Neutral Citation: [2016] IEHC 2

THE HIGH COURT

[2013 No. 144 CA]

BETWEEN

DENIS O'BRIEN

APPELLANT

AND
THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 12th day of January 2016

Introduction

1. The issue between the parties in this case arises from the steps taken by the appellant to challenge an adverse decision made by the Appeal Commissioners in July, 2011. After the decision, the appellant notified the respondent in writing that he wished to state a case to the High Court under s. 941 of the Taxes Consolidation Act 1997 ("the Act"). He also gave notification of an intention to appeal to the Circuit Court, as provided for in s. 942 of the Act. Both notices were given within the respective prescribed periods.

2. It is common case that it is a standard practice to initiate both procedures, and that the taxpayer must make an election at some stage as to which remedy he or she intends to pursue. However, the Act does not stipulate how or when the election is to be made, or how or to whom it should be communicated.

3. Ultimately, a case stated was prepared and lodged in the Central Office of the High Court. However, it was lodged by the appellant outside the time set by the Act, and was struck out of the High Court list on the application of the respondent. Before that application was heard the appellant attempted to progress an appeal to the Circuit Court by bringing a motion to fix a date for hearing. The learned Circuit Court judge before whom the motion came refused to list the matter, on the basis that the evidence showed that the appellant had elected for the case stated and could not, therefore, proceed in the Circuit Court. This is the appeal against that decision.

4. In brief, the appellant submits that the High Court was never seised of the case stated, while he had never withdrawn his notice of appeal to the Circuit Court. He says that in the circumstances he retained the option to proceed in the Circuit Court.

Background facts

5. In 2010, an inspector of taxes sought certain information in respect of the appellant's tax return for the tax year 1999/2000. The appellant contested the inspector's right to make the enquiries and appealed to the Appeal Commissioners, pursuant to the provisions of s. 956 of the Act.

6. An Appeal Commissioner determined the issue in favour of the respondents on 20th July, 2011, and decided that it was lawful for the enquiries to be made.

7. The appellant expressed dissatisfaction with the determination of the Appeal Commissioner, in accordance with the relevant statutory provisions of the Act and, on the 28th July, 2011, requested him to state a case for the opinion of the High Court.

8. Either party to a hearing before the Commissioner may request a case stated on a point of law. Pursuant to s. 941(4) of the Act, the case stated must be transmitted to the High Court within seven days of receipt of the signed case from the Appeal Commissioner. There is no provision for an extension of time.

9. By letter of the same date, the appellant's solicitors sent to the inspector of taxes a notice of the appellant's request to appeal the matter by way of a rehearing in the Circuit Court, pursuant to s.942 of the Act.

10. Such an appeal is a full de novo hearing. The inspector of taxes does not have the right to seek a rehearing before a judge of the Circuit Court, but does have certain obligations imposed where there is an appeal by the taxpayer. Under s. 942(2), it is incumbent on the inspector, or other authorised officer of the Revenue, to transmit the prescribed form with the decision of the Appeal Commissioner to the Circuit Court at or before the time of the rehearing by the judge of that Court.

11. The Circuit Court Rules do not make any specific provision for the listing of such appeals. It appears that, as a matter of practice rather than statute, the matter is normally put into the list on the initiative of the Revenue. However there is, it is agreed, nothing to prevent the taxpayer from taking steps to have it listed.

12. It appears that the letter of the 28th July, 2011, requesting an appeal was misdirected within the respondent's offices and was not received by the inspector. No step was taken in relation to bringing any appeal before the Circuit Court. However on the 2nd August, 2011, a copy was sent by email to the Revenue's solicitor.

13. On the 5th September, 2011, there was a telephone conversation between the Revenue's solicitor, Ms. Croasdell, and the appellant's solicitor, Mr. Doorly of William Fry Solicitors.

14. According to Ms. Croasdell's note of the conversation, she asked Mr. Doorly whether the request for a case stated had been put in just to stop time running, or if it was intended to proceed with it. Mr. Doorly confirmed to her that it was going ahead and that he hoped to have the first draft by the end of October. It had not yet been discussed with counsel. Ms. Croasdell said that she anticipated that she would be under pressure to keep the matter to a schedule. It was agreed that the appellant would present a draft which both sides could then work on. They discussed the possibility that the case might be listed with another case stated being conducted on behalf of the appellant – this discussion was on the basis that neither of them had instructions as yet on that issue.

15. Mr. Doorly has averred that he does not recall that part of the discussion dealing with the question whether the case stated had been requested only to stop time running and his own note does not refer to it. However he says that he is "very clear" that he did not, in either that or any other communication with the respondent, expressly or impliedly withdraw the Circuit Court appeal. He had yet to discuss the matter with counsel and had no instructions to make any such withdrawal.

16. Correspondence relating to the case stated was exchanged over the following months. For the most part, this consists of reminders and requests for presentation of a draft from the respondent. In July 2012, in the absence of a draft from the appellant,

the respondent forwarded a copy of its own draft. This was returned by the appellant's solicitor with some amendments. Both sides subsequently made further amendments.

17. On the 19th November, 2012, the case stated was sent by the respondent to the Appeal Commissioner. By letter dated the 22nd November, 2012, the office of the Appeal Commissioners sent the signed case stated by hand to the appellant's solicitors, for transmission by the appellant to the High Court in accordance with the provisions of section 941(4) of the 1997 Act. The Revenue Solicitor was also sent a copy of the letter, by post, and received it on 23rd November, 2012.

18. The question of law posed for determination by the High Court was whether the Appeal Commissioner was correct in holding that the inspector was not precluded from making enquiries of the appellant by reason of subsection 1(c) of s.956 of the Act.

19. The appellant's solicitor transmitted the case stated to the High Court on 30th November, 2012. Having regard to the relevant dates, this should have been done by the 28th November (if it was received on the 22nd) or the 29th November at the latest (if it was received on the 23rd).

20. The respondent's solicitor wrote to the appellant's solicitors on 5th December, 2012, stating that it was the understanding of the Revenue Commissioners that the requirements of section 941(4) of the 1997 Act had not been complied with, in that there had been a failure to transmit the case stated to the High Court within time. The appellant's solicitor did not initially respond to this. He wrote to Ms. Croasdell to say that the matter had been listed in error for mention in the High Court on the 17th December, 2012, and had been taken out of that date. The Central Office had informed him that they could apply for a hearing date in due course. She was asked to provide a range of dates suitable to her counsel, and it was suggested that the hearing be deferred until after the other case stated had been determined. Mr. Doorly subsequently wrote to say that it was not accepted that the case stated was out of time.

21. Ms. Croasdell responded by proposing that the two cases be heard together, and suggesting that the question whether the time limit had been complied with should be dealt with as a preliminary issue. Mr. Doorly replied that he was not consenting to the matters being run together.

22. By letter dated 15th April, 2013, the Revenue Solicitor notified the appellant's solicitor that an application would be brought to strike out the case stated. A motion was issued on the 2nd May, 2013, returnable for the 10th June, 2013, seeking an order pursuant to the inherent jurisdiction of the Court striking out the proceedings, on the grounds that the case stated was not transmitted to the High Court within seven days after receiving it as required by the Act, and that the Court therefore had no jurisdiction to consider the issue. This application did not come on for hearing until the 15th July, 2013, having been adjourned for the purpose of allowing the appellant to consider filing an affidavit.

23. Meanwhile, on the 10th May, 2013, the appellant's solicitor wrote to the inspector of taxes dealing with the matter. He expressed surprise that there had been no correspondence in relation to the appeal from either the Revenue or the Circuit Court, and enquired what steps had been taken to comply with s. 942 of the Act and when it was expected that the appeal would be listed. The reply to this letter was sent by the Revenue Solicitor, who described the enquiry as "disingenuous". Reference was made to the conversation of the 5th September, 2011, and the subsequent signature of the case stated. It was Ms. Croasdell's position that by choosing to pursue a case stated in the High Court the appellant had withdrawn his request for a re-hearing by the Circuit Court. It was noted by her that there had been no reference to the Circuit Court since the letter of the 28th July, 2011, whether in correspondence or in oral discussion. She said that there was no provision for the "re-instatement" of a request for a rehearing, once it had been withdrawn, and that any attempt to reinstate it would be vigorously opposed.

24. Mr. Doorly responded that the appeal had never been withdrawn, and that the inspector had not complied with his obligations under the Act.

25. On the 22nd May, 2013, Mr. Doorly sent a request to the respondents pursuant to the Freedom of Information Act 1997 (as amended). The covering letter made reference to the pending motion in the High Court and asked that the requested information be made available before the 10th June, 2013 (the return date on the motion). The information sought related to every case stated transmitted to the High Court pursuant to s. 941(4) of the Act over the previous ten years. Specific details were sought in relation to every case stated transmitted outside of the statutory time frame, with the object of discovering the number of times the respondent had brought motions to strike out in such circumstances; the number of cases in which the time limit had been raised as a defence to a case stated; and the number of such cases that proceeded to hearing without objection.

26. It appears that this request was responded to on or before the 2nd June, 2013. The results have not been exhibited.

27. On the 5th June, 2013, as the respondent was refusing to list the matter in the Circuit Court, the appellant issued a motion before that Court for the purpose of having the appeal listed for hearing. The motion came on for hearing in the Circuit Court on 1st July, 2013. It was argued on behalf of the appellant that he had not yet elected between the High Court and Circuit Court procedures. Counsel informed the Court that if he was successful in getting a hearing date in the Circuit Court he would be proceeding in that Court. However he also said that a decision on the issue of election would have to be made if the respondent did not succeed in having the case stated struck out in the application listed in the High Court. It was submitted that he did not have to make an election until a final date for hearing was fixed for one or the other. He had not applied for a hearing date for the case stated in the High Court previously because he was keeping his options open.

28. Counsel pointed to the fact that the respondent had done nothing to progress the request for a re-hearing in the Circuit Court. It was submitted that if the normal practice had been followed and the County Registrar had been asked to fix a date, that in itself could not have been determinative of the issue as to whether the appellant was entitled to pursue a case stated. Similarly, it was argued that the fact that a case stated was agreed between the parties could not determine the entitlement of the appellant to pursue a hearing in the Circuit Court.

29. The learned Circuit Judge asked counsel if he was going to oppose the High Court application to strike out the case stated. In effect, he declined to answer the question, on the basis that this was a matter involving legal advice.

30. The learned Judge found in favour of the respondent, refusing the appellant's motion to list the appeal for hearing. She held that in pursuing his appeal by way of case stated and transmitting same to the High Court, he had made a choice and was not entitled to pursue his appeal to the Circuit Court.

31. By notice of appeal dated 5th July, 2013, the appellant appealed this decision to the High Court. (A subsequent application by the

respondent to strike out the appeal on the ground that no appeal lay in tax cases was dismissed by Barton J. on the 27th June, 2014 – *O'Brien v Revenue Commissioners* [2014] IEHC 347. Barton J. held that the decision in question was not "a decision on an appeal" within the meaning of s.36 of the Courts Act 1936). Also on the 5th July, letters were written on behalf of the appellant to the Revenue Commissioners and to the High Court, stating that the case stated *"was not currently before the court"* and would not be listed for hearing. The appellant's solicitor therefore requested the return of the papers.

32. The respondent's application to strike out the case stated in the High Court was heard on the 15th July, 2013. The appellant's position on the application was that there was no case stated before the Court, since it had not been filed in accordance with the statutory requirements. It was therefore submitted that there was no necessity and, in effect, no jurisdiction to strike it out. Counsel said that the appellant had elected to proceed in the Circuit Court and he therefore did not wish to be understood as acknowledging that the High Court had any jurisdiction in the matter. In granting the application of the respondent, Laffoy J. said:

> *"Well I am satisfied that there is something that needs to be struck out. The matter was given a record number 2012/1004R so that there is something there. So I am going to make an order in the terms sought striking out the proceedings for failure to comply with the requirements of section 941(4)…"*

Additional evidence

33. After the sequence of events above it became apparent, at some stage later in 2013, that the original notice of appeal had been received in the respondent's office but had been internally misdirected. It had never been received by the relevant inspector of taxes. That gentleman said that, if he had received it, he would have acted upon it.

34. Ms. Croasdell has sworn an additional affidavit in which she says that in Dublin, the practice is that the Revenue Solicitor (not the inspector of taxes) writes to the Circuit Court office to request that an appeal be listed. The letter of the 28th July, 2011, had been copied to her. She did not write to the Circuit Court in the appellant's case because she had no reason to, in circumstances where the appellant had indicated his intention to proceed by way of case stated. She was never asked to list it.

35. By way of letter dated 5th December, 2013, the appellant's solicitors wrote to the inspector of taxes asking how he would have acted upon receipt of the letter dated 28th July, 2011, notifying him of the appellant's wish to appeal the matter by way of a rehearing to the Circuit Court. The inspector did not reply to this.

Relevant provisions of the Taxes Consolidation Act 1997

36. Section 933 deals with appeals to the Appeal Commissioners. Subsection (4) provides that their determination shall be final and conclusive

"unless the person assessed requires that that person's appeal shall be reheard under section 942 or unless under the Tax Acts a case is required to be stated for the opinion of the High Court."

37. Section 941(4) sets out the requirements for a case stated.

> *"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."*

38. Subsection (6) provides as follows:

> *"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."*

39. Section 942(1) provides for an appeal to the Circuit Court as follows:

> *"Any person aggrieved by the determination of the Appeal Commissioners in any appeal against an assessment made on that person may, on giving notice in writing to the inspector or such other officer as the Revenue Commissioners shall authorise in that behalf (in this section referred to as "other officer") within 10 days after such determination, require that the appeal shall be reheard by the Judge of the Circuit Court…"*

40. Subsection (2) deals with the obligations of the inspector in the event of an appeal.

> *"At or before the time of the rehearing of the appeal by the judge, the inspector or other officer shall transmit to the judge the prescribed form in which the Appeal Commissioners' determination of the appeal is recorded."*

41. S 942(3) provides that the Circuit Court Judge is to

> *"…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 s. 943 be final and conclusive."*

42. 942(8) deals with the situation where the parties reach an agreement before the hearing in the Circuit Court. An agreement which is not in writing shall not be deemed to be an agreement for this purpose unless either party confirms it in writing, and the other party does not within 21 days repudiate or withdraw from it.

Submissions on behalf of the appellant

43. On behalf of the appellant, Mr. Hayden SC says that the statute permits him to proceed either in the High Court or the Circuit Court. Accepting that he cannot proceed to hearing in both, he submits that the High Court never had seisin of the case stated and could not have extended the time for lodgement of it. The jurisdiction of that Court depended upon transmission of the case stated within the statutory period. It is contended that the notice of appeal to the Circuit Court had never been withdrawn, either in writing or otherwise. The respondent's own procedures, as outlined in the Tax and Duty Appeals Manual, require confirmation in writing of a settlement but the Revenue Solicitor never asked for that, nor enquired as to what was happening with the appeal.

44. The Manual is a document issued by the Tax and Duty Appeals Committee of the Office of the Revenue Commissioners for the

assistance of Revenue officers dealing with appeals and as a training aid. The version exhibited by the appellant was revised in February, 2012.

45. Asked what the position would be if the inspector of taxes had received the letter of the 28th July, 2011, and acted upon it as he says he would have, perhaps by putting the matter before the Circuit Court, Mr. Hayden said that if that happened the appellant would still have had the option of writing to say that he would not proceed with the appeal. He could only be held to have elected for the Circuit Court if he himself sought a hearing date, as he did in this case. Conversely, he could be held to have elected for the case stated procedure only if he lodged the case stated within the seven days permitted. The effect of this would be, under the Act, to invest the High Court with jurisdiction in the matter. The preliminary steps in agreeing the case stated, and the fact that it was signed, could not amount to an election on his part such as to prevent him from opting for the Circuit Court, since the Act does not provide that they should.

46. It is submitted that if the respondent's position is correct, the appellant is debarred from both appeal procedures on the basis of being deemed to have implicitly made an election. This is not provided for in the Act and would amount to a refusal of access to the courts. The argument made is that s. 942(1) of the Act of 1997 is a recognition of the constitutional right of access to the courts enjoyed by the tax payer. The appellant sought to invoke this right by giving the requisite notice in writing to the inspector by the letter dated 28th July, 2011. Section 942(2) imposed a statutory onus on the inspector to comply with mandatory requirements before the matter could be listed before a judge of the Circuit Court. The admitted failure on the part of the Revenue in relation to the misdirection of the letter is described as "the root cause" of the prejudice suffered by the appellant thereafter, since it was the reason why his appeal was not listed for hearing.

47. Mr. Hayden says that he unequivocally told the Circuit Court Judge that no matter what the outcome of the High Court motion to strike out was, he was seeking to proceed in the Circuit Court.

48. The appellant refers to the various authorities relating to the Constitutional right of access to the courts, such as *O'Brien v. Manufacturing Engineering Co. Ltd*. [1973] I.R. 334. It is submitted that any statutory provision seeking to limit the right must do so in clear and express terms. If the entitlement of a taxpayer to seek a rehearing before the Circuit Court is to be contingent on not pursuing a case stated to the High Court, the Act should expressly state that. It cannot be asserted by way of implication. The following passage from Dodd on Statutory Interpretation in Ireland (Tottel, 2008) is cited:

> *"[11.51] It is frequently said that enactments that interfere with constitutional rights are to be strictly construed. The strict interpretation rule means that where there is a genuine doubt or ambiguity as to the interpretation, a permitted meaning that is less restrictive of the constitutional right should be presumed to be the intended one. The more radically an enactment erodes a constitutional right, the more it is to be expected to be expressed without absolute clarity. Court may not readily permit a provision to abrogate constitutional rights by implication and may reject interpretations that limit such rights where there is no clear and express wording supporting the interpretation. A strict interpretation does not omit the possibility of necessary implications, but those implications must be clearly intended if they are restrictive of constitutional rights."*

49. Reliance is also placed on the common law authorities referring to the presumption against the exclusion of the ordinary jurisdiction of the courts such as *Albon v Pyke* (1842) 4 M. & Gr. 421 and *Goldsack v. Shore* [1950] 1 K.B. 708,and *Hoffman La Roche v. Secretary of State for Trade & Industry & anor.* [1974] EWCA Civ J0725-4.

50. Reference is made to the judgment of Barton J. in refusing to strike out the instant appeal (referred to above in paragraph 31), where he said at paragraph 100:

> *"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."*

51. The appellant relies on the proposition that taxation statutes are to be construed in a strict and literal manner, with any ambiguity to be resolved in favour of the taxpayer. In this regard a number of well-known authorities have been cited - *Texaco (Ireland) Limited v. Sean Murphy* [1991] 2 I.R. 449, *Revenue Commissioners v Doorley* [1933] I.R.750, *Inspector of Taxes v. Kiernan* [1981] I.R. 117, *McGarry v. Revenue Commissioners* [2009] IEHC 427 and *Harris v. Quigley* [2006] 1 I.R. 165. In the latter case Geoghegan J. said (at p. 183):

> *"While, as far as possible, a taxing statute should be interpreted in the same way as any other statute and should not be interpreted, if at all possible, as to create an absurdity, nevertheless there is a countervailing principle that where there is an ambiguity a taxing statute will be interpreted in favour of the taxpayer. I do not consider that this court would be justified in implying into s.934(6) words of exception which are not there, covering appeals to the Circuit Court or cases stated to the High Court."*

52. The appellant therefore submits that ss. 941 and 942 of the Act ought to be interpreted on the actual language utilised therein and in a strict manner. If there is any ambiguity as to the interpretation of either or both sections then such ambiguity ought to be interpreted in favour of the appellant and the *contra proferentem* rule applied.

Submissions on behalf of the respondent

53. On behalf of the respondent, Mr. Maurice Collins SC disputes the contention that the case concerns either the appellant's right of access to the courts or the interpretation of tax legislation.

54. It is accepted that the appellant had a choice of appeal procedures. There was nothing improper about initiating both, in the first instance, with the letters written on the 28th July, 2011. However, thereafter, nothing was said or done with respect to the appeal to the Circuit Court until May, 2013. It is accepted that inaction could not be decisive, and nor could a failure to expressly preserve one's position. However it is submitted that these are factors for consideration in deciding whether or not the appellant is to be taken as having made an election. That decision depends upon whether the conduct of the appellant can be said to communicate an unequivocal decision.

55. It is submitted that the only inference to be drawn from the evidence as to the contact between the parties, in particular in the period between November, 2011 and December, 2012, is that the appellant intended to proceed against the Appeal Commissioner's determination by way of case stated to the High Court on a point of law and not to proceed with an appeal by way of rehearing to

the Circuit Court. The point at which the election is said to have crystallised is put at the 22nd November, 2012, when the Appeal Commissioner signed the case stated.

56. The question, it is submitted, is – what did the appellant's conduct communicate? Mr. Collins says that the engagement towards an agreement of a form of case stated; the reaching of an agreement on the form of the case stated; the presentation of that agreed form of case stated to the Appeal Commissioner for execution or signing and its transmission to the High Court all cumulatively communicated the same decision, a decision to pursue the case stated.

57. It is noted that Mr. Hayden accepted that transmission of a case stated within the seven days would amount to an election. That being so, it is submitted, the fact that the exercise of the right to state a case was not effective could not alter the fact that an unambiguous election had been made. A consequence of the election was that the appeal to the Circuit Court could not be pursued. There was no requirement to have that put in writing.

58. Reference is made to the following passage from Spencer Bower, *Estoppel* by Representation, (4th ed. 2004) at p. 421:

> *"A party may be held to have made an unequivocal election either by words or conduct or, in some case, by inaction. Where a party expressly states that her or she is making an election (usually with the benefit of legal advice), this calls for no comment. But it is often the case that one party will attempt to derive from the communications passing between the parties or their conduct an unequivocal representation that one party has made a clear choice. The general approach which the court will take to the statements of conduct of the parties has already been discussed above. But there is no doubt that the conduct of a party may also give rise to the implication of an irrevocable election without any express statement to that effect. More particularly a party's conduct in continuing to exercise contractual rights or to perform contractual obligations (often without a reservation of rights) has often been held to give rise to a binding election…This is always a question of fact, however and there are as many, if not more, examples of conduct which has not been held to amount to a binding election, even when it involves the exercise of contractual rights or the continuing performance of contractual obligations."*

59. On p. 423 the author continues:

> *"A party may also be taken to have made a binding election purely by silence or inactivity. That silence or inactivity when coupled with lapse of time may indicate unequivocally to the other party that the electing party has made a final decision. In many cases this issue is probably better classified as the loss of the right to elect rather than an instance of election itself and is considered in that context…but there may be circumstances in which a party has genuinely communicated an election purely by silence."*

60. It is accepted that the authorities referred to in Spencer Bower all relate to contractual situations but it is submitted that the same principles apply to the requirement to elect between the available appeal processes. However Mr. Collins' argument does not depend on what the respondent was led to believe – his case is that the election was in fact made. Once that point was reached, the Circuit Court had no jurisdiction to entertain an appeal.

Discussion and conclusion

61. The Court has been informed that, surprising as it may appear, this issue has never previously arisen. There are therefore no authorities directly on the point. I have considered the authorities cited by the parties but unfortunately, because they deal with quite different situations, they are of limited assistance. The matter has, therefore, to be approached largely on the basis of first principles.

62. It seems clear that the Act, without expressly saying so, permits a dissatisfied taxpayer to serve the prescribed notification for both a case stated and an appeal by way of rehearing in the Circuit Court. Although the Act does not expressly say so, it seems equally clear that the procedures cannot be run in parallel. The reason for this, in my view, is jurisdictional. Two courts cannot be seised of the same issue at the same time.

63. If the Circuit Court rehears a tax case, any decision made on a point of law by the Appeal Commissioner is open to re-argument, based on whatever evidence is adduced before that Court. The Court's decision will, under the provisions of the Act, be final. The case stated procedure, on the other hand, envisages the determination of the point of law by the High Court, followed by reversal, affirmation or amendment of the decision, or remittal of the case back to the Appeal Commissioner with the opinion of the Court thereon. The High Court could have no jurisdiction to embark upon that process if the Circuit Court was seised of an appeal.

64. By the same token, the Circuit Court could not embark upon an appeal if the case stated procedure was underway. It could not be open to that Court to make a final decision on issues of fact and law if the High Court was in the process of determining a point of law with the potential effect of varying the decision of the Appeal Commissioners.

65. The aggrieved taxpayer must, therefore, make a choice as to which route to take.

66. This situation differs from the scenario where, on occasion, a person aggrieved by the decision of a court or tribunal may be entitled to seek judicial review while preserving an entitlement to appeal the decision in question. That is because of the different function of the judicial review jurisdiction, which is discretionary in nature and is in general concerned with the process adopted by the decision-making court or tribunal rather than with the merits of its decision. In the instant case, there is no issue as to the process of the Appeal Commissioner. The question in the case, whether it came before the High Court or the Circuit Court, would concern the powers of the inspector to make particular enquiries.

67. The requirement to make a choice does not involve any improper restriction on the Constitutional right of access to the courts. That right must always be exercised in accordance with any relevant rules, including rules about jurisdiction and any relevant limitation periods. All that is required here is for an appellant to make a choice as to the preferred appellate process, and to then comply with the rules relating to that process.

68. There is, in my view, no issue of statutory interpretation involved. The appellant has argued that the Act should not be read as making the right to a rehearing in the Circuit Court contingent upon there not being a case stated in the High Court. I consider that there is such a limitation, but it does not arise from the provisions of the Act, or from any ambiguity falling to be resolved by the Court, but from the jurisdictional considerations identified above.

69. It is for the taxpayer to elect for the process considered to be the most beneficial in the circumstances of any given case. Given

the jurisdictional nature of the issue, it seems to me that the question whether an election has been made cannot be answered purely by reference to the conduct of the parties prior to the bringing of the matter to court. The authorities on the common law principles relating to election in the context of ongoing private law relationships do not, therefore, seem particularly helpful. It may be that in a particular case under the Act, one party might engage in conduct leading the other to believe that a particular course was being adopted with the consequence of inducing that party to act to its detriment, but no such considerations arise in this case.

70. I will continue to use the word "election", since it was used throughout the case, but in the sense only of referring to a binding choice made as to which procedure to adopt in the context of appeals under the Act. The choice, in my view, becomes binding when an action is taken which is incompatible with the adoption of the alternative procedure. I do not accept, therefore, the argument that the choice remains open up to the point when a hearing date is fixed.

71. As far as the case stated procedure is concerned, I do not think that the crucial point is reached when the case stated is drafted, agreed or signed. All of these stages can be completed without any step being taken to transmit it to the High Court, in which case the jurisdiction of that Court is not invoked and there is no issue of incompatibility with the Circuit Court process. If, to take a hypothetical example, an appellant informed the Revenue on the eighth day after signature of a case stated that it had not been lodged and that the appeal in the Circuit Court would be pursued instead, the Revenue might have grounds to complain of inconvenience, wasted time and expense but I cannot see that the jurisdiction of the Circuit Court would be affected. A similar situation might arise if an appellant was prevented by unforeseen circumstances from transmitting the case stated in time and chose, therefore, to rely upon the fact that the request for an appeal had not been withdrawn.

72. In this case, the appellant did in fact lodge the case stated in the High Court in the apparent belief that it was lodged in time. Manifestly, this was done with the intention of invoking the jurisdiction of the High Court. That can only be seen as an election for the case stated procedure since it is not compatible with a parallel process of appeal to the Circuit Court.

73. The appellant subsequently, without accepting that the case stated was out of time, attempted to get a listing in the Circuit Court. The facts presented to the learned Circuit Court Judge were that a case stated had been transmitted to the High Court and that there was an application to strike it out pending. She was not told whether or not the appellant was going to oppose that application. She was, certainly, told that if the application before her, to fix a date, was successful, the appellant would proceed in the Circuit Court. However she was also told that, if the strike-out application was unsuccessful, the appellant would then decide which process to pursue. She was therefore being asked to fix a date, which would involve an assumption that she had jurisdiction to hear the matter, in circumstances where the case stated had to be viewed as at least potentially viable. It is, I think, relevant in this regard that the appellant's representatives had around this time clearly been engaged in efforts to make a case that the seven day limit should not or could not be relied upon by the respondent.

74. In those circumstances, in my view, the Judge had no option but to decline to list the matter in the Circuit Court.

75. The argument now made is that the transmission of the case stated, since it was out of time, was in law a nullity and the High Court never had seisin of the matter. It must be noted, firstly, that this argument was unsuccessfully made before Laffoy J., when the submission was made that no order was required to strike out the matter. She did not accept that proposition, holding that there was "something" in the list, and she struck it out. It has not been suggested that I should hold that she was wrong in so doing.

76. The question whether, in any circumstances, a case stated that is transmitted outside the permitted time could nonetheless proceed was not argued before me and I do not think it would be wise to embark upon it. However, on the assumption that it could not, I think that the respondent is correct in arguing that an election that is not effectively implemented can still amount to a binding election. That is what occurred in this case – the appellant elected for the case stated procedure and invoked the jurisdiction of the High Court, thereby depriving the Circuit Court of jurisdiction to deal with his subsequent application to hear his appeal. The fact that the requirements of the case stated procedure were not met, and the respondent successfully asserted the right to have the matter struck out, does not mean that the choice made by the appellant should be regarded as a nullity ab initio.

77. This decision, obviously, deals only with a situation where an appellant made what I hold to be a binding election in respect of a case stated of which he had carriage.

78. I will therefore dismiss the appeal.