapplicable, and the second premise applicable but not in the way it may have been thought to be. The first premise, that *stare decisis* is based on court status, is not germane when what is in issue is an intra-court conflict, ie the relative precedential status of decisions made within the same court. And the second premise, that Judges and Masters are judges of the High Court exercising the same jurisdiction, is relevant because it requires one to understand the delegation arrangement between them, and not because it hints at co-equivalence of their decisions.

The fact that no other judicial office in the senior civil courts is quite like that of the Master, to whom power and jurisdiction are merely delegated, may also be contrasted with how deputy or supplementary judges are appointed or assigned under s 9 of the 1981 Act. It is clear from that provision that such judges possess jurisdiction *in their own right*. To equate the Master's delegated jurisdiction to the originating jurisdiction of the Judges, thereby equalising the precedential status of their decisions, glosses over this critical difference.

In truth, the effective advantage the Masters desire is emancipation from a covering but unconvincing decision of a High Court Judge; to be able to declare that decision merely persuasive instead of binding.[80] But in the first place the observance of their function to adjudicate disputes requires no indispensable ability to depart freely from decisions of the Judges. No Master being in that position (and as a consequence of exercising a delegated jurisdiction) is the final arbiter of substantive legal questions, and any potential injustice in having to follow what appears to the Master an erroneous holding of law should be remediable on appeal,[81] unless a statute has very exceptionally provided

[77] [1985] QB 67.

[78] [1947] KB 842.

[79] *R v Greater Manchester Coroner, ex p Tal* [1985] QB 67 at 81.

[80] As Professor Bronaugh stated, it is in the nature of binding precedents that they may control decisions without at the same time persuading, that is, convincing substantively: R Bronaugh 'Persuasive precedent' in L Goldstein (ed) *Precedent in Law* (Oxford: Clarendon Press, 1987) p 231.

[81] It might perhaps be separately argued that costs and time would be much saved by loyal obeisance on the Master's part and by letting the parties take up the legal complexities on appeal. As has been observed, even Judges in the High Court, who

otherwise. The technical way of putting the point is that such an ability would involve reading an extended utility into the words 'perform any act' in CPR 2.4,[82] one not essential for Masters to perform their intended role as permitted under ss 19(3)(b) and 68(1)(c) of the 1981 Act. Since the legislation represents a delegation of power, a limited reading should be preferred to an expansive one. If one has ever thought it injurious that Judges should be allowed to disagree with one another, it is highly doubtful that the solution is to welcome more dissonant voices into the fray.

Finally, it is questionable whether Masters are able to affect the rules of precedent within the High Court. They do not constitute the High Court; the Judges do. The latter are the original and primary keepers of the rules, fashioned to allow the court to govern itself. It would invert logic if a delegate, appointed to assist the business of the Judges and whose authority and jurisdiction could be limited or removed by those very same Judges, were able to emancipate herself from the terms of delegation.[83] Where there is a delegation, the delegator (quite naturally) sets those terms. No adjutant can command the general; and it is relevant that the present push for equality is being advocated by the Masters, running against a position that has persisted for over a century. It is suggested here that, subject to contrary legislation, only the primary office holders who constitute the court, and not their deputies or surrogates, may ordinarily change the rules of precedent operating within that court. On that footing, recognising all his exceptional qualities, Mr Foxton sitting then as a Deputy Judge could not himself have changed any rule of precedent in the High Court.[84] This restriction would apply not just to the High Court but also in the Court of Appeal, so that any change to the internal rules would usually require at least a panel fully composed of ex-officio or ordinary judges of that court.[85]

Nothing here is meant to suggest that Masters are simulacra or superfluous. That would be an unfair reflection of the practical state of affairs; modern litigation would grind to a halt without the assistance they provide. For the reasons mentioned, however, the delegated authority and jurisdiction exercised by Masters should not include a power to amend the rules of precedent within the High Court. The assumption of a right to depart from decisions of High Court Judges is functionally unnecessary and possibly even open to challenge on legitimacy grounds.

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are the resident happy larks, willingly fetter themselves by following the later of two conflicting first instance decisions if the second had considered the first (see text at n 41 above).

[82]Or, for that matter, into the authorisation under the instruments and provisions referred to at n 53 above. Contrast this with the Ontario case of *GTA Structural Steel Ltd v 20 Ashtonbee Holdings Ltd* (2005) 49 CLR (3d) 157 at [21]–[22].

[83]See also the Singapore case of *Actis Excalibur Ltd v KS Distribution Pte Ltd* [2016] SGHCR 11 at [18].

[84]In *Coral Reef* the judge would of course have seen himself as defender and not attacker.

[85]See *Gallie v Lee* [1969] 2 Ch 17 at 49; *Davis v Johnson* [1979] AC 264 at 344; *R (Al-Saadoon) v Secretary of State for Defence* [2009] EWCA Civ 7, [2010] QB 486 at [47]; CEF Rickett 'Precedent in the Court of Appeal' (1980) 43 MLR 136 at 151; H Carty 'Precedent and the Court of Appeal: Lord Denning's views explored' (1981) 1 LS 68 at 75; Evans, above n 73, at 178; P Aldridge 'Precedent in the Court of Appeal – another view' (1984) 47 MLR 187 at 196–198 (and for the latest changes in the Civil Division of the Court of Appeal see *Actavis UK Ltd v Merck & Co Inc* [2008] EWCA Civ 444, [2009] 1 WLR 1186 at [85]–[107]; *Symbian Ltd v Comptroller General of Patents, Designs and Trade Marks* [2008] EWCA Civ 1066, [2009] Bus LR 607 at [33]–[36]; *Patel v Secretary of State for the Home Department* [2012] EWCA Civ 741, [2013] 1 WLR 63 at [59]; *R (DN (Rwanda)) v Secretary of State for the Home Department* [2018] EWCA Civ 273, [2018] 3 WLR 490 at [40]–[41]). The apparent anomaly is the practice of the Criminal Division of the Court of Appeal, which seems capable of changing the content of its own rules of *stare decisis* even with High Court Judges in the quorum (see *R v Newsome* [1970] 2 QB 711 at 717; *R v Simpson* [2003] EWCA Crim 1499, [2004] QB 118 at [38]; *R v Magro* [2010] EWCA Crim 1575, [2011] QB 398 at [30]–[31]). A plausible explanation is that the doctrine of *stare decisis* does not apply with the same rigidity in the court's criminal jurisdiction as in its civil jurisdiction (*R v Gould* [1968] 2 QB 65 at 68–69; H Parker 'The Lord Chief Justice on criminal appeals' (1969) 46 Law Guardian 11 at 13). The more satisfactory one points simply to a possible judicial oversight that the earlier case of *R v Taylor* [1950] 2 KB 368, which had amended the rules of precedent and was relied upon for support in some of the later authorities, was actually decided by the Court of Criminal Appeal. It was unobjectionable there for puisne Judges to have sat to change a rule of precedent, since the Court of Criminal Appeal was by statute constituted partly by puisne Judges (Criminal Appeal Act 1907, s 1(1)). As the Court of Appeal (Criminal Division) is *not* so constituted, however, reliance on that authority in the later cases may have been misplaced. Note also that the transitional provision in the Criminal Appeal Act 1966, s 1(4) is worded in general terms and unenlightening on the issue of precedent.

(b) Rank and stature

The rank/stature argument is shorthand for a number of overlapping considerations which distinguish the High Court Judge and Master and, therefore, possibly the precedential status of their decisions. One obvious factor is the relative difference in the *ranks* of the judges. An affiliated matter is the functional *office* to which the judge has been appointed. Lastly, there is the *stature* and *experience* of the judge concerned, which seem to be subsidiary considerations as regards the formal bindingness of a decision. But some development of these themes is necessary to ascertain their relevance.

(I) RANK AND OFFICE

The rank of the judge is often associated with her appointed functional office. That comes across clearly in the higher courts. A Lord or Lady Justice is a member of the Court of Appeal. The position of a Justice of the Supreme Court speaks for itself. But it is particularly in the lower courts, including for present purposes the High Court, where the two are not always so conjoined. The main reason for this is the deputy. A Deputy Judge is strictly lower in the hierarchy than a puisne High Court Judge, but is appointed to act in the same functional office. And so too it is as regards the respective deputies of the Circuit Judge, District Judge, Master and Registrar.

This was bound to raise an issue of precedent. On present authority it should be the functional judicial office – normally evinced by the court in which the judge is sitting – rather than the rank which matters for the doctrine of *stare decisis*.

In *R v Hertsmere Borough Council, ex p Woolgar*,[86] Sir Louis Blom-Cooper QC suggested that a decision of a High Court Judge should be more readily followed by a Deputy High Court Judge on the basis that the former possessed an enhanced status, but he was aware that the two were bound only by comity and not a rule of strict precedent to usually follow each other. Much to the same effect was *R v Southwark London Borough Council, ex p Bediako*,[87] where Stephen Richards (as he then was) would have followed a High Court Judge's decision unless convinced it was wrong, in accordance with the comity existing among courts of co-ordinate jurisdiction. Because he was sitting as a deputy, Mr Richards indicated that the threshold of conviction for identifying error was higher than usual, but I read this to refer to the degree of deference and not to remove the case altogether from the situation in which co-ordinate courts follow each other out of comity.[88]

This has potential implications for the Master's condition. It could be argued that, if a Master has occasion to 'sit as a court of co-ordinate jurisdiction' vis-à-vis a High Court Judge – one possible outcome of the discussion in the previous section – then it should not matter that the Master is of clearly lower rank than the Judge. She would have equal standing where the doctrine of precedent was concerned. But that does not conclude the argument. Its success still turns on being able to view Masters to Judges as deputies are to the real thing.[89]

The obstacle to finding this equivalence lies in the manner of authorisation in which each is conferred the relevant powers and jurisdiction. The deputy is, for effectively all intents and purposes, the full office holder. This replica model is encapsulated in ss 9(4) and 9(5) of the 1981 Act. The exceptions, where a deputy is not treated as a full High Court Judge, generally relate to non-adjudicatory matters like tenure of office, retirement, removal, remuneration, allowances and pensions.

As mentioned, however, Masters are only given whatever specific jurisdiction they have by rules of court and practice directions – jurisdiction that can be varied or even removed through amendment or revocation of the secondary legislation or by judicial fiat. This leads to a real distinguishing factor between Masters and Deputy Judges. By emendations to rules of court or practice directions, a Master's High Court jurisdiction can be changed without affecting (indeed they cannot affect) the

[86](1995) 27 HLR 703 at 716.

[87](1997) 30 HLR 22 at 25.

[88]*Sed quaere Bristol & West Building Society v Trustee of the Property of Back* [1998] 1 BCLC 485 at 488; *In re SHB Realisations Ltd* [2018] EWHC 402 (Ch), [2018] Bus LR 1173 at [47].

[89]To quote the court in *R v Hertsmere Borough Council, ex p Woolgar* (1995) 27 HLR 703 at 716.

jurisdiction possessed of a puisne Judge.[90] In comparison, the deputy is generally given the same substantive powers and jurisdiction of a Judge, for by definition those are required for her to undertake the intended function.

For this reason, it is the better view that Masters occupy a lower office than Judges of the High Court or, indeed, Deputy Judges, Circuit Judges and Recorders when each is acting as a High Court Judge. It is inconclusive but of note that the present qualification to be a Master or Registrar is satisfaction of the judicial-appointment eligibility condition only on a five-year basis, whereas for a Judge (and likewise a deputy) it is satisfaction of the condition on a seven-year basis. In my opinion, neither the argument from equality of rank nor that from equality of office offers positive support for Masters to stand on the same footing as Judges for the purposes of *stare decisis*. Nor is it of dispositive significance that the effect of specific legislation may, very exceptionally, be to permit a Registrar in Bankruptcy to sit to review, rescind or vary the decision of a High Court Judge.[91]

It should be added that this understanding does not jar against the views traditionally held by Masters and their equivalents elsewhere. Master Matthews has described how the order to which he belongs would in the past be seen as 'obviously inferior' to the Judges.[92] An Assistant Registrar in Singapore freely admitted that he was of lower standing than a High Court Judge.[93] In Alberta, Master Funduk wrote that:

> Any legal system which has a judicial appeals process inherently creates a pecking order for the judiciary regarding where judicial decisions stand on the legal ladder. I am bound by decisions of Queen's Bench judges, by decisions of the Alberta Court of Appeal and by decisions of the Supreme Court of Canada. Very simply, Masters in Chambers of a superior trial court occupy the bottom rung of the superior courts judicial ladder. I do not overrule decisions of a judge of this court. The judicial pecking order does not permit little peckers to overrule big peckers. It is the other way around.[94]

These fowl remarks have been echoed without embarrassment in various Canadian provinces.[95] Isolated instances exist there of Masters attempting to avoid the binds; Master Baker, for one, felt free to escape a Judge's decision by saying it had been delivered orally in chambers, in apparent analogy with *nisi prius* judgments.[96] And nor should it be thought that the general sense of self-deprecation is exclusive to the Masters.[97] But the larger point here is that the overall sentiment of institutional inferiority harboured by Masters would likely have stemmed, in part, from the realisation that

[90] See also *Re Calahurst Ltd* (1989) 5 BCC 318 at 319.

[91] *Sands v Layne* [2016] EWCA Civ 1159, [2017] 1 WLR 1782 at [63]. See also *Re W & A Glaser Ltd* [1994] BCC 199 at 206; *Re Piccadilly Property Management Ltd* [2000] BCC 44 at 55–56; *dubitante Re S N Group plc* [1993] BCC 808 at 810. Generally, however, the appeal, review or application for permission to appeal should be heard by a judge or judges more senior than the first instance judge; see eg *Bailey v Dargue* [2008] EWHC 2903 (Ch), [2009] BPIR 1 at [22]; M Briggs *Civil Courts Structure Review: Interim Report* (December 2015) para 9.17.

[92] *Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 874 (Ch) at [39].

[93] *Peter Low LLC v Higgins* [2017] SGHCR 18 at [27].

[94] *South Side Woodwork (1979) Ltd v RC Contracting Ltd* (1989) 95 AR 161 at 166–167. Master Funduk's concession that he was bound by the Judge's ruling was later noted (albeit without comment) by the Alberta Court of Appeal in *Re Electric Furnace Products Co Ltd* (1991) 80 DLR (4th) 572 at 576.

[95] In Alberta (*Sucker Creek First Nation v Canada* 2012 ABQB 460 at [17]; *CIBC Mortgages Inc v Tuchsen* (2015) 24 CBR (6th) 303 at [36]–[37]; *Crossroads-DMD Mortgage Investment Corporation v Gauthier* (2015) 28 Alta LR (6th) 104 at [34]–[35]), British Columbia (*Chandi v Atwell* 2011 BCSC 1498 at [72]; *Franzman v Munro* 2013 BCSC 1758 at [31]; *Gill v Wal-Mart Canada Corporation* 2017 BCSC 135 at [32]) and Ontario (*Robinson v Northmount School for Boys* 2013 ONSC 1028 at [25] and [27], and on appeal 2014 ONSC 2603 at [27]; *RSG Mechanical Inc v 1398796 Ontario Inc* (2014) 38 CLR (4th) 236 at [36]–[37]; *Sukhu v Bascombe* (2018) 80 CCLI (5th) 250 at [26]). An older study of the jurisdiction of the Canadian Masters can be found in B Fisher 'Jurisdiction of the Master' (1990) 48 The Advocate 13 at 16–17.

[96] *Director of Civil Forfeiture v Ngo* 2011 BCSC 1191 at [10].

[97] In *Bentine v Bentine* [2013] EWHC 3098 (Ch), [2013] 6 Costs LR 934 at [38], Proudman J believed (and it is fair to say that she would hardly be alone here) that a puisne Judge should always start from the proposition that the Court of Appeal

they could lose the accoutrements of power and jurisdiction through amending secondary legislation or by judicial fiat.

(II) STATURE AND EXPERIENCE

The relevance of the stature or experience of the judge in the formal doctrine of precedent can be examined by asking two questions. Was the prior decision made by a judicial character of such renown or expertise that the judge in the instant case is obliged to defer in some way to those qualities, even when both are technically sitting in the same court? If so, what form should the deference take?

By the late nineteenth century, the effective power to adjudicate disputes had completed its transfer in Britain from laypeople to professional judges learned in the law. The law itself became increasingly complex along with the rapid development of industrial society and technology. Access to legal knowledge was limited to a small section of the population. Within that section, great respect was accorded to its leadership, the senior judiciary with the Lord High Chancellor at its head. It may explain Fry J (as he then was) saying in 1881 that 'the Lord Chancellor, wherever he is sitting and whatever cases he is trying, is still Lord Chancellor, and that his decision is binding on me'.[98] Isolated expression of homage this was not, as one Victorian catalogue records.[99]

However, any gap between the Judges and other judicial officers narrowed dramatically in the decades ahead, owing to the development of advanced legal databases[100] and the fragmentation of modern litigation. It is practically impossible for the present-day court machinery to dispose of cases without drawing on the assistance offered by Masters at the interlocutory and case management stages. Over the years they have, in turn, accumulated an unrivalled expertise in their domain.[101]

Therefore the matter of stature and experience stands at a crossroads of sorts. For a long time, Masters and their decisions were regarded as the poorer cousins. But today it is in practical terms unrealistic to utter the same. Should the Masters' rulings then be elevated to the same level of precedence? The difficulty is that precedence of authority itself has never been linked to omniscience. A respectable knowledge of the law is insufficient to guarantee obeisance. Not even in the deferential climate of the nineteenth century was recognised expertise generally said to be any more than an indication to a later judge that the earlier decision might be accorded greater weight (and that only) for the identity of its maker.[102] That is undoubtedly because the contrary position, namely, to cause formal

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was more likely to be right, and that it would be a brave judge who ventured to suggest that a Court of Appeal judgment was decided *per incuriam*.

[98] *Ex parte Vicar of St Mary, Wigton* (1881) 18 Ch D 646 at 648. See also *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 at 651; *Henty v Wrey* (1882) 21 Ch D 332 at 346–348; WHD Winder 'Precedent in equity' (1941) 57 LQR 245 at 263–268; FR Burns 'The court of Chancery in the 19th century: a paradox of decline and expansion' (2001) 21 U Queensland LJ 198 at 206–210.

[99] J Ram and J Townshend *The Science of Legal Judgment* (New York: Baker Voorhis, 2nd edn, 1871) pp 299–308.

[100] As one realises today simply by asking the question, how many do *not* use electronic databases when hunting for authority or exposition on a point of law?

[101] In *Sansom v Sansom* [1966] P 52 at 54, Sir Jocelyn Simon P (as he then was) observed that Registrars in the Probate, Divorce and Admiralty Division saw many more alimony cases than did Judges and had developed a sort of sixth sense in dealing with them (see also *Rosling King v Rothschild Trust* [2002] EWHC 1346 (Ch), [2005] 2 Costs LR 165 at [8]). Master Matthews also did not overstate matters when he said that all High Court Masters were experts in matters of procedure and their considered decisions on particular points were no less valuable than decisions of the Judges (*Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 874 (Ch) at [45]; see also *Randall v Randall* [2014] EWHC 3134 (Ch), [2015] WTLR 99 at [82]; IH Jacob *The Fabric of English Civil Justice* (London: Stevens & Sons, 1987) pp 111–112; and in Ontario, see DH Sandler 'Preparing for and conducting a Master's motion' (1983) 4 Advocates' Quarterly 159 at 175).

[102] In their treatise *The Science of Legal Judgment* (New York: Baker Voorhis, 2nd edn, 1871) pp 299, 307 and 308, J Ram and J Townshend surveyed the authorities and opined only that a name 'often augments the authority of a judgment, or opinion'; that a judge's particular quality or character may lead a judgment or opinion to 'derive a peculiar weight'; that 'the authority of a case may, moreover, be strengthened'; and that the case bear 'augmented weight', due to the learning of the judge or court. While the doctrine of *stare decisis* as we know it developed into full bloom only later, it is striking that Ram and Townshend were observing at the time how the courts were identifying and differentiating the appropriate *weight* to be placed on some judgments but not others.

binding authority to depend upon the judge's learning and experience, was and is likely to encourage chaos. All judges think they are right, as indeed they should, having been appointed for their knowledge and expertise. Many do not easily concede that they may be wrong. But supreme intelligence or contriteness is not what the rules of *stare decisis* require. The desired quality, instead, is viewed to be *loyalty*, which Lord Hailsham of St Marylebone LC and Lord Diplock described to mean the duty of lower courts to loyally accept the decisions of the higher tiers of courts.[103] In a system with appellate avenues in place to check potential injustices, this cannot be said to be an indefensible compromise to mediate between fairness to the individual litigant and general certainty for all other present and future cases. Their Lordships there were responding with particular gusto to the one-man crusade of Lord Denning MR to loosen the shackles of the Court of Appeal.[104] Not since his time has that court (or any other court) in England and Wales claimed the title of chief rebel spirit. Not all will want a return to those days.

In so summarising the historical arch and conventional thinking of the judiciary, there has been little to suggest that a tribunal's knowledge or experience (or lack thereof) operates, of itself, to confer or negate precedential authority. Indeed it does not conduce to certainty or predictability for the obligation to follow a decision being made dependent upon a personal characteristic of its maker, whether that is called knowledge or stature, learning or experience, all of which are infinitely variable from judge to judge. A decision which is not binding by any other rule does not become binding because of the qualities of its maker; that applies to veteran and neophyte Masters alike. So long as this principle is borne in mind, there ought generally in a proper case to be no quarrel with attributing greater weight to one decision over another decision of equal standing, should both exert binding force over the judge.

(c) Routes of appeal

It was mentioned that the usual recourse of an appeal might render it functionally unnecessary for Masters to have the freedom to depart from decisions of Judges. That is concededly not a fatal argument because it is *not* completely intolerable for the existing system to accommodate a change to this effect. Some have nevertheless used the fact of appellate recourse itself to deny the Masters their goal.

The routes of appeal argument is illustrated in Mr Foxton's judgment in *Coral Reef*. In concluding that a Master was strictly bound by the decision of a Judge in the High Court, Mr Foxton thought it highly significant that a Judge exercised appellate jurisdiction over a Master's decision:

> Such an appeal can be brought with the permission of a master or the High Court judge in circumstances in which a High Court judge may make a finding on an issue of law when exercising an appellate jurisdiction over a master. It seems to me very difficult to argue that such a decision would not have precedential effect if the same issue came before that or a different master on a future occasion.[105]

[103] *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1054 and 1131. See also *Bradley Phillips Pty Ltd v Burn Brite Lights (Vic) Pty Ltd* [2002] SASC 145 at [20] (applying *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166). There is another more generalised aspect of loyalty, that being loyalty to the rule of law, which Professor Waldron has mooted (J Waldron 'Stare Decisis and the Rule of Law' (2012) 111 Mich L Rev 1). Judges having to base their decisions on general norms and not leave them as freestanding particulars, he suggests that subsequent judges should then take note of the general norms that have been used, and play their part in establishing the norm as something whose generality is more than merely notional (eg by not distinguishing on flimsy grounds), all whilst maintaining the constancy and stability of the body of law that emerged from all this by not overturning precedents lightly or too often.

[104] Crusader language was famously introduced into the lexicon by Lord Diplock in *Davis v Johnson* [1979] AC 264 at 325.

[105] *Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 3844 (Ch), [2018] 4 WLR 104 at [61]. Much the same argument has been propounded (but with differing outcomes) in Singapore and Queensland (see, in Singapore, *Peter Low LLC v Higgins* [2017] SGHCR 18 at [27], and in Queensland, WC Lee 'The role of Masters in Supreme Court practice' (1981) 11 Queensland Law Society Journal 115 at 123). And Simon Salzedo QC has written that 'it is at least arguable that a rational

The analysis involves a conflation depriving it of great persuasiveness. Take a Judge's decision that is appealed to the Court of Appeal (or a judgment of the Court of Appeal appealed to the Supreme Court); we may say matter-of-factly that the appellate tribunal sits at the next level of the court hierarchy. As a distinct proposition, we also say that the Court of Appeal binds the High Court (and the Supreme Court the Court of Appeal). Each observation is independently correct, but the conflation occurs in any suggestion that one leads inexorably to the other. A reviewing tribunal's precedence (in terms of binding authority) over the tribunal whose decision is being reviewed is not required to be absolutely linked to the route of appeal.[106] One instance in England and Wales relates to the Crown Court, which hears appeals from the magistrates' courts but does not bind them.[107] Eschewing this conflation, we can see that the fact a decision of a Master might be reviewed by a High Court Judge does not necessarily dictate the latter's binding the former for the purposes of *stare decisis*.

It could even be contended that the routes of appeal argument proves too much. If every appellate tribunal bound the first instance tribunal, that would extend to the proximate pairs at every level in the jurisdiction. The existing situation at the lower tiers would immediately create an extremely wide exception to the principle. Something as remarkable as this should give pause for thought. It might then perhaps be argued that the principle applies only in respect of appeals to a superior court of record such as the High Court; after all, Mr Foxton's opinion in *Coral Reef* was specifically about a decision made by a High Court Judge on appeal from a Master having precedential effect if the same issue came before the Master on a future occasion. But that is uncompelling, primarily because it ignores that one High Court Judge does not bind another. In the event that decisions of multiple Judges exist to tug in different directions, even the Master who was once reversed by a Judge is, in theory, entitled *not* to follow the reversing decision of that Judge the very next day. If it helps anyone at all, the point aids the Master. Mr Morgan devotes the fullest attention to this, and argues that it is why High Court decisions should not bind the County Court.[108]

Another source of encouragement for the Master is the fact that she normally resides in the same court as a High Court Judge, unlike the position of the Judge vis-à-vis the Court of Appeal (or the Court of Appeal vis-à-vis the Supreme Court). If valid – and this ties in with one's conclusions on the other grounds discussed here – it too would lessen the force of the argument made with reference to the route of appeal.

Lastly, the logical end of Mr Foxton's reasoning on the routes of appeal argument might be to distinguish between the decision of a High Court Judge made at first instance and one made when sitting on appeal from a lower court or tribunal (in this context specifically from a Master), with only the latter decision then strictly binding upon the Masters. There is enough authority not to consign the proposition to heterodoxy – Master McCloud recently professed to follow a similar split,[109] while the Divisional Court is said to only bind itself when acting in its appellate but not supervisory capacity[110] – but this opens the result to a considerable degree of arbitrariness, since the same point of law could, as a matter of chance, arise either at first instance or on appeal; according precedence to

system of *stare decisis* requires that the appellate relationship is a *sufficient* condition for binding effect' (emphasis in original): S Salzedo 'New precedent on precedent' (available at www.linkedin.com/pulse/new-precedent-simon-salzedo-qc).

[106]See also Evans, above n 73, at 169, fn 20.

[107]Another instance of binding authority and the route of appeal not being invariably linked is how Divisional Courts exercising criminal jurisdiction are generally thought to be bound by Court of Appeal (Criminal Division) judgments, even though it is to the Supreme Court that an appeal from the Divisional Court lies, with leave, under the Administration of Justice Act 1960, s 1 (see eg *C v Director of Public Prosecutions* [1996] AC 1 at 12–13; *Morgans v Director of Public Prosecutions* [1999] 1 WLR 968 at 979; Cross and Harris, above n 50, p 121; P Morgan 'Doublethink and district judges: High Court precedent in the county court' (2012) 32 LS 421 at 427).

[108]Morgan, above n 107.

[109]*JLE v Warrington & Halton Hospitals NHS Foundation Trust* [2018] EWHC B18 (Costs) at [23].

[110]*Rogers v Essex County Council* [1985] 1 WLR 700 at 706; *Ritz Video Film Hire Ltd v Tyneside Metropolitan Borough Council* (unreported 26 January 1995, Divisional Court).

one decision but not the other is unproductive of the predictability desired.[111] Mr Foxton himself would have avoided such a stark differentiation, although he was of course intending for a Judge's ruling to be binding in both situations.[112] It might once have been a rebuttal that the law was often deliberated upon more closely on appeal than at first instance, but the general industry of judges and counsel combined with their ready access to case law means that any distinction in quality is nowadays more theoretical than real.

The foregoing disagreement with the routes of appeal argument has been based on reasons varying somewhat from those Mr Morgan proffered after his investigation of the binding nature of High Court precedent in the County Court.[113] He too was critical of the argument, but mainly because that would mean that the rules of precedent would be determined by track allocation, seeing as appeals from the County Court went to different courts depending on the type of action and the track. He said that it would be undesirable for the County Court to be bound by the High Court in some cases but not others, and in some cases to be bound only by the Court of Appeal and above.[114]

Mr Morgan's objection to the routes of appeal argument seems to arise from an overly tight focus on the initial track allocation – a comparatively recent invention of the CPR – at the expense of the freestanding rules of *stare decisis* of the High Court and Court of Appeal. One might, instead, have surmised that in a case where a first appeal would go from the County Court to the High Court, the Circuit Judge is nevertheless generally disentitled from ignoring relevant Court of Appeal precedent, for the reason that if there is a second (exceptional) appeal the High Court itself would be bound by the Court of Appeal. Considering the other scenario, even if a first appeal would lie directly from the County Court to the Court of Appeal,[115] the Circuit Judge cannot sidestep a relevant High Court precedent if there is no higher authority on point, because the same issue of law could arise in another County Court matter which *was* appealable to the High Court (whose rulings are ordinarily considered binding on the County Court). Infrequently the system may act adventitiously, but at no time should it be assisted by a dose of arbitrariness when laying down precedential rules to guide the lower courts. If it was a determinant at all, the track allocation was not so crucial as to affect the existing rules leading to Mr Morgan's feared result.

(d) Standard of review

The routes of appeal argument was an attempt (albeit an imperfect one, as I have endeavoured to show) to relate back to the structural hierarchy. The standard of review argument similarly draws its life force from this design – specifically, the existence of an avenue of appeal against the Master's decision – but the emphasised factor of importance is not where, but *how*, the appeal is heard.

The standard of review argument has received attention in Singapore. In *Peter Low LLC v Higgins*,[116] it was noted that an appeal to a High Court Judge from an Assistant Registrar's decision on an interlocutory application operated as an actual rehearing of the application, with the Judge treating the matter afresh as though it had come before her for the first time. The fact that the Judge need not consider how the Assistant Registrar exercised her discretion was strongly indicative of Judges

[111]See also P Jackson 'The Divisional Court: the survival of binding precedent' (1985) 101 LQR 484.

[112]*Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 3844 (Ch), [2018] 4 WLR 104 at [62].

[113]Morgan, above n 107, at 426–427.

[114]This argument might conceivably have applied in respect of the Masters since they were also affected by the track system, but the matter is now largely moot following the streamlining of the appeal avenues, pursuant to the Civil Procedure (Amendment No 3) Rules 2016, SI 2016/788; Access to Justice Act 1999 (Destination of Appeals) Order 2016, SI 2016/917; CPR Practice Direction Amendments (86th Update). For relevant background provided by Briggs LJ (as he then was), see his *Civil Courts Structure Review: Interim Report* (December 2015) paras 3.30–3.33; *Civil Courts Structure Review: Final Report* (July 2016) paras 3.22–3.23.

[115]First appeals from the County Court to the Court of Appeal are now restricted to the circumstances set out in CPR 52.23 (1) and the Access to Justice Act 1999, s 57.

[116][2017] SGHCR 18.

standing above Assistant Registrars in the judicial hierarchy.[117] Now the point might have been – but was not – advanced further in *Higgins*. Since on a rehearing a Judge was bound by neither the discretionary rulings nor the pronouncements of law of the Assistant Registrar, and could, indeed, freely call for further evidence and submissions, did not this complete lack of deference show that, as between Judge and Assistant Registrar, the latter's ruling held no precedential or authoritative significance and served only to bind the immediate parties thereto for such time it had not been overturned? It was not so much that the Judge's ruling was automatically superior, but that the Assistant Registrar's interlocutory ruling was always liable to be overturned on a lower standard of review, which revealed its dearth of any more general quality of compulsion. It was inconsistent to say that the reviewing Judge was entitled to freely ignore a holding of the Assistant Registrar, and that that holding (on the off chance it was not appealed against) stood of co-ordinate authority as a decision of a High Court Judge. Only one part of this sentence could be correct.

This may seem unanswerable where the appeal is indeed a full rehearing of the case, and where the appellate court has an unfettered discretion to call for new evidence and submissions. But the CPR has altered the standard of review, and it is the Masters whom the argument might now appear to favour. The analysis is not straightforward. I will use the example of a Master's interim decision (commonly known as an interlocutory decision under the old RSC regime) and consider the standard of review in an appeal against such a decision. I do not canvass the position either of a Registrar in Bankruptcy[118] or of a Master's decision made after trial or on an assessment of damages.[119]

By the former operation of RSC Ord 58 r 1, an appeal against a Master's interlocutory decision was heard by a High Court Judge in chambers. The appeal functioned as a rehearing *de novo* and the Judge, while giving any deserving weight to the decision below, was entitled to exercise an unfettered discretion.[120] She was certainly not bound by a ruling of law made by the Master. However, under CPR 52.21(1), every appeal is now limited to a review of the decision in the lower court, unless a practice direction provides differently for particular categories of appeals or the court considers it to be in the interests of justice to hold a rehearing. The interim decision of a Master is now reversible by a Judge only if the decision is wrong or unjust because of a serious procedural or other irregularity in the proceedings before the Master.[121]

Brooke LJ observed in *Tanfern Ltd v Cameron-MacDonald*[122] that this transition from rehearing to review marked a significant change in practice; an interim decision of the lower court now attracted much greater significance than before. The courts would be slow to depart from the normal rule that a

[117] At [29].

[118] Because the Insolvency Act 1986 and its subsidiary rules have been construed to render an appeal therefrom a true appeal, with the Registrar's decision reversible by a Judge only if the Registrar had erred in principle or in law when applying or exercising a discretion; see *Re Industrial & Commercial Securities plc* (1989) 5 BCC 320 at 323; *Re Gilmartin* [1989] 1 WLR 513 at 515–516; *Re Probe Data Systems Ltd (No 3)* [1991] BCC 428 at 431; *Re A Debtor (No 2389 of 1989)* [1991] Ch 326 at 336–337; *Re Busytoday Ltd* [1992] 1 WLR 683 at 688.

[119] Because the standard of review of such a decision was broadly similar whether before or after the introduction of the CPR. Under the old RSC Ord 58 r 2, an appeal from a Master's decision made at trial or on an assessment of damages would proceed with leave directly to the Court of Appeal. In an appeal against an assessment, for instance, interference with the exercise of discretion was warranted only if the damages had been assessed on a wholly erroneous basis (see eg *Fielding v Variety Incorporated* [1967] 2 QB 841 at 851 and 853, applying *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601). The other grounds for interference stated in *Davies* (at 617) would presumably have been applicable too, such as where the court below had acted on a wrong principle of law or misapprehended the facts. For the standard of review in the Court of Appeal after the CPR was introduced in 1998 (but before the latest 2016 amendments streamlining the appeal routes, mentioned at n 114 above), see *Gorne v Scales* [2006] EWCA Civ 311 at [56]; *Earlrose Golf and Leisure Ltd v Fair Acre Investments Ltd* [2009] EWCA Civ 1295 at [35].

[120] *Evans v Bartlam* [1937] AC 473 at 478. Megarry J (as he then was) described the position as having once been even more dismissive as regards the review of a Chancery Master's decision (*Re Rolls Razor Ltd (No 2)* [1970] Ch 576 at 589–590); see also *Report of the Committee on Chancery Chambers and the Chancery Registrars' Office* (Cmnd 967) (London: HMSO, 1960) para 85.

[121] CPR 52.21(3).

[122] [2000] 1 WLR 1311 at [31] and [50].

review be conducted on appeal, and special factors or exceptional circumstances had to be shown for a rehearing.[123]

On one view, this shift to a review standard may support the Masters' position that their decisions are no less jurisprudentially significant than those made by Judges, given that due deference must now be shown when the lower decision is reviewed on appeal by the higher court.[124] One could therefore contend that the new CPR standard recognises the quality and standing of the Masters' rulings.

The contrary take is that the change means nothing as far as the doctrine of precedent is concerned. This seems the safer conclusion. The move to a review standard of generalised application was in respect of civil appeals across the entire courts structure, affecting an appeal from a Circuit Judge to a High Court Judge as much as an appeal from a High Court Judge to the Court of Appeal. Saying that such a move propelled the Masters' decisions to parity with decisions made by the High Court Judges would by the same measure have entailed a conclusion, as novel as it was unacceptable, that a ruling of a Circuit Judge or High Court Judge gained precedential equipollence to a ruling of a High Court Judge or the Court of Appeal respectively. The point is that this reform to the standard of review, significant as it might have been in other respects,[125] never did address itself to the binding authority of judgments; and, in any case, within its intended scope of operation it had a much wider application than simply to appeals against rulings of the Masters.[126] If that context is borne in mind then this version of the standard of review argument appears to be irrelevant in determining whether a Master's decision stands on a similar precedential footing as a decision of a Judge.

(e) Publication

We should lastly consider if the greater publication and retrievability of written decisions is a factor supporting equivalence of the decisions of Masters and of High Court Judges. Notably, in responding to a submission that the lack of routine reporting of the former derogated from the certainty required for the doctrine of precedent to operate, Master Matthews in *Coral Reef* said that:

> I accept that in the past masters' decisions have not been commonly available. But, as HHJ Mackie QC noted in *O'Brien v Seagrave*, all that means is that, if a judge does not have the master's reasons for judgment, he or she cannot take them into account. A judge reaching a different decision from that of the master in the absence of the master's reasons is all the more likely to be convinced it is wrong. But in modern times, with the growth of computer databases (both proprietary and free), searchable over the internet, important masters' decisions are now readily available. Given the specialist skills that masters have, and the important role that they play in the procedure of Queen's Bench and Chancery litigation, this can only be an advantage.[127]

[123] *Lewis v Secretary of State for Trade and Industry* [2003] BCC 567 at 569; *EI Dupont de Nemours & Co v ST Dupont* [2003] EWCA Civ 1368, [2006] 1 WLR 2793 at [96].

[124] A Master's first instance decision has to be accorded an appropriate respect (*Dalton v Gough Cooper & Co Ltd* [2014] EWHC 1556 (QB) at [50]; see also *McCarthy v Essex Rivers Healthcare NHS Trust* [2010] 1 Costs LR 59 at [22]; and compare *Hoddle v CCF Construction Ltd* [1992] 2 All ER 550 at 550–551 with *Sony Music Entertainment Inc v Prestige Records Ltd* [2000] 2 Costs LR 186 at 192–193).

[125] Although the lack of an instructional manual accompanying the textual change left some slightly bemused; see JA Jolowicz 'The new appeal: re-hearing or review or what?' (2001) 20 CJQ 7.

[126] Contrast this with some of the legislatively or judicially effected changes in other parts of the Commonwealth which specifically targeted appeals against decisions of Masters, Associate Judges and Prothonotaries (eg in the Australian Capital Territory (Courts Legislation Amendment Act 2015 (ACT) ss 44 and 47), New South Wales (*Do Carmo v Ford Excavations Pty Ltd* [1981] 1 NSWLR 409 at 413–420) and Canada (*Zeitoun v Economical Insurance Group* (2008) 91 OR (3d) 131, and on appeal (2009) 96 OR (3d) 639; *Hospira Healthcare Corp v Kennedy Institute of Rheumatology* (2016) 402 DLR (4th) 497 at [46]–[65]; contra *Ralph's Auto Supply (BC) Ltd v Ken Ransford Holdings Ltd* 2011 BCCA 523 at [14]–[15]; *Sidhu v Hothi* 2014 BCCA 510 at [22]; *Kondori v New Country Appliances Inc* 2017 BCCA 164 at [18]–[19])).

[127] *Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 874 (Ch) at [48].

This came close to turning the submission on its head; what was a negative argument (the lack of routine reporting) became, with notice of electronic database technology, more or less positive support for according precedence to an entire class of judgments. The alchemy drew fire from Mr Foxton when the decision was appealed to him; he held that the ready availability of Masters' decisions should not be regarded as a determinative consideration, since the doctrine of precedent had to operate regardless of whether the decisions of a particular court were readily available or not, and its scope could not be altered by changing practice in the distribution of judicial decisions over time.[128]

Mr Foxton has the technical position impeccably stated.[129] At the same time, there is a realisation that litigation and advisory work has had, and will continue to have, to accommodate rapid technological changes. An encouragement to publish reasoned judgments can lead to greater certainty of decision-making and increase the quality of justice. Admittedly the aims are occasionally at tension.

It is trite that a judicial order lacking reasons attains little (if any) precedential value. There is no difference between such an unreasoned order and a reasoned decision that is undiscoverable. If, however, there existed wider and active dissemination and tracking of the decisions of Masters, that would facilitate analysis of the quality of those decisions, which might prove to be particularly helpful in subject areas where their authors have acknowledged expertise, such as civil procedure, case management, assessments and inquiries.

On the other hand, many have noted the often unnecessary avalanche of case law now cited in court in well-intentioned but indiscriminate manner. The increasing number of written judgments is undoubtedly a cause. In 2001, Lord Woolf CJ was sufficiently troubled to issue a practice direction on the citation of authority, saying that the deployment of inappropriate and unnecessary material was causing problems in case preparation and argument and threatening the efficiency of the courts in their goal to achieve justice.[130] The current rule is that an unreported case is not usually to be cited in court unless it contains a relevant statement of legal principle not found in reported authority.[131] It would seem that the ideal solution is not to ignore or hide the decisions being made, but to develop better analytical and smart-sieving technology so that only the appropriate authorities are brought to the attention of the court.[132]

Having parsed these considerations, we can be confident that the mere fact of open publication ought not to operate to confer precedential status upon a decision. There is too much left to chance if the authority to bind were activated chiefly on an extra-legal (and possibly uncontrollable) circumstance like publication or reporting,[133] with the concomitant risk of this being both under- and over-inclusive at the same time. Precedentially significant decisions on points of law might not be made available, and mistaken emphasis could instead be placed on relatively unimportant decisions. Nevertheless, there is room to admit that the increased availability of reasoned decisions *is* a key strut in any system of precedent that would accord judgments of Masters the same standing as

[128] *Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 3844 (Ch), [2018] 4 WLR 104 at [66].

[129] In an extra-curial essay, Sir Robert Megarry wrote that 'Surely the law must be what the courts declare it to be, and not merely what the law reports decide to publish: a poor report, or no report at all, may make it difficult to discover what was said, and summary reports not prepared by barristers may have to be scrutinised with care, but a decision ought not to be rejected out of hand merely because there is no orthodox report of it': RE Megarry 'Reporting the unreported' (1954) 70 LQR 246 at 250.

[130] *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001 at [1]–[2]. See generally also *Noble v Southern Railway Co* [1940] AC 583 at 597; *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192 at 200–202; *Hamblin v Field* [2000] BPIR 621 at 627–628; *A v B plc* [2002] EWCA Civ 337, [2003] QB 195 at [8]–[10]; *R v Erskine* [2009] EWCA Crim 1425, [2010] 1 WLR 183 at [63]–[81]; G Lightman 'The civil justice system and legal profession – the challenges ahead' (2003) 22 CJQ 235 at 239.

[131] *Practice Direction (Citation of Authorities)* [2012] 1 WLR 780 at [10]; Criminal Practice Directions 2015, Division XII (General Application) paras D.3 and D.7.

[132] The suggestion is nothing new but finds echo in Megarry, above n 129, at 251–252. Perhaps we may yet reap some benefit from all that technology.

[133] cf *Beach v Smirnov* [2007] EWHC 3499 (QB) at [48], where a suggestion was rejected that a High Court decision appearing in the *White Book* held greater authority than other High Court decisions which did not.

those made by Judges, if that should eventually be the path chosen. The system of precedent cannot function effectively if there is no outlet into public consciousness for the judgments handed down.

Conclusion

Given the disagreement witnessed thus far on this issue, the responsibility for a conclusive determination could effectively rest with a higher court.[134] Any resolution will require in part an honest assessment of the current place of the Masters. For a significant portion of judicial work today, their position and function are in practice converging with that historically assumed by the Judges. Answers to the question of precedent here may therefore depend to some extent on how one views the changing role of the Master, whose essentialness in modern litigation practice cannot be gainsaid.

The inquiry in this paper has evidently been informed by elements of power, authority and jurisdiction. I am unconvinced that it suffices to say (as some have done) that, because the rules of *stare decisis* are ultimately rules of practice, the question of binding authority is unlikely to hinge on legal niceties, such as the nature of the authority and jurisdiction in question.[135] That attitude could perhaps be taken to an apex court, where there is no higher judicial tribunal to disagree with it and which has correspondingly a greater degree of freedom. But a conflict of opinion at any lower level necessarily involves having to decide between the contrasting views of judges, not only within that level but also with those in the neighbouring tiers. A judicial consensus on the practice might not readily be forthcoming, with the consequence that questions of power, authority and jurisdiction do require to be examined.

This paper has proposed some answers. Thus far in England and Wales only the routes of appeal argument has been positively harnessed to deny parity of precedence between decisions of Judges and those of Masters. That, upon evaluation, is unpersuasive. It is the strong point in the Masters' favour. The greater dissemination of judgments in the electronic medium today also does their cause no harm, although that by itself ought not to confer co-equal status in precedential terms.

However – and quite apart from the arguments stemming from the rank and status of the Masters and the standard of review of their decisions, each of which, it has been suggested, does not significantly advance the contention of parity – the main obstacle in the way of the Masters' claim appears to be the nature of the powers and jurisdiction they are permitted to exercise. If it is correct that the delegation once effected by the RSC has flowed into the CPR construct, then not only is the ability to depart from decisions of High Court Judges functionally unnecessary, but the change desired by the Masters is susceptible to a charge of illegitimacy. For the reasons discussed above it is concluded therefore that, under the current statutory framework, Masters exercising High Court jurisdiction should be strictly bound by decisions emanating from Judges sitting in the High Court. Ultimately, one recognises that it is to the benefit of the justice system and the quality of its outcomes that this constructive judicial discourse is taking place. That is the expressed desire of the participants and also no less than what we can expect of these august office bearers.

[134]Whether a higher court (eg the Court of Appeal) will feel able to intervene decisively in an intra-High Court dispute on precedent may be doubted by some; see eg WHD Winder 'Divisional Court precedents' (1946) 9 MLR 257 at 267 ('The question of the binding force of [Divisional Court decisions upon itself] when the Divisional Court is the final court of appeal … could not, in fact, ever come directly before the Court of Appeal'); Aldridge, above n 85, at 194 ('It is also interesting to note that the issue whether the decision of one High Court judge sitting at first instance is binding upon another has never formed the basis of a determination by the Court of Appeal, and, it may confidently be predicted, never will'). See also *Boys v Chaplin* [1968] 2 QB 1 at 35; *Gallie v Lee* [1969] 2 Ch 17 at 49; *Davis v Johnson* [1979] AC 264 at 344; contra *Davis v Johnson* [1978] 2 WLR 182 at 224–225; *In re Lune Metal Products Ltd* [2006] EWCA Civ 1720, [2007] Bus LR 589 at [9]–[10].

[135]cf L Tham '*Stare decisis* and ARs' *Singapore Law Gazette* (January 2017).

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