Neutral Citation Number: [2009] IEHC 25

THE HIGH COURT

JUDICIAL REVIEW

2006 679 JR

BETWEEN

D. O'Q.

APPLICANT

AND

HER HONOUR JUDGE OLIVE BUTTIMER

RESPONDENT

AND

M. O'Q.

NOTICE PARTY

JUDGMENT of Mr. Justice John Edwards delivered on the 26th day of January, 2009

Introduction
This matter comes before me by way of an appeal against an Order for Discovery made by the Master of the High Court on 29th day of October, 2008. This Order was made on foot of a Notice of Motion issued by the applicant on the 3rd day of July, 2008 and which was grounded upon the pleadings already had in these proceedings, including an affidavit of D. O'Q. filed on 12th June, 2006. The Master's Order as perfected and exhibited before me is in terms:

> "…that the respondent do within nine weeks from the date hereof make discovery on oath of the following documents which are or have been in her possession or power : Judge Buttimer's notes in regard to the Kilkenny Circuit Court hearing on 2nd June, 2005 Case No. D. 24/2002, the affidavit on behalf of the respondent to be made by Judge Olive Buttimer."

Background to the proceedings
The applicant and the notice party were parties to, and the respective protagonists in, certain family law litigation that came before the respondent in 2005 when she was sitting as the Circuit Judge for the South Eastern Circuit in the County of Kilkenny. The relevant proceedings bore Circuit Court Number D. 24/2002.

The applicant in the present proceedings was the respondent in the Circuit Court proceedings. Moreover, the notice party in the present proceedings was the applicant in the Circuit Court proceedings. For the avoidance of confusion I will refer to the applicant in present proceedings as the "husband" when referring to the Circuit Court proceedings. Similarly, I will refer to the notice party in present proceedings as the "wife" when referring to the Circuit Court proceedings.

In the course of the family law litigation in the Circuit Court there were hearings on three dates which are relevant to issues that I have to decide in the present appeal. These hearings took place on the 5th May, 2005, the 2nd June, 2005 and the 15th December, 2005, respectively.

At the hearing on 5th May, 2005 the Circuit Court Judge had had to consider whether a foreign divorce granted in South Africa in June, 1994 should be recognised in this State under s. 29(1)(e) of the Family Law Act, 1995. The learned Circuit Court Judge ruled that this divorce should not be recognised. The husband disagreed with that ruling and subsequently, on the 25th May, 2005, initiated Judicial Review proceedings against the learned Circuit Court Judge with a view to having her Order quashed.

There was then a further hearing before the learned Circuit Court Judge on 2nd June, 2005 in relation to a different aspect of the matter. On this occasion the issue concerned the maintenance to be paid by the husband to his wife in respect of their three dependent children. At the time of the maintenance hearing on 2nd June, 2005 there was an existing maintenance order in place whereby the husband was required to pay €1,000 monthly in advance to the wife in respect of the three dependent children, representing three equal monthly payments of €333.33 per child. It appears that the wife was seeking an increase in maintenance, presumably on the grounds of a change in circumstances. It was common case that the eldest child H. was due to enter third level education in October of that year and was intending to take up a place at DCU. The husband's account of what occurred in the Circuit Court on the 2nd of June 2005 is set out at para. 6 of an affidavit which he has sworn in the present proceedings on the 9th June, 2006. He deposes therein to the following matters:-

> "I say and believe that at the maintenance hearing of the 2nd June, 2005 that I was asked by the judge what I was willing to pay by way of increased maintenance. I said that I was willing to cover all of H.'s college expenses, including fees, living expenses and accommodation and to pay these monies directly to H. (H. was commencing college in DCU in September, 2005) and also to continue to pay the current maintenance to the applicant of €667 per month in respect of the other two dependants, C. and S. The Judge commented directly to the applicant's counsel that the offer seemed a very fair offer. The applicant's counsel after discussion with their client said that

> they were seeking in addition to the increased maintenance on offer covering H.'s college expenses that they were also looking for a further 50% increase in the maintenance in respect of the other two children, and wanted €1,000 per month to be paid to the applicant (€500 per child per month). I argue that I could not afford to cover both and as it stood I would have to extend my debt just in order to cover the cost of H.'s college expenses. The judge rejected the applicant's request and ruled that I should pay for H.'s college expenses when he starts in September, 2005 and pay €667 per month in respect of the other two children but in the interim should continue to pay to the applicant until September the €1,000 per month in respect of the three children while H. is at home."

It appears that neither side took up a copy of the learned Circuit Court Judge's order of the 2nd June, 2005 in the immediate aftermath of the hearing. The husband paid maintenance to the wife in accordance in what he believed had been ordered by the learned Circuit Court Judge. Accordingly he continued to pay €1,000 in respect of the three children for each of the months of July, August and September. Then in October, he paid for H.'s college fees and boarding and paid €333 directly to H. to cover his living and other costs. He also paid €667 directly to the wife in respect of the other two children.

Shortly after these October payments had been made the wife purported to dispute the husband's interpretation of the learned Circuit Court Judge's Order made on 2nd June, 2005, and to contend that the learned Circuit Court Judge had in fact directed the payment of increased maintenance (i.e. maintenance increased from €333.33 to €500.00 per child per month) from October onwards.

On 19th October, 2005 the husband wrote to the County Registrar seeking clarification on the issue and requesting that the matter should be listed before the learned Circuit Court Judge as soon as possible. The County Registrar arranged for the matter to be listed again before Judge Buttimer on 15th December, 2005 so that the parties could ask the Court to clarify it's order. Moreover, in the course of replying to the husbands' correspondence the County Registrar enclosed a copy of the court clerks note concerning what had occurred on the 2nd June, 2005. The husband believed (and continues to believe) that this note supports his interpretation as to how learned Circuit Court Judge had ruled on 2nd June, 2005.

At paras. 11 and 12, respectively, of his affidavit of the 9th June, 2006 the husband gives his account concerning what happened before the learned Circuit Court Judge at the hearing on 15th December, 2005. He states:-

> "11. I say and believe that at the hearing of 15th December, 2005, Judge Buttimer said that the Order was "quite clear" and read from her notes of the 2nd June, 2005 stating that there was an interim order whereby I should continue to pay until September, the €1,000 per month in respect of the three children to the applicant while H. is at home and thereafter pay for H.'s college fees, accommodation and living expenses and the apportioned amount of €667 per month in respect of the other two dependents. This agreed and was the same as my interpretation of the 2nd June, 2005 maintenance hearing.
>
> 12. The applicant disputed this statement from the Judge vehemently and continued to do so for some period. During this period Judge Buttimer read through the case file and noted the application by myself, the respondent, the application seeking a Judicial Review against herself on the ruling regarding the recognition of the foreign divorce made on 5th May, 2005. Judge Buttimer asked me why she had not been served with the Judicial Review application. I replied that I had served it via the Kilkenny County Registrar in accordance with Order 84 of the Superior Court Rules. The applicant continued to contradict the statement made by Judge Buttimer and then the Judge read out another statement which contradicted her original statement and were in the words of the applicant's solicitor, stating that I should in addition to paying H.'s college fees, accommodation and other expenses, also increase maintenance payments to €1,000 in respect to the other two dependants, C. and S.. I argued that I could not afford to pay this money as that as I was already extending my debt just to cover the payment of H.'s college expenses and that it was an impossible order. Judge Buttimer advised that if I wished to, that I could lodge an application seeking a reduction in maintenance due to a change in circumstances. Judge Buttimer further added that any such application should be heard before any Judge other than herself due to the matter involving the Judicial Review proceedings brought by myself which would only allow for biased interpretation of any further rulings by herself."

The applicant in the present proceedings was unhappy with the learned Circuit Court Judge's ruling at the clarification hearing on 15th December, 2005. He has initiated the present proceedings with a view to having the maintenance Order made by the learned Circuit Court Judge on 15th December, 2006 quashed. To that end he applied to Mr. Justice O'Neill in the High Court on 19th June, 2006 seeking leave to apply for an *Order of Certiorari* by way of judicial review and was refused leave. He then appealed Mr. Justice O'Neill's Order to the Supreme Court and was successful.

By Order of the Supreme Court dated 25th April, 2008, he was granted:

> "…leave to apply for an *Order of Certiorari* by way of application for judicial review as set forth in para. D. of the Statement dated 12th June, 2006 on the grounds set forth at para. E in the aforesaid statement."

The relief sought at para. D in the applicant's Statement dated 12th June, 2006 claims:-

> "An *Order of Certiorari* to quash the maintenance order made by Judge Olive Buttimer in the Kilkenny Circuit Court family law on 15th December, 2006, record number D. 24/02".

The grounds upon which that relief is sought are set out at para. E in the said Statement as follows:-

> "(1) Judge Buttimer was wrong to make an impossible maintenance order when at neither the 2nd June, 2005 nor the 15th December, 2005 clarification hearing was there any presentation, discussion or verification of means, income or expenditure by either the applicant or respondent. The Judge was procedurally incorrect to make a maintenance order other than what is volunteered and is contrary to proper court procedure as stated in the Status of Children Act, 1987 – s. 17 and 18 (5)(a).

(2) Judge Buttimer on 15th December, 2005 hearing upon being requested for clarification of an order that she made on 2nd June, 2005 (this order was not perfected until the 18th January, 2005 after the 15th December, 2005 hearing) made an maintenance order that contradicted both the judge's own notes of 2nd June, 2005 hearing as was read out by the judge on 15th December and the court clerk's notes of 2nd June, 2005 hearing and ruled based upon the applicant's solicitor interpretation of the ruling of the 2nd June, 2005, this is procedurally incorrect.

(3) The judge was procedurally incorrect to make any ruling on 15th December as the respondent had lodged judicial review proceedings against the judge on 25th May, 2005 with regard to the judge's ruling made on 5th May, 2005 in the matter of the recognition of foreign divorce granted in South Africa under s. 29 (1)(e) of the 1995 Family Law. The judge should have excused herself from the case without making any rulings as any ruling would be considered biased against the respondent."

Following his successful appeal to the Supreme Court the applicant brought a motion before the Master of the High Court dated 3rd July, 2008 seeking an Order for Discovery of Judge Buttimer's notes in regard to the Kilkenny Circuit Court hearing on 2nd June, 2005 in Case No. D. 24/02. The applicant sought this discovery purportedly in aid of his judicial review proceedings. The matter came on for hearing before the Master on Wednesday 29th October, 2008 and, as I have previously indicated, the Master acceded to the applicant's application and granted an Order for Discovery. The terms of his Order were as I have recited them in the introduction to this judgment. The respondent has now appealed to this Court against the Master's Order

In support of the appeal this Court has before it an affidavit of one Emma Golden, a solicitor in the office of the Chief State Solicitor. She states that she is dealing with the matter on behalf of the respondent and she makes the usual averments with respect to her means of knowledge. It is not necessary for the purposes of this judgment that I should recite the contents of her affidavit in full and it will suffice if I summarize the points made therein. It should be stated that the contents of this affidavit are predominantly in the nature of legal submissions rather than evidence as to matters of fact, but no point was taken on this. She contends that the Master ought not to have made the Order in question for a number of reasons.

First of all, she makes the point that the Master was not entitled to make the order in circumstances where no affidavit grounding the application for discovery had been sworn or was before the court, and she states that the need for such an affidavit is clearly required by O. 31 of the Rules of the Superior Courts.

Secondly, she complains that the applicant did not send a request for voluntary discovery, identifying the reasons therefore, as provided for in O. 31 r. 12 of the Rules of the Superior Courts.

Thirdly, she contends that it was inappropriate to order discovery in circumstances where discovery of the particular material sought could not in any event aid the applicant. Ms. Golden complains that the applicant has failed to demonstrate why he says that the documentation sought is relevant and necessary in the context of the relief that he is claiming. In this regard she exhibits a course of correspondence between the applicant and the Kilkenny County Registrar, marked "EG 2", to demonstrate that the applicant has already been provided with, on request, copies of the notes made by the court clerk who was sitting as the Circuit Judge's Registrar on the 2nd of June, 2005.

Fourthly, she avers that she has instructions to the effect that the respondent does not intend to take any part in these proceedings and that the only potential *legitimus contradictor* to the application will be the notice party. She avers that, to date, no opposition papers have been filed by or behalf of the notice party. She submits that discovery should only be ordered in aid of some issue that emerges from information contained in the affidavits filed in response to the application. Since no affidavit has been filed in response to the substantive claim for relief, it was inappropriate and incorrect to order discovery.

Fifthly, Ms. Golden further submits that the personal notes taken by a Judge in the context of legal proceedings do not form part of the court file and they are therefore outside the scope of any application for discovery or disclosure, whether in the context of subsequent or other proceedings or whether available to a party to such proceedings as a matter of entitlement.

I also have before me an affidavit sworn by the applicant on the 20th November, 2008, for the purpose of replying to Ms. Golden's affidavit. Once again it is not necessary for me to recite the entire contents of this affidavit and it will suffice if I summarise the points made therein.

With respect to the point that there was no affidavit before the Master grounding the application for discovery the applicant contends that the Master accepted the sworn affidavit that was on file, namely his affidavit of the 9th June, 2006, and that this affidavit fulfils the requirements of O. 31 of the Rules of the Superior Courts.

In response to the contention that there was no request for voluntary discovery the applicant disputes this. He contends that he made two requests made for voluntary discovery and that these were communicated via the Kilkenny County Registrar. In fairness to the applicant, Ms. Golden did exhibit, as part of the bundle of correspondence marked EG 2 to which I have previously referred, a letter from him to the Kilkenny County Registrar dated the 8th May, 2008, in which the applicant does request the County Registrar to make available to the High Court, *inter alia*, "an attested copy of Judge Buttimer's notes of the hearing of the 2nd June, 2005, in respect of case No. D24/02". Further, this letter also enclosed a copy of the pleadings in the current judicial review proceedings. The applicant contends that it would have been self evident to any person reading that material as to why he wanted discovery of the document in question.

In response to the third matter raised by Ms. Golden the applicant contends that discovery of the judge's notes "would conclusively reinforce the judicial review claims".

In response to the fourth matter raised by Ms. Golden, the applicant contends that in circumstances where the respondent does not intend to take any part in these proceedings her notes would provide the only true record of the hearing of the 2nd June, 2005, and that they are therefore essential.

In response to Ms. Golden's fifth point, the applicant states:

> "this entire case has evolved due to misinterpretations, misunderstanding and ambiguity and in an *in- camera* court hearing where personal recordings are not accepted as legitimate records, then the only true record of what was ruled by the judge is indeed the judge's notes themselves. The judge's notes are the least to be expected where dispute arises over what was understood to have been said by the judge particularly when rulings in the lower courts are not made in writing by the judge compared to that of their superiors in the Supreme Court".

The applicant further avers that at the time of making his discovery Order the Master, having first of all quoted Article 40 of the Constitution (I would infer that the applicant is referring specifically to Article 40.1 of the Constitution) then commented that all are equal under the law and that judges as public servants were no exception to this rule.

The Law
Whilst it is true to say that the Constitution does provide in Article 40.1 that "all citizens shall, as human persons, be held equal before the law", the critical wording here is " . . . citizens, as human persons . . ." In *Quinns Supermarket Limited and Another v. The Attorney General and Others* [1972] I.R. 1, the Supreme Court has held that the guarantee "refers to human persons for what they are in themselves rather than to any lawful activities, trades or pursuits which they may engage in or follow". All judges are of course human persons and *qua* other human persons they must indeed be held equal before the law. However, the entitlement of a judge on the Bench to administer justice does not derive from any facet of his or her human personality but rather from the fact that the judge is a constitutional officer appointed in accordance with Articles 34, 35 and 36 of the Constitution.

Article 34.1 provides that justice shall be administered in courts provided by law by judges appointed in the manner provided by this Constitution. Article 34 also provides, *inter alia*, for the establishment of courts of first instance and also a court of final appeal to be known as the Supreme Court. The courts of first instance are to include a High Court invested with full original jurisdiction and also courts of local and limited jurisdiction. Both the Circuit Court and District Court are courts of local and limited jurisdiction. Article 35.1 provides that the judges of the Supreme Court, the High Court and all other Courts established in pursuance of Article 34 shall be appointed by the President. Article 34.5 specifies the form of the declaration that is to be made by every person appointed a judge under the Constitution, and further specifies where, or before whom and when that declaration shall be made. Article 35.2 provides that all judges shall be independent in the exercise of their judicial functions and subject only to the Constitution and the law. Article 35.4.1 protects the security of tenure of Supreme Court and High Court judges. Accordingly a judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his or her removal. Judges of the other courts depend upon statute for their guarantee which is in similar terms. Article 35.5 provides that the remuneration of a judge shall not be reduced during his or her continuance in office.

It follows from all of this that a judge, when acting as a judge, is not equal to, but rather is in a different position to, other citizens and indeed other public servants. He or she has a constitutionally guaranteed independence and freedom of action, subject only to the constitution and the law, and this is something that must be vigorously defended in the public interest.

Moreover, and as a support to the principle of judicial independence, judges have immunity from suit in respect of things said and done by them as judges, providing that they do not deliberately and consciously act in excess of their jurisdiction. The reasons for this are obvious. Judges cannot be always looking over their shoulders in the performance of their judicial functions out of concern for being sued, or in some other way being made answerable, for their actions. Morris P. explained the necessity for, and the limits upon, judicial immunity in the case of *Desmond v. Riordan*, [2000] 1 I.R. 505 when he said:

> "… the granting of an immunity to the judiciary of necessity imposes a limitation upon the constitutional rights of the citizen to vindicate his good name and so the limitations placed upon the exercise of this right must strictly limited to the degree to which the granting of the immunity may be necessary to achieve its objectives, namely to enable the judge to administer the law freed of the concern that he will made answerable for his actions."

In the view of this Court a strong argument can also be made in favour of the existence of a constitutional immunity or privilege rendering a judge's notes non-compellable in any proceedings, in further support of the principle of judicial independence as enshrined in Article 35.2 of the Constitution.

In the view of this Court the order made by the Master of the High Court is objectionable on number of grounds. First of all, the Court is concerned that it represents an impingement upon the judge's constitutionally guaranteed independence. A judge's notes are a personal *aide memoire* taken by the judge in the course of a case. They are intended for the judge's use and the judge's use alone. They are not intended to be referred to or used by any other person. A judge's notes are unlike, for example, hospital or medical notes in that there is no requirement that they should be generated and kept according to any established protocol. Nor is a judge required to use any standard form of notation. Some judges may write everything down in every case. Other judges may do that in some cases but in other cases may prefer to listen carefully to the evidence or to the arguments, or to observe the demeanour of a witness, taking only essential notes. Sometimes an extensive note may be taken because of the length of the case, the complexity of it or the likelihood of judgment being reserved. At other times a judge might regard an application or case as being straight forward and as not require the taking of a very detailed note, for example, where the case is flagged as being a short one and judgment is likely to be delivered on the same day. That might also be true in a case involving a net point of law and where the essential facts are not greatly in controversy, particularly if the parties have filed extensive written submissions in advance of the hearing. The extent of the note taken in any case and the system of note taking employed is entirely up to the individual judge. The judge may use or her own shorthand or none at all. He or she may have their own system of memory prompts. He or she may cross reference different pieces of evidence according to their own system. The notes may also record a judge's impression of a witness's credibility and reliability. There may be case citations or references to published material. Simply put the notes may be more or less comprehensive as the judge sees fit, and they may take any form that the judge sees fit.

The difficulty with making such notes available to a third party, whether on discovery or otherwise, is that they will frequently require deciphering or explanation by the note-taker. This raises the spectre of a judge having to explain, and

possibly being cross-examined upon, his or her notes, something which is inimical to the notion of judicial independence and contrary to the public interest. It is a matter of particular concern to this court that the Master of the High Court in ordering the respondent to make discovery has directed that the respondent should make the affidavit of discovery personally. The Supreme Court has expressly stated that it is undesirable for a judge to swear an affidavit concerning the exercise of his judicial functions. In the case of *The State (Sharkey) v. District Justice McArdle and the Director of Public Prosecutions,* (Unreported, Supreme Court, 4th June, 1981) Henchy J. stated:-

> "This court has pointed out on a number of occasions that it is undesirable in a case such as this for a person exercising judicial functions to rely on an affidavit made by himself. Such an affidavit leaves him open to the risk of being cross-examined by the dissatisfied litigant. It would be more judicious if the affidavit were made by the court clerk or registrar, and it should contain an averment that it is made from information within the deponent's own knowledge and/or from information supplied by a named person."

This passage, albeit *obiter*, has been cited, alternatively alluded to, with approval by Judges of both the High Court and the Supreme Court on a number of occasions since. See for example Barr J. in *The State (Freeman) v. Connellan* [1987] I.L.R.M. 470 at 476 and the judgment of Murphy J. (Hamilton C.J. concurring) in the Supreme Court decision in *O'Connor v. Carroll,* [1999] 2 I.R. 160 at 166. Therefore if the respondent's notes of the hearing on 2nd June, 2005 are discoverable, and the court has the gravest doubts about this, the appropriate person to swear the affidavit of discovery would be the appropriate court clerk or registrar and not the respondent herself.

Although the Court has expressed itself sympathetic to the view that a judge's notes are in principle to be regarded as non-compellable on the grounds of constitutional immunity, it is in fact not necessary for it to express a definitive view on this question in the particular circumstances of this case. However, it is the strong view of this court that if discovery of a judge's notes were theoretically possible, it could only happen in the most exceptional circumstances and where the necessity for it was clearly demonstrable. It is indeed difficult to conceive of a case in which it might be necessary. It is certainly not necessary in the present case

Order 84, r. 25 allows for applications for discovery in judicial review proceedings. This rule provides that:-

> "An interlocutory application may be made to the court in proceedings on an application for judicial review."

It then goes on to provide that "interlocutory application" includes an order for discovery under O. 31. However, it is also well established that the jurisdiction to grant discovery in judicial review matters should be exercised sparingly. In *Carlow Kilkenny Radio Limited v. Broadcasting Commission of Ireland,* [2003] 3 I.R 538, Geoghegan J. stated at p. 537:-

> "The established English and Northern Irish jurisprudence, which would seem to be in conformity with our own principles of discovery, is to the effect that discovery will not normally be regarded as necessary if the judicial review application is based on procedural impropriety as ordinarily that can be established without the benefit of discovery."

The test is whether, in the words of Bingham M.R. in *R. v. Secretary of State for Health, ex parte Hackney London Borough*, (Unreported English Court of Appeal, 24th July, 1994) the applicant has "a factual issue of sufficient substance to lead the court to conclude that it may, or will, be unable to try the issue fairly, fairly that is to all parties, without discovery of documents bearing on the issue one way or the other."

This court has come to the conclusion that discovery of the respondent's notes are not necessary for the purposes of the applicant's present judicial review proceedings. The normal way in which a party proves something that was said in court on a previous occasion is by calling evidence from somebody who was present in court at the time that the words were spoken to give evidence as to what was said. This could be done by the calling of oral evidence or the swearing of an affidavit as appropriate in the circumstances of the particular case. Although this particular case was conducted in camera, the applicant himself was present, the notice party was present, the notice party's solicitor was present and the court clerk was present. All four of those persons are in a position to depose as to what the judge said in the course of reading out her notes. It is not necessary for the actual notes to be produced. Moreover, it is established that such notes do not form part of the record.

The ground pleaded at para. E (1) of the applicant's statement represents a two part complaint. The applicant complains firstly of procedural impropriety by the learned Circuit Court Judge and he also advances what amounts to a claim of irrationality in as much as he contends that the maintenance order made by the learned Circuit Court Judge was unsupported by evidence as to the means of income or expenditure of the respective parties. In the opinion of this court the applicant does not require discovery of the material which is the subject matter of the Master's order to enable him to establish either of these matters. The complaint made at para. E (2) of the applicant's statement is again a complaint of procedural impropriety. As pointed out by Geoghegan J. a judicial review application based on procedural impropriety can ordinarily be established without the benefit of discovery. I am satisfied that that is the case here. The grounds pleaded at para. E (3) of the applicant's statement are comprised of a two-fold complaint. Once again there is claim of procedural impropriety. There is also a claim that the judge should have excused herself from the case for bias or perceived bias. Once again, these are matters that are capable of being established without resort to discovery of the judge's notes.

Finally, while the Court is satisfied that the Master was entitled to regard the affidavit of the 9th of June 2006 as sufficient to ground the application for discovery, and while there does seem to have been a request for voluntary discovery, Ms Golden is nonetheless correct in the other procedural objection that she makes (her fourth point) namely that discovery should only be ordered in aid of some issue that emerges from information contained in the affidavits filed in response to the application. She rightly points out that since no affidavit has been filed in response to the substantive claim for relief, it was inappropriate and incorrect to order discovery in any event.

Accordingly, in all the circumstances of the case I am disposed to allow the appeal against the Master's order dated the 29th October, 2008.