Neutral Citation: [2014] IEHC 347

THE HIGH COURT

[2013 No. 144 C.A.]

BETWEEN

DENNIS O'BRIEN

APPELLANT

AND

THE REVENUE COMMISSIONERS

RESPONDENTS

JUDGMENT of Mr. Justice Barton delivered on the 27th day of June, 2014

1. This matter comes before the court by way of motion on notice dated 17th September, 2013, in which the respondents seek an order striking out the appellant's appeal against an order of the Circuit Court dated 1st July, 2013, whereby the appellant's application to have his appeal to the Circuit Court from the determination of the Appeal Commissioners dated 20th July, 2011, listed of hearing, was struck out.

2. The respondents invoke the inherent jurisdiction of this Court to strike out the appellant's appeal having regard to the provisions of s. 31(2) of the Courts of Justice Act 1936, which provides as follows:-

> *"Notwithstanding anything contained in this Part of this Act, no appeal shall lie from any decision of the Circuit Court on an appeal to that Court under an enactment relating to a tax or duty under the care and management of the Revenue Commissioners, save only such (if any) appeal (including an appeal by way of case stated) as may lie under any such enactment as aforesaid in force immediately before the commencement of this Part of this Act."*

3. Following upon the order of the Circuit Court of 1st July, 2013, the appellant's solicitors, by letter dated 5th July, 2013, wrote to the respondent in the following terms:-

> *"Our client has considered his position arising from the decision of the Appeal Commissioners on 20th July, 2011 and, as represented to the Circuit Court on 1st July, 2013, he is electing to appeal by way of rehearing to the Circuit Court. In light of the decision of her Honour Judge Linnane on 1st July, 2013, we are appealing that issue to the High Court.*
>
> *Our client has not applied to the High Court to list the case stated for hearing. In relation to the motion issued by your client in the High Court on 2nd May, 2013, we agree that no case stated is currently properly before the High Court arising from the decision of the Appeal Commissioners on 20th July, 2011. In those circumstances we do not see any basis for the continuance of the motion as issued by your client in that the underlying matter to your motion is not properly before the High Court. We propose to inform the Central Office of this in respect of the underlying matter bearing record No. 2012/1004R."*

4. In response to that letter and the service of the notice of appeal, the respondents by letter of even date wrote to the appellant's solicitor in the following terms:-

> *"I acknowledge receipt of the notice of appeal served on this office on 5th July. Please note there is no appeal to the High Court in this matter pursuant to the Courts of Justice Act 1936 and/or the Rules of the Superior Court. I refer you to s. 31(2) of the Courts of Justice Act 1936, which specifically excludes such an appeal in a tax matter, save for such appeal as may lie under the enactments relating to tax."*

5. The issue for determination by the court on this application is in essence a net point of law, namely whether the order of the Circuit Court made on 1st July, 2013, was a decision within the meaning of s. 31(2) of the Courts of Justice Act 1936 (hereinafter referred to as the Act of 1936) and if so whether, on a true construction of the wording of that subsection, the order of the Circuit Judge (hereinafter referred to as the order of 1st July, 2013) was final, conclusive, unappealable to the High Court and effective to dispose of the appellant's appeal to the Circuit Court pursuant to s. 942 of the Taxes Consolidation Act 1997 (hereinafter referred to as the TCA of 1997) against the determination of the Appeal Commissioners made 20th July, 2011 (hereinafter referred to as the determination of 20th July, 2011).

Background

6. The court is not concerned on the present application with the substance of the appellant's appeal against the order of 1st July, 2013 nor, for that matter, with the appellant's appeal to the Circuit Court against the determination of 20th July, 2011, but rather with a construction of the meaning of s. 31(2) of the Act of 1936. It is considered useful, however, to summarise the factual background and relative legislative provisions so as to place the within application in context.

7. Section 941 of the Act of 1997, provides, *inter alia*:-

> *"(1) Immediately after the determination of an appeal by the Appeal Commissioners, the appellant or the inspector or such other officer as the Revenue Commissioners shall authorise in that behalf (in this section referred to as 'other officer'), if dissatisfied with the determination as being erroneous in point of law, may declare his or her dissatisfaction to the Appeal Commissioner who heard the appeal.*
>
> *(2) The appellant or inspector or other officer, as the case may be, having declared his or her dissatisfaction, may within 21 days after the determination by notice in writing addressed to the Clerk to the Appeal Commissioners require the Appeal Commissioners to state and sign a case for the opinion of the High Court on the determination.*

…

(4) The case shall set forth the facts and the determination of the Appeal Commissioners, and the party requiring it shall transmit the case when stated and signed to the High Court within 7 days after receiving it.

…

(6) The High Court shall hear and determine any question or questions of law arising on the case, and shall reverse, affirm or amend the determination in respect of which the case has been stated, or shall remit the matter to the Appeal Commissioners with the opinion of the Court on the matter, or may make such other order in relation to the matter, and may make such order as to costs as to the Court may seem fit.

…

(8) An appeal shall lie from the decision of the High Court to the Supreme Court."

8. The appellant invoked the procedure to have a case stated under s. 941 on 28th July, 2011. The Appeal Commissioners signed the case stated on 22nd November, 2012, however, it was not transmitted until 30th November, 2012, being outside the seven day time period specified in section 941(4). When the respondent's motion came on for hearing before Laffoy J. on 15th July, 2013, the appellant's case stated was struck out by consent of the parties. The respondent's notice of motion to strike out the case stated was dated 2nd May, 2013. It was common case that at the hearing before this Court that on the date of the appellant's application to the Circuit Judge to fix a date for the hearing of his appeal against the determination of the Appeal Commissioners that the respondent's motion returnable before the High Court would most likely be successful, there being no statutory provision enabling the court to extend the time limited by s. 941(4) of the TCA of 1997.

9. Section 942 of the TCA of 1997 provides for appeals by any person aggrieved by a determination of the Appeal Commissioners and in this regard, it is provided that the appeal is to be by way of a rehearing by a judge of the Circuit Court. Section 942 subsection (3) provides:-

"(3) The judge shall with all convenient speed rehear and determine the appeal, and shall have and exercise the same powers and authorities in relation to the assessment appealed against, the determination, and all consequent matters, as the Appeal Commissioners might have and exercise, and the judge's determination shall, subject to section 943 , be final and conclusive."

The Determination by the Appeal Commissioners

10. On 6th May, 2010, the respondent's Revenue Inspector, Michael Brennan, wrote to the appellant's solicitor seeking answers to three questions concerning the appellant's tax return for the year 1999 to 2000, and relating to the exchange of his holding of shares in ESAT Telecom for loan notes issued by BT Hawthorn Limited. The inquiries were made under the provisions of s.956(1)(b)(i) of the Act of 1997, as amended, having regard to subs. (1)(c) of that section.

11. In that letter, the inspector advised that he had formed a belief that the return submitted on behalf of the appellant for the tax year 1999 to 2000 was insufficient due to it having been completed in an negligent manner and in that regard, he detailed a number of other beliefs he had come to on the basis of certain understandings which were also set out in the letter.

12. As against that inquiry, the appellant appealed to the Appeal Commissioners under s. 956(2)(a) of the Act of 1997. That section permits a person chargeable to tax to appeal on the grounds that the chargeable person considers that the inspector is precluded from making the inquiries and the Appeal Commissioners are required to hear the appeal in all respects as if it were an appeal against an assessment. The issue for determination by the Appeal Commissioners was whether the inspector had at the time of writing his letter on 6th May, 2010, reasonable grounds for believing that the return for the tax year 1999 to 2000 was insufficient due to it having been completed in a negligent manner.

13. By the determination of 20th July, 2011, the Appeal Commissioners decided that in accordance with s. 956(2)(c)(ii) of the Act of 1997, the Revenue Inspector was not precluded from making the inquiry he did by reason of the provisions of subsection (1)(c) and that it was therefore lawful for him to continue with his inquiry in relation to the appellant's tax return.

14. The appellant's dissatisfaction with the determination was expressed as required by and within the time permitted by the TCA of 1997.

Appeal to the Circuit Court

15. On 28th July, 2011, the appellant's solicitors wrote to the inspector of taxes requesting an appeal by way of rehearing before a judge of the Circuit Court pursuant to the provisions of s. 942 of the TCA of 1997.

16. The letter was received by the Revenue Commissioners, however, although addressed to the inspector, it was not received by him personally at the time, a fact which came to light as a result of an FOI request (5513/2013) raised by the appellant's solicitors through correspondence in 2013.

17. It appears therefrom that on 18th November, 2013, in searching for any relevant documents that might have existed in relation to the FOI request, the letter of 29th July, 2011, was located in an appeal's committee file. The letter had been misdirected. The inspector wrote to the appellant's solicitors on 21st November, 2013, enclosing certain copy documentation with an explanation as to what had happened and explaining why the letter had not come to his attention in July 2011.

18. It was common case that a practice exists whereby some persons chargeable to tax and dissatisfied with the determination of the Appeal Commissioners, invoke both the case stated and appeal provisions contained in s. 941 and s. 942 of the TCA of 1997. It was also common case that the person chargeable to tax is ultimately required to make an election to proceed either with the case stated or, alternatively, with an appeal to the Circuit Court.

19. It is clear from the affidavits and exhibited correspondence in these proceedings that there was an issue between the parties as to whether and if so, when an election as required was made by the appellant.

20. Following the issuing of the respondent's motion dated 2nd May, 2013, for an order that the appellant's case stated be struck out

on the grounds that it had not been transmitted to the High Court within the time prescribed by s. 941(4) of the TCA of 1997, the appellant's solicitors, by letter dated 10th May, 2013, wrote to the Inspector of Taxes inquiring as to the listing of the appellant's appeal to the Circuit Court in accordance with s. 942 of the TCA of 1997. This letter was replied to by the respondents on 13th May, 2013. They declined to list the circuit appeal on the grounds that the appellant had elected to proceed with the case stated. In response, the appellant's solicitors wrote on 27th May, 2013, stating that the request for a rehearing of the matter by a judge of the Circuit Court had never been withdrawn and again requesting the respondent to write to the County Registrar seeking a time and venue for the rehearing of the matter by a judge of the Circuit Court and in default it was intimated that an application would be made by the appellant to have the appeal listed. At that time, it is quite clear from the papers before this Court that the inspector, Mr. Brennan, was personally unaware of the appellants solicitors letter of 28th July, 2011, giving notice of the appellant's intention to appeal the determination of the Appeal Commissioners to the Circuit Court. A copy of the letter of 28th July, 2011, was, however, sent to Mr. Brennan under cover of a letter from the appellant's solicitors dated 10th May, 2013. When he received that letter, he made a note that the appellant's request for a rehearing of the appeal by a Circuit Judge "*came out of the blue*". It does not, however, seem to have resulted in any change to the position of the respondents who persisted with their view on the question which was that as far as they were concerned the appellant had elected to proceed by way of case stated.

21. The failure of the respondents to act on the request to list the appeal for hearing by the Circuit Court, caused the appellant's solicitors to issue a motion seeking an order of the Circuit Court listing the appellant's appeal for hearing against the determination of 20th July, 2011.

22. The appellant's motion was heard on 1st July, 2013, by Her Honour Judge Linnane. That motion proceeded on affidavit and after hearing all parties, she made an order refusing the application. A transcript of the proceedings before the learned Circuit Judge was provided to this Court on the hearing of the within application.

23. It appears from a reading of the transcript that the position adopted by the appellant at the hearing before the Circuit Judge was that whilst he accepted that he could not proceed with both the case stated and the circuit appeal, he had not yet made an election. In essence, he was trying to keep his options open. If he was successful on the respondent's motion in the High Court, he would have the option to pursue his case stated, on the other hand, if he was unsuccessful in that application he would have the option of pursuing his appeal by way of rehearing before the Circuit Court. This scenario was described by the Circuit Judge in the following way:-

> *"Counsel for the appellant argued that they still had not elected which appeal the appellant is pursuing. It is accepted he cannot run both appeals but counsel for the appellant has indicated that if the Revenue's motion before the High Court to have the case stated struck out is not successful a decision will be made then as to which appeal they will run."*

24. The learned Circuit Judge concluded:-

> *"In my view, the appellant, in pursuing his appeal by way of case stated and transmitting same to the High Court, he has made a choice and is not entitled to pursue his appeal to the Circuit Court. Accordingly, I am refusing this application to have his appeal to the Circuit Court listed."*

25. In subsequent exchanges between counsel and the learned Circuit Judge it is clear that she herself did not consider that the making of such an order amounted to a determination of the substantive appeal.

26. Whether or not the learned Circuit Judge was correct in her judgment and in the order she made is not germane to the outcome of the within application, being referred to here by way of background only. Suffice to say, however, that the order she made is now the subject matter of an appeal to this Court brought, it is contended by the appellant, pursuant to the provisions of s. 37 of the Act of 1936 and O. 61 of the Rules of the Superior Courts.

27. Having served a notice of appeal on the respondents against the order of 1st July, 2013, the appellant consented to the order made by Laffoy J. on 15th July, 2013, striking out the case stated.

28. As the court is not concerned on this application with the merits or otherwise of the subject matter of the appeal to this Court against the order of 1st July, 2011, no comment will be made in relation thereto. What is relevant on this application, however, is whether or not, given the background to the case, the appellant is entitled to appeal against that order having regard to the provisions of s. 31(2) of the Act of 1936.

The Submissions

29. The court had the benefit of both written and oral submissions. At the hearing, senior counsel on behalf of the respondents, Mr. Murray, succinctly summed up the issue this way:-

> *"The net issue that presents itself is whether, as I say, Judge Linnane's decision of 1st July, 2013, was a decision of the Circuit Court on an appeal from a decision of the Appeal Commissioners or whether, as Mr. Hayden says, that section is limited to an appeal from the full substantive hearing. So Mr. Hayden says there was no full hearing of the appeal and, therefore, this section doesn't prevent him from appealing and I say no, this section applies to any decision on an appeal and this was a decision on an appeal. In fact, it was a decision to the effect that no appeal could be brought."*

30. Mr. Murray submitted that whilst the provisions of s. 31(2) of the Act of 1936, had not, as far as he was aware, been construed, the Court would, nevertheless find assistance in decisions of the High Court and the Supreme Court on the construction of s. 39 of the Act of 1936, which whilst not phrased in the same way, did employ similar language. Section 39 of the Act of 1936 provides:-

> *"The decision of the High Court or of the High Court on Circuit on an appeal under this Part of this Act shall be final and conclusive and not appealable."*

31. He submitted that the same principles which govern appeals from the Circuit Court to the High Court – there being no appeal to the Supreme Court – govern an appeal from the Appeal Commissioners to the Circuit Court and that the effect of s. 31(2) was, save where a case was stated for the opinion of the High Court on a point of law, to totally oust the jurisdiction of the High Court. In short, there was no appeal to that court from any decision of the Circuit Court on appeal proceedings brought against a determination of the Appeal Commissioners. It was his submission that the order of 1st July, 2013, constituted a decision within the meaning of s. 31(2) of the Act of 1936 and that accordingly, as the word "*any*" was also used in conjunction with the word "*decision*" the effect of the order of 1st July, 2013, was also to dispose of the appellant's appeal to the Circuit Court pursuant to the provisions of s. 942 of the TCA of 1997 and that appeal in this context meant that which constituted the entire appeal proceedings.

32. Referring to s. 39 of the Act of 1936, counsel for the respondents gave by way of example a decision on a procedural motion having the effect of determining the proceedings without the substance of the appeal itself being heard by the court, namely an application by a defendant to dismiss a case for want of prosecution. Were the High Court to strike out a circuit appeal for want of prosecution, there would be no appeal to the Supreme Court against that order nor would there have been any hearing on the substantive appeal but the order striking out the proceedings would, nevertheless, put an end to those proceedings. It was submitted that it was clear on the face of the order of 1st July, 2013. Accordingly, the only relevant consideration was whether that order amounted to a decision on appeal from the Appeal Commissioners and if so having regard to the provisions of s. 31(2) of the Act of 1936, that had the effect of disposing of the entire proceedings. The respondent submitted that it was a decision of the Circuit Court on an appeal to that court and that the consequence of that was to dispose of the entire appeal proceedings. The language of the section did not bear the construction which the appellant sought to put on it. That construction would be illogical and inoperable because it would have the effect enabling an appeal to the High Court on procedural motions but not against a decision of the Circuit Court after a full rehearing of the appeal to that court.

33. Counsel for the respondent cited in aid the following authorities *W.J. Prendergast & Sons Limited v. Carlow County Council* [1990] 2 I.R. 482; *L.P. v. M.P.* [2002] I.R. 219; and *Canty v. Private Residential Tenancies Board* [2008] 4 I.R 592.

34. Having considered those decisions, I think it appropriate to observe that in the case of *Prendergast v. Carlow County Council*, which involved a purported appeal to the Supreme Court against both a substantive decision of the High Court and a refusal to state and sign a case on a point of law in proceedings brought pursuant to the provisions of the Malicious Injuries Act 1981, a full hearing of the application for compensation had taken place in the Circuit Court, moreover, the appeal by the respondent against the order of the Circuit Judge and which was successful, also involved a full rehearing. Similarly, in the case of *L.P. v. M.P.*, which involved family law proceedings that had commenced in the Circuit Court, there had been a full hearing in that court which made an order against which the husband appealed to the High Court. When the proceedings came on for hearing before the High Court, counsel for both parties addressed the High Court judge outlining the facts, the areas of agreement between the parties, the matters in issue and the kind of order which could be made so as to resolve those issues. Evidence as such, however, was not tendered. After certain remarks were made by the High Court Judge, counsel for the respondent asked the High Court to vary the Circuit Court order concerning the custody of the children as agreed between the parties but to disqualify himself from hearing the maintenance issue. The respondent did not call evidence regarding the maintenance issue. The High Court Judge did not disqualify himself but varied the order of the Circuit Court concerning the custody of the children and affirmed the maintenance order. The respondent appealed to the Supreme Court seeking an order to have the High Court order set aside and an order directing a rehearing.

35. It was held by the Supreme Court that once the High Court had embarked on a hearing of the appeal from the Circuit Court, it was acting exclusively within its appellate jurisdiction pursuant to s. 38 of the Act of 1936 and that all decisions in the course of that hearing were governed by s. 39 of the Act of 1936.

36. Murray J., as he then was, in his judgment at p. 224 stated:-

> *"Any rulings of the trial judge in the High Court were in the course of hearing the appeal and neither such rulings nor his order determining the appeal can be appealed to this court. It was submitted that the order of the High Court Judge was an order determining the circuit appeal in accordance with the provisions of the Act of 1936. There was a re-hearing within the meaning of that Act. The case was opened on the 7th February and when, the following day the respondent declined to tender evidence, the High Court properly decided the circuit appeal within the meaning of s. 39."*

37. Later at p. 225:-

> *"All the issues were open for decision by the High Court Judge and the fact that the party appealing decided not to call evidence on the one issue which remained in contention, for whatever reason, does not deprive the hearing before the High Court of its character as an appeal from the Circuit Court. That is what the High Court re-heard and determined."*

38. At p. 226:-

> *"In the course of any judicial hearing before the courts, in this instance an appeal from the Circuit Court to the High Court, the presiding judge will have occasion to rule on legal and procedural issues arising in the course of that hearing even though such issues may not be those which are the substantive ones in respect of which the parties seek relief from the court. An example, among many of such issues is the admissibility or inadmissibility of evidence or rarely, as in this case, that the presiding judge should for some reason, disqualify himself from continuing with the hearing. Such matters arise within and in the course of a hearing and are inherent in the judicial process. I do not think it is open to parties to cherry-pick this or to say that a ruling made by the presiding judge in the course of a hearing is not part of, or germane to, the hearing."*

39. As to what position would pertain, however, in relation to an application concerning an appeal made prior to and distinct from the hearing of the appeal itself, Murray J. observed further at p. 226:-

> *"I would perhaps add that if some form of application concerning a Circuit Court appeal was made to the High Court prior to and distinct from the hearing of the appeal itself, particularly if it was made to the High Court exercising its original jurisdiction pursuant to Article 34.3, other considerations would arise concerning an appeal from a decision on such an application, but this is far from the situation here."*

40. Finally, with regard to the case of *Canty v. Private Residential Tenancies Board*, and which involved proceedings pursuant to the provisions of the Residential Tenancies Act 2004, there had been a hearing and determination by the Tribunal which was established under the Act and a full rehearing of an appeal from the determination of that Tribunal by the High Court. As it happens the Supreme Court allowed the appellant's appeal on a jurisdictional point.

41. These decisions insofar as they can be said to be in any way supportive of the construction or interpretation for which the respondents contend as to the meaning of s. 31(2) have to be viewed in a context where, apart from the similarities as to some words used in s. 39 and s. 31(2), other completely different and unrelated statutory provisions were involved and where the factual background differed materially from that pertaining to these proceedings, moreover, in each of those cases, the High Court had embarked upon a rehearing of the appeal pursuant to the provisions of s. 38 of the Act of 1936.

42. Finally, it was submitted on behalf of the respondents giving the language employed in s. 31(2), its ordinary and natural meaning, that it was the clear intention of the legislature that there should be no appeal to the High Court from any decision on an appeal to

the Circuit Court brought under s. 942 of the TCA of 1997. The effect of the provision was to completely oust the jurisdiction of the High Court. It was common case that had the learned Circuit Judge entertained the appellant's application to fix a date for the hearing of his appeal against the determination of the Appeal Commissioners and had reheard the appeal and made an order upon it there would be no right of appeal by either party to the High Court against the judgment and order save to have a case stated to the High Court on a point of law pursuant to the provisions of s. 941 and s. 943 of the TCA of 1997.

43. It seems to me, having regard to the exchange which took place between counsel and the learned Circuit Judge immediately consequent upon her judgment, that counsel for the appellant seemed to have interpreted the statement by the Circuit Judge that she had not made a determination on the actual appeal itself as being significant and that the appropriate route for his client to follow was the one upon which he subsequently embarked, namely to appeal the order of the Circuit Court to this Court. The respondent submits that that course is not open to the appellant by virtue of the provisions of s. 31(2) of the Act of 1936, since the decision amounted to a determination as to whether or not the appellant's appeal to the Circuit Court could or could not proceed and that accordingly that order was necessarily captured by those provisions.

44. Senior counsel for the appellant, Mr. Hayden, submitted that the characterisation of the application before the Circuit Judge by the respondents as being one of jurisdiction was incorrect. The word was never used and the point was never canvassed. He submitted that no decision had been made on the appellant's appeal from the determination of 20th July, 2011, accordingly, the provisions of s. 31(2) of the Act of 1936 had no application.

45. It was agreed between the parties that the issue as to whether or not the order of 1st July, 2013, was one concerning jurisdiction, was not germane to the within application but rather was the subject matter of the appeal to this Court should it be decided that the appellant was entitled to proceed with it and accordingly no further comment will be made in relation thereto.

46. As far as the appellant was concerned the application was merely a procedural motion to fix a date for the hearing of the appellant's appeal against the determination of the Appeal Commissioners. That being so, and the learned Circuit Judge confirming that as far as she was concerned she had not made a determination on the substantive appeal, no application was made to her to state a case for the opinion of the High Court on a point of law.

47. The appellant submitted that the questions which had to be answered in determining the issue before the court were:-

> (i) Does the appeal before the High Court against the order of the Circuit Court constitute an appeal from a decision of that court?
>
> (ii) Was the decision of the Circuit Court of 1st July, 2013, a decision of a matter on appeal to the Circuit Court?
>
> (iii) Was the decision of the Circuit Court of 1st July, 2013, a decision of the Circuit Court on an appeal to that court under an enactment relating to a tax or duty under the care and management of the Revenue Commissioners?

48. It was submitted that the clear intent and purpose of s. 31(2) was to designate the Circuit Court as the final court to consider appeals in respect of determinations that had been rendered by the Appeal Commissioners and that this provision could not be divorced from the provisions of s. 942 of the TCA of 1997, which conferred a right of appeal on a person chargeable to tax and which appeal by the Circuit Court was to be by way of a full *de novo* rehearing. It could not be argued, it was submitted, but that the appellant had appealed the determination of the Appeal Commissioners in accordance with the provisions of s. 942 of the TCA of 1997 and equally that there had not been any hearing of that appeal by a judge of the Circuit Court in accordance with the provisions of that section. It followed, therefore, that what was before the Circuit Court was not the appellant's appeal against the determination of the 20th July 2011, but rather a procedural application to fix a date for the hearing of that appeal. That being so, the order of 1st July, 2013, was not and could not have been a decision on the appellant's appeal against the Appeal Commissioners determination.

49. In that regard, counsel for the appellant called in aid certain correspondence from the respondent's inspector, Mr. Brennan, dated 10th July, 2013 and 2nd August, 2013, which acknowledged that the appeal against the order of 1st July, 2013, was "*not an appeal within the terms of s. 942 TCA 1997*". The view being taken by the respondents at that stage was that nothing stood in the way of the inspector proceeding with an inquiry under s. 956 of the TCA of 1997, on foot of the determination of 20th July, 2011 and that the reason for this was because they viewed the order of 1st July, 2013, as not coming within the terms of that section.

50. Accordingly, it was submitted that if the appeal against the order of 1st July, 2013, was not an appeal relating to a tax or duty, the provisions of s. 31(2) did not apply.

51. I inferred from this submission that as the appeal against the order of the Circuit Judge was procedural in nature it constitutes an appeal from that court to this Court by virtue of the provisions of s. 37 of the Act of 1936 and in respect of which the decision of the High Court pursuant to the provisions of s. 39 of that Act is final and conclusive and not appealable.

52. It was further submitted that if the respondents were correct in their submissions as to the interpretation to be placed on the provisions of the subsection then the consequence of the judge's decision on a procedural motion to fix a date would be to deprive the appellant of a right conferred on him by virtue of the provisions of s. 942 of the TCA of 1997, namely to appeal the determination of 20th July, 2011, to the Circuit Court and to have that appeal dealt with by way of rehearing.

53. It was also submitted that the order made by the Circuit Court was an order made exercising its original jurisdiction from which an appeal lay to the High Court. Had the legislature intended that a decision on a procedural application was to have the effect of determining the subject matter of the appeal itself then that was something which the law required the legislature to state in clear and unambiguous terms.

54. In addition, it was submitted that the meaning contended for by the respondents would have the effect of depriving the appellant of his constitutional right of recourse to the courts and fair procedures.

55. Finally, it was submitted on behalf of the appellant that once notice had been given by the appellant of an intention to appeal the decision of the Appeal Commissioners, there was by virtue of the provisions of s. 942 of the TCA of 1997, a mandatory requirement on the Circuit Court Judge to arrange with all convenient speed to rehear and determine the appeal. Manifestly, this had not happened. Simply put, the learned Circuit Judge had done no more than make an order refusing an application to list the appellant's appeal for hearing and nothing more.

The Law

56. The contest between the parties on this application as to the meaning of s. 31(2) of the Act of 1936, sufficiently demonstrates, in my view, an ambiguity as to what was intended by the legislature when enacting that provision.

57. If the respondents are correct as to the meaning of the subsection then the effect of the order of 1st July, 2011, is to determine not only the appellant's appeal against that order but also his appeal under s. 942 of the Act of 1997.

58. If the appellant is correct in his contention as to the meaning of the subsection then not only is he entitled to proceed with his appeal against the determination of 20th July, 2011, but he is also entitled by virtue of the provisions of s. 37 of the Act of 1936, to appeal the order of 1st July, 2013, to the High Court.

59. Given the issue and questions now before it, the court considers the provisions of s. 5 of the Interpretation Act 2005, to be relevant. That section provides:-

> *"In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) —*
>
> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—*
>
> > *(i) in the case of an Act to which paragraph (a) of the definition of 'Act' in section 2 (1) relates, the Oireachtas, or*
> >
> > *(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*
>
> *the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*

60. In *Howard v. Commissioner of Public Works Office* [1994] 1 I.R. 101, Blayney J. cited with approval the rule as expressed by Lord Blackburn in *Direct United States Cable Company v. Anglo American Telegraph* [1877] 2 App 39:-

> *"The cardinal rule for the construction of acts of parliament is that they should be construed according to the intention expressed in the acts themselves. If the words of the statue are themselves precise and non-ambiguous then no more can be necessary than to expand those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law giver."*

61. Where ambiguity or obscurity is concerned, the court may consider the consequences of alterative meaning to determine which is the intended meaning. (See *Campbell O'Donnell & Boylan v. MIBI* [2005] IEHC 266)

62. Given the respective contentions it seems to me that the first point of departure must be the application of what are now well established canons of construction to statutory interpretation. In this regard, Barron J. in *O'H. v. O'H* [1990] 2 I.R. 558 at 563, observed:-

> *"The true principles to apply are in my view, these: that the first and most important consideration in construing a statute is the ordinary and natural meaning of the words used; that, if such meaning is plain, effect should be given to it; and that it is only if such meaning is not plain, but obscure or equivocal, that resort should be had to presumptions or other means of explaining it."*

63. In *McGrath v. McDermott*, Finlay C.J. described the function of the court in interpreting a statute of the Oireachtas as follows:-

> *"The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable. In rare and limited circumstances words or phrases may be implied into statutory provisions solely for the purpose of making them effective to achieve their expressly avowed objective."*

64. McKechnie J. in his judgment in *Harrisgrange Limited v. Duncan* [2003] 4 I.R. 1, described the approach of the court when invited to construe a statutory provision in the following terms:

> *"The overriding duty of a court when asked to construe any piece of legislation is to try and ascertain what the true will and intention of the legislature is. The first step in this process is to consider, in the context in which they appear, the words themselves and, in the absence of any contraindication, to give such words their ordinary and natural meaning. If in doing so, the court can in this way, clearly identify what was intended by the Oireachtas then it will not be necessary to invoke any of the varying numerous subsidiary rules of construction which have been established over the years."*

65. It is necessary, therefore, that effect must be given, where possible, to all of the words used in the statutory provision being construed. In this regard it is settled law that the legislature is deemed to have intended the use of each word employed. See *Goulding Chemicals Limited v. Bolger* [1977] I.R. 211

66. It seems to me that the difficulty or ambiguity giving rise to the competing interpretations urged on the court by the parties can be attributable almost entirely to the phrase *"any decision…on an appeal…".* In my view, the remaining words of the provision present no difficulty in terms of interpretation.

67. The second point of departure, therefore, should, it seems to me, be to understand what is meant by the words "*appeal*" and "*decision*" having regard to the scheme and purpose of that part of the statute in which those words are used, namely Part 4 of the Act of 1936.

68. That part makes comprehensive provision for appeals from the Circuit Court. It is, I think, notable that with regard to the

provisions relating to appeals to the High Court provided for in ss. 34, 37, 38 and 40 the word "*appeal*" is used in the context of a hearing of the appeal by a judge and that this is so in each of those sections.

69. Section 37(2) provides "*every appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by way of rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made…".* (Emphasis added)

70. Section 38(2) provides:-

> *"Every appeal under the section shall be heard and determined by one judge of the High Court and shall be so heard by way of a rehearing of the action or matter in which the judgment or order the subject of such appeal was given or made." (Emphasis added)*

71. All of these provisions are for the purposes of giving practical effect to the right of appeal provided for in that part of the Act.

72. The purpose of s. 31 is to provide for the finality of decisions of the Circuit Court in certain cases in the same way that the provisions of s. 39 provide for a finality of decisions of the High Court or the High Court on Circuit on an appeal from the Circuit Court.

73. In order to better understand, therefore, what is meant by the use of the word "*appeal*" or the words "*any appeal*" or "*an appeal*" or "*on an appeal*" it is necessary to view those words in the context of the statutory provisions contained in that part of the Act where they are used. With regard to the words "*an appeal*" it seems to me that in order to give practical effect to the right of appeal conferred by the provisions of that part of the act in which they appear it is necessary that there be a rehearing of the subject matter of the appeal; accordingly, the words "an appeal" in s.31 (2) of the act of 1936 bear that meaning.

74. I am fortified in the view which I have taken as to the meaning of "*an appeal*" in Part 4 of the Act of 1936 by the definition of "*an appeal*" in *Halsburys Law of England* (5th Ed.) Vol. 12 Chapter 25, at para. 1657 as follows:-

> *"An appeal is an application to a Superior Court or Tribunal to reverse, vary or set aside the judgment, order, determination, decision or award of a lower court or Tribunal in the hierarchy of courts or Tribunals on the ground that it was wrongly made or that as a matter of justice or law it is required to be corrected. A right of appeal is conferred by statute or equivalent legislative authority; it is not a mere matter of practice or procedure, and neither the superior nor the lower court or tribunal nor both combined can create or take away such a right."*

75. In *Attorney General v. Sillen*, 33 LJ Ex 209; 10 H.L. Cas. 704, Westbury C. said of an appeal that "*…it was the right of entering a superior court and invoking its aid and interposition to address the error of the court below*".

76. In *Ponnamma v. Arumogam* [1905] A.C. 383 at 390, Lord Davy in his judgment in the Privy Council on an appeal from the Supreme Court of *Ceylon* stated that an appeal is one "*in which the question is whether the order of the court from which the appeal is brought was right on the materials which the court had before it*". These definitions and descriptions of what constitutes an appeal commend themselves to me and I adopt them.

77. Turning now to the meaning of the word "*decision*", that was considered by the Supreme Court in the context of its use in Article 34.4.3 of the Constitution. In *Society for the Protection of Unborn Children v. Grogan* [1989] I.R. 753; [1990] ILRM 350. Finlay J. (as he then was) stated at p. 763/354:-

> *". . . I am satisfied that no mere absence of formal words from a High Court order could be permitted to remove from the appellate jurisdiction of this Court a determination of a High Court Judge which affects one of the parties involved and has all the characteristics of a decision."*

78. There seems to me little doubt but that the legal meaning of the word "*decision*" includes any determination of a suit by way of the judgment and order of the court made after a full rehearing of all of the evidence on a substantive matter of the case itself or on an appeal from the court below as well as an order made on a preliminary matter of a procedural nature such as the order of the 1st of July 2013 and may even extend to a refusal of a judge to discharge himself or herself from a case. See *Dublin Well Woman Centre v. Ireland* [1995] ILRM 408; "decision" also includes any determination of an issue as to costs affirming part of the decision in a case. See *Canty v. Private Residential Tenancies* [2008] I.R. 592 at 596.

79. What has to be considered here, however, is the legal meaning of the word "*decision*" when taken together with the other words employed in the provision. When one considers the order of 1st July, 2013, there was no question, to my mind, but that this was a decision within the legal meaning of that word taken on its own.

80. Inquiring, therefore, as to the meaning to be attributed to the words "*any decision . . . on an appeal*", I note that the word "*decision*" in this context was considered by the Court of Appeal in England in the case of *Podbery v. Peake* [1981] 1 All E.R. 69.

81. In that case the appeal came before the court by way of appeal against a refusal of the Divisional Court to extend the time in which to appeal an order of the County Court to the Divisional Court in bankruptcy proceedings.

82. The Court of Appeal decided, *inter alia*, that it had no jurisdiction under s. 108(2)(a) of the Bankruptcy Act 1914, to entertain the appeal because a refusal by the Divisional Court to extend time for an appeal was not a decision upon an appeal for the purposes of the Act and in this regard Eveleigh L.J. at p. 702 stated:-

> *"A decision…upon [an] appeal, however, results from an appeal having been heard. In the present case there has been no hearing 'any such appeal' as sub-s (2)(a) refers to, namely an appeal from an order made by the County Court, an application for leave is not an appeal."*

83. In *B. v. Governor of Training Unit* [2002] 2 ILRM 161, the Supreme Court had to consider the provisions of s. 5(2) and (3) of the Illegal Immigrants (Trafficking) Act 2000. Section 5(2) requires that an application for judicial review in respect of certain specified matters must be made within 14 days commencing on the date on which the person was notified of the act in question unless the High Court considers that there is good and sufficient reason for extending that time. Section 5(3) provides that a determination of the High Court of an application for leave to apply for judicial review, or of the application itself, is final and that no appeal is to lie from the decision of the High Court to the Supreme Court in either case, except with the leave of the High Court.

84. One of the issues which arose in that case concerned the legal meaning of the word "*determination*" as employed in s. 5(3)(a) and whether this meant a final judicial conclusion, after an examination of the merits, of either an application for leave to apply for judicial review or the application for a judicial review itself. It was argued that an application for an order extending the period within which an application is to be made did not necessarily involve any examination of the merits of the case and that accordingly it could not be regarded as "*a determination*" within the meaning of the section. It was also argued that if an application for an extension of time could be made prior to the expiry of the 14 day period, and that application were refused, an appeal to the Supreme Court would lie since the decision of the High Court would not constitute a determination of the application for leave, it is still being open to an applicant to apply for leave before the expiry of the 14 day period.

85. If the time has not been extended then such an application is not properly before the court. It was held, *inter alia*, that the refusal of an extension of time was not "*a determination*" of the application for leave within the meaning of the Act. A "*determination*" of an application for leave means a decision on an application for leave when such application was properly before the court.

86. As to the contention of the respondents that the wording of s.31 (2) has the effect of ousting altogether the jurisdiction of the High Court, it is now well settled law that what is required of any statutory provision the intent of which is to oust, except from, or regulate the appellate jurisdiction of the Supreme Court or the High Court to hear or determine an appeal, is that any such intention must be expressed in the most clear and unambiguous terms.

87. Having reviewed a number of authorities, Geoghegan J. in his judgment at p. 186 stated:-

> *"…the issues involved on the application for extension of time may be substantially different from those involved in the application for leave. Under the express terms of the Act the restrictions on the right of appeal to the Supreme Court apply to the application for leave or the application for judicial review as a matter of ordinary grammar and syntax, I find it difficult to see how it could be argued that there is an ouster of the right of appeal from a refusal to extend time. If the Oireachtas had intended that, it should have said so. Until the extension is granted there is no application for leave in existence. But even if as a matter of grammar and syntax, such an argument could be made there is certainly not a clear and unambiguous ouster of the right of appeal which is required under the constitutional jurisprudence referred to earlier in this judgment."*

Decision

88. As has already been stated herein, the respondents have invoked the inherent jurisdiction of the court to strike out the appellant's appeal against the order of 1st July, 2013. As to that, it was explained in the following terms by Costello J. in his judgment of *Barry v. Buckley* [1981] I.R. 306 at p. 308:-

> *"This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence. If, having considered the documents, the Court is satisfied that the plaintiff's case must fail, then it would be a proper exercise of its discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to a defendant."*

89. As to that it seems to me that in addition to the interpretation of a contract or agreed correspondence referred to by Costello J. in *Barry v. Buckley* the inherent jurisdiction of the court can also be exercised in a case where the outcome depends on the interpretation of a statutory provision. That this is so in this case is not a matter of controversy between the parties.

90. Having read and considered the affidavits and correspondence exhibited therein as well as the submissions made, I am of the view that the factual background giving rise to this application constitutes a prime example of a difference between the justiciable controversy which was required to be resolved and arising from the respondent's opposition to the appellant's application to fix a date for the hearing of the appellant's appeal from the decision of the Appeal Commissioners on the one hand and the justiciable controversy necessarily arising upon the rehearing of the appellant's appeal before the Circuit Court under s. 942 of the Act of 1997.

91. The purpose of s. 942 of the Act of 1997 is to provide for appeals to the Circuit Court from the determination of the Appeal Commissioners against an assessment and therefore constitutes a statutory right of appeal conferred on a taxpayer who is aggrieved by such determination and which requires the appeal to be reheard by a judge of the Circuit Court.

92. Section 942(2) requires the inspector or other officer to transmit to the judge the prescribed form in which the Appeal Commissioners determination of the appeal is recorded and that that be done at or before the time of the rehearing of the appeal by the judge. It is evident from the factual background of this case that no such form recording the determination of the Appeal Commissioners was transmitted to the judge for consideration by her nor did the Circuit Judge arrange for a rehearing of the appeal by listing or fixing a date as required by s. 942(3) of the Act of 1997, less so was there any proceeding which could be described as a rehearing of an appeal on the determination of the Appeal Commissioners as envisaged by that section.

93. In my view, to give the words of s. 31(2) of the Act of 1936, the meaning contended for by the respondents would have the consequence of divesting the appellant of a clear statutory right of appeal conferred upon him to have his appeal against the determination of 20th July, 2011, reheard by a Circuit Court Judge.

94. The Oireachtas must be deemed to have known of the provisions of s. 31(2) when it was enacting s. 942 of Act of 1997. If it had been intended by the Oireachtas that a decision on a preliminary application of a procedural nature was to have the effect of determining the subject matter of the appeal from a determination of the Appeal Commissioners without a rehearing of that appeal then that was something which was required to be expressed in the most clear and unambiguous terms. Such are, in my view, absent from the provision in question.

95. In passing, I think it noteworthy that the language employed in s. 31(1) and ss. 37 and 38 of the Act of 1936, refers to "*…any judgment or order of the Circuit Court…"* or "*…every judgment given or order made by the Circuit Court…*".

96. Whereas s. 31(1) provides that no appeal shall lie "*from any judgment or order of the Circuit Court*" in any civil action or matter by virtue of certain enactments therein referred to, the language employed in s. 31(2) is materially different. Whereas subs. (2) provides that no appeal is to lie from a decision of the Circuit Court under the enactments referred to in that subsection, the Oireachtas did not employ the terminology used in s. 31(1) nor in ss. 37 or 38 but rather chose to employ the words "*any decision of the Circuit Court on an appeal…".*

97. It seems clear to me that an order of the Circuit Court in a civil action or a matter coming before the court by virtue of the statutes referred to in that subsection is final, conclusive and not appealable to the High Court. The decision of the High Court on an appeal from the judgment or order of the Circuit Court under ss. 37 and 38 of the Act of 1936, is also final and conclusive by virtue of the provisions of s. 39 of the Act of 1936, and from which no appeal lies to the Supreme Court save in exceptional circumstances as illustrated in the cases of *Canty v. Private Residential Tenancies Board* and L.P. v. M.P. referred to herein.

98. Having chosen to employ the language it did in s.31 (2), the Oireachtas inextricably linked and expressly confined the decision of the Circuit Court to the appeal made to that court. That being so and given the meaning earlier ascribed to the words used in that subsection, it is the judgment of the court that on a proper construction of s.31 (2) of the act of 1936, the words "*…any decision of the Circuit Court on an appeal*" mean any decision of the Circuit Court made upon a rehearing of the subject matter of the appeal to that court under the enactments referred to in the subsection including, as in this case, the appeal against the determination of the 20th July, 2011.

99. Were the meaning to be otherwise and the subsection was to receive the construction contended for by the respondents then, in my view, a manifestly unjust and absurd result would ensue, namely, that the person chargeable to tax would on the outcome of a procedural motion adverse to that persons interest be deprived of a right conferred by statute to have their appeal by way of rehearing decided by the Circuit Court. In my view, that was not the intention of the Oireachtas but even if I am wrong about that and such was the intention then it is my view that the words employed are wholly insufficient to achieve that objective being neither clear or unambiguous to that end as is required by law.

100. Given the construction placed by the court on the provisions of s. 31(2) of the Act of 1936, it follows that before any decision of the Circuit Court is captured by that subsection it is necessary that the court embarks upon the appeal to that court as envisaged by the statutes referred to in the subsection. There can also be no doubt to my mind but that such right of appeal given to a person chargeable to tax by s. 942 of the TCA of 1997 necessarily involves a mandatory requirement on the appropriate Circuit Court judge to arrange for the rehearing and determination of the appeal and for which purpose the respondents are themselves required to transmit the prescribed form in which the Appeals Commissioner's determination of the appeal to them is recorded.

101. Although the order of the 1st July, 2013, was, on its face, made in proceedings arising as a result of the provisions of the TCA of 1997, it was not a "*decision on an appeal*" within the meaning ascribed by the court to those words in s.31 (2) of the Act of 1936. The prescribed form as required by s.942 (2) of the TCA of 1997 had not been transmitted to the Circuit Court judge less so had the Circuit Court judge arranged to rehear or determine the appeal in accordance with the provisions of subsection 3 of that section, rather that was object of the procedural application to the court on the 1st of July 2013, accordingly, the matter before the court on that date could not have been nor was it an appeal within the meaning of s. 942 of the TCA of 1997.

102. Having so found, it follows that the order of 1st July, 2013, was not a decision on the appeal within the meaning of s. 31 of the Act of 1936, but rather an order of the Circuit Court on a procedural application of the type envisaged by Murray J. in his judgment in *L.P. v. M.P.* [2002] 1 I.R. 219 at 226, and from which an appeal lies to this Court pursuant to the provisions of s. 37(1) of the Act of 1936.

103. Consequent upon this judgment, the court will refuse the respondent's application to strike out the within appeal. I will discuss with counsel the form of the final orders required.