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

Delivered: 19/10/2016

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND CHANCERY DIVISION (BANKRUPTCY)

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BETWEEN:

IRISH CEMENT LIMITED

Appellant;

-v-

DONAL MURPHY

Respondent.

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Morgan LCJ, Weatherup LJ and Weir LJ

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WEATHERUP LJ (delivering the judgment of the court)

[1] The preliminary issue for determination is whether, in insolvency proceedings, there is an entitlement to apply for leave to appeal from a decision of the Bankruptcy Master to the Court of Appeal. Ms Danes QC and Mr McCausland appeared for the appellant and Mr Acheson for the respondent.

[2] On 4 June 2015 Master Kelly sitting as the Bankruptcy Master dismissed an application by the appellant under Article 236 of the Insolvency (NI) Order 1989 that a voluntary arrangement approved by a creditors' meeting had unfairly prejudiced the interests of the appellant and that there had been a material irregularity at the

meeting. The appellant appealed to the Chancery Judge by Notice of Appeal dated 24 June 2015 but the appellant did not proceed with that appeal and by consent the appeal was dismissed on 14 September 2015. In the meantime the appellant appealed to the Court of Appeal by Notice of Appeal dated 1 July 2015. The appellant contends that in insolvency proceedings there is both a right of appeal to the Chancery Judge or alternatively an entitlement to apply for leave to appeal to the Court of Appeal.

The background dispute.

[3] The appellant claims £375,000 due by the respondent. In 2009 the appellant and Premier Cement Ltd issued a Statutory Demand against the respondent and on his failure to pay the claim issued a petition for the respondent's bankruptcy. The respondent claimed that the debt was not due by the respondent but by Murphy Sand and Gravel Ltd. The Bankruptcy Master dismissed the petition. The appellant issued High Court proceedings against the respondent for the amount of the claim and by his defence the respondent pleaded that the debt was due by the limited company. The limited company went into liquidation in 2010.

[4] The respondent sought an Individual Voluntary Arrangement ("IVA") with his creditors. At a meeting of the respondent's creditors on 10 December 2014 the Chairman rejected the appellant's claim on the basis that there was insufficient evidence that the appellant was a creditor of the respondent. Thus the appellant did not have a vote at the creditor's meeting and the proposed IVA was approved.

[5] The appellant applied to the Bankruptcy Master for an order revoking the approval of the IVA. On 4 June 2015 the Master dismissed the application and upheld the decision taken at the creditors' meeting. The appellant claims that, as the debt was disputed, it should have been admitted at the meeting and the objection to the debt noted. The Chairman refused to admit the debt on the basis that there was insufficient evidence to establish that the appellant was a creditor. The respondent claims that the appellant did not bring forward such evidence as established the debt as being due by the respondent.

[6] The appellant contends that the Chairman took the wrong approach at the creditors' meeting as he should have admitted the debt and noted the respondent's objection rather than seeking sufficient proof of debt, as was stated in his letter to be the basis of his decision.

[7] The appellant further contends that the Bankruptcy Master took the wrong approach as she should have determined whether there was sufficient proof of debt rather than, according to the respondent, in effect deferring to the decision of the Chairman of the creditors' meeting. A solicitor's note of proceedings before the Bankruptcy Master records the Master as stating that the Chairman was an

experienced insolvency practitioner and his affidavit made clear that he was in no doubt as to his decision to reject the claim.

[8] The approach of the Chairman at a creditors' meeting to a disputed debt was outlined in Official Receiver v Thompson [2002] NICh 10 at paragraph [10]. The creditors' meeting is not a place to go into lengthy debates as to the exact status of a debt and the Chairman of the meeting should look at the claim and either admit the debt or reject it and if there was a doubt he should admit the debt but mark it as objected to.

[9] The approach of the Bankruptcy Master on an application to set aside the Chairman's decision was discussed recently in Kingston's Investments Limited v Sale [2015] EWHC 1619 (CH) at paragraph [169]. One approach is stated to be to apply the "balance of probabilities test" in that the court must ask itself whether, on the evidence before it, the claimant has on balance made out its case of entitlement. The other approach is stated to be to apply a "clear prima facie case test", that is to ask whether the creditor has made out a clear prima facie case in support of a given minimum claim and if so whether that prima facie case has been met by an arguable case.

[10] The appellant now seeks to appeal the decision of the Bankruptcy Master to the Court of Appeal and the respondent objects that this Court lacks jurisdiction to hear the appeal and that any appeal must be to the Chancery Judge. The appellant contends for a dual right of appeal and that an appeal to the Court of Appeal is appropriate when the issue requires a legal ruling rather than a factual inquiry. In the present case the legal ruling is said to concern the nature of the approach to be taken by the Chairman and the Master. Whether there is such a dual right of appeal requires consideration of the Insolvency (NI) Order 1989 and the Judicature (NI) Act 1978.

Jurisdiction in insolvency proceedings

[11] Article 236 of the 1989 Order provides for a challenge to the decision of a creditors' meeting on the basis of unfair prejudice or material irregularity by "*an application to the High Court*". On such an application, the High Court, if satisfied as to unfair prejudice or material irregularity, may revoke or suspend any approval given by the meeting and/or give a direction for a further meeting to consider any revised proposal or reconsider the original proposal. Thus, jurisdiction on such an application lies in the High Court.

[12] Article 359 of the 1989 Order provides for the making of Rules for the purpose of giving effect to the 1989 Order. By paragraph (2)(c) the Rules may contain *"provision for enabling the Master (Bankruptcy) to exercise such of the jurisdiction conferred for the purposes of this Order on the High Court as may be prescribed and for enabling the review of any such jurisdiction".*

[13] The relevant rules are the Insolvency Rules (Northern Ireland) 1991 and Rule 7.03(2) provides for the Bankruptcy Master to exercise the jurisdiction of the High Court as follows:

> "Subject to paragraph (1), unless the judge has given a general or specific direction to the contrary, *the jurisdiction of the court to hear and determine an application will be exercised by the Master*, and the application will be made to the Master in the first instance."

[14] The Master's exercise of the High Court jurisdiction is not exclusive. Paragraph (3) provides that where the application is made to the Master he may refer any matter to the Judge. Paragraph (4) provides that an application may be made directly to the Judge in a proper case.

[15] Further, the exercise of this jurisdiction by the Master is stated to be subject to paragraph (1), which provides for those applications that are to be made direct to the Judge. Of note is that the applications that shall be made direct to the Judge include, at paragraph (1)(d), "*appeals from an order or decision of the Master*".

[16] Clearly, in granting High Court jurisdiction to the Master, it is necessary to exclude from the exercise of that jurisdiction, the right of appeal from the Master's decision and direct that such appeals are made to the Judge. Rule 7.03 (1)(d) may appear to present a blockage to the appellant's contention that there is a right of appeal to the Court of Appeal. However the appellant contends that paragraph (1)(d), while stating that appeals from an order or a decision of the Master shall be made direct to the Judge, does not prohibit an application for leave to appeal to the Court of Appeal from the exercise by the Master of High Court jurisdiction.

[17] As to the review of the Master's exercise of the High Court jurisdiction, Rule 7.42(1) provides for the power of review under the heading "Appeals from the Master" as follows - "*…. an order or decision of the Master in insolvency proceedings may be reviewed by an appeal to the judge*".

[18] Rule 7.42(1) might also appear to present a blockage to the appellant's contention that there is a right of appeal to the Court of Appeal. However the appellant contends that Rule 7.42 is not mandatory and merely provides that an order or decision "may" be reviewed by an appeal to the Judge. Thus the appellant contends that any general right of appeal to the Court of Appeal arising from the exercise of High Court jurisdiction continues to apply.

The Judicature (NI) Act 1978

[19] The appellant's proposed route to the Court of Appeal is by section 35 of the Judicature (Northern Ireland) Act 1978 which provides -

> "(1) Subject as otherwise provided in this or any other statutory provision, the Court of Appeal shall have jurisdiction to hear and determine in accordance with rules of court *appeals from any judgment or order of the High Court or a judge thereof.*
>
> (2) No appeal to the Court of Appeal shall lie –
>
> (j) Without the leave of the High Court or of the Court of Appeal, *from a decision of the High Court under the Insolvency (Northern Ireland) Order 1989."*

[19] By Article 236 of the 1989 Order challenges to a decision at a creditors meeting are made by an application to the High Court. By virtue of the rule-making power under Article 359 and Rule 7.03(2) of the Insolvency Rules that High Court jurisdiction may be exercised by the Master. A decision of the Bankruptcy Master in insolvency proceedings is a judgment or order of the High Court for the purposes of section 35(1).

[20] However section 35(1) is qualified by the opening words "Subject as otherwise provided in this or any other statutory provision ….". The "other statutory provision" that is relevant is the Insolvency (NI) Order 1989 which provides, by the 1989 Order and the 1991 Rules that a decision of the Bankruptcy Master in insolvency proceedings, being a judgment or order of the High Court, shall be appealed to the Judge. Ms Danes contends that the opening words to section 35(1) do not have the effect of excluding an appeal from the decision of the Bankruptcy Master to the Court of Appeal, because the Insolvency Order does not preclude such an appeal to the Court of Appeal but rather provides the alternative of an appeal to the Judge.

[21] We are unable to accept this contention. The Insolvency Order provides the power to make rules for the Bankruptcy Master to exercise the jurisdiction of the High Court and also for the review of that jurisdiction to be undertaken by appeal to the Judge. The insolvency provisions provide for appeals to the Judge. We have concluded that the provision that appeals from an order or a decision of the Master shall be made to the Judge does apply to the exercise by the Master of High Court jurisdiction in insolvency proceedings. The provision is set out in the context of the grant of the High Court jurisdiction to the Master. The judicature provisions are made subject to the insolvency provisions. The effect of the statutory scheme is to preclude such an appeal to the Court of Appeal. Thus we are satisfied that an appeal

from the Bankruptcy Master, exercising the jurisdiction of the High Court in insolvency proceedings, lies to the Chancery Judge and not to the Court of Appeal.

[22] Section 35(2)(j), on which the appellant relies, requires the leave of the High Court or of the Court of Appeal. By section 2 of the Judicature (NI) Act 1978 the High Court consists of the Lord Chief Justice and the Judges of the High Court. There is no power of the Master to grant leave to appeal to the Court of Appeal in insolvency proceedings. Accordingly, if the appellant is correct, the awkward result would be that, on a decision by the Bankruptcy Master in the exercise of the High Court jurisdiction in insolvency proceedings, leave to appeal to the Court of Appeal would be required in the first instance from the Chancery Judge and not the decision-maker. In the event the appellant did not apply to the Bankruptcy Master or the Chancery Judge for leave to appeal.

[23] There remains a place for the operation of section 35(2)(j), in applications in insolvency proceedings that are heard by the Judge, for appeal to the Court of Appeal with the leave of the Judge or the Court of Appeal.

[24] The Rules of the Court of Judicature have application in relation to appeals in insolvency proceedings. Rule 7.45 of the Insolvency Rules however gives priority to the Insolvency Rules by providing that "*Except so far as inconsistent with the Rules, the [Rules of the Court of Judicature] and the practice of the High Court apply to insolvency proceedings with any necessary modifications*".

[25] Rule 7.42, in providing for a review of an order or decision of the Master by way of an appeal to the Judge, provides that Order 58 Rule 1(2) to (4) applies to such an appeal.

[26] Order 58 Rule 1 provides that, except as provided by Rules 2 and 3, an appeal shall lie to a Judge in chambers from any judgment, order or decision of a Master. Rule 1 (2) to (4) concerns the process for such an appeal to the Judge

[27] The exceptions in Rules 2 and 3 make express provision in the Rules of the Court of Judicature for a direct appeal from the Master to the Court of Appeal. Order 58 Rules 2 and 3 provides that, where a question in dispute consists wholly or in part of matters of account and the Court has ordered the whole cause or matter or any question or issue of fact arising therein to be tried before the Master (Queen's Bench and Appeals) or the Master (Chancery), an appeal shall lie to the Court of Appeal from any judgment, order or decision of the Master on the hearing or determination of any cause, matter, question or issue tried before or referred to the Master or any assessment of damages undertaken by the Master (Queens Bench and Appeals). The Rules of the Court of Judicature have made provision for direct appeals from the Master to the Court of Appeal in the specified cases, by way of exception to an appeal to the Judge rather than as an additional right of appeal. Nor do we see the need for any such dual rights of appeal, either in the specified cases of

the Queens Bench and Appeals and the Chancery Masters or in the case of the Bankruptcy Master in insolvency proceedings.

[28] We are satisfied that the Court of Appeal does not have jurisdiction to entertain this appeal from the decision of the Bankruptcy Master. Appeals from the Bankruptcy Master in insolvency proceedings lie to the Chancery Judge.