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THE COURT OF APPEAL

Record Number: 2022/86

High Court Record Number: 2019/15CA

Neutral Citation Number: [2022] IECA 279

Faherty J.

Collins J.

Butler J.

BETWEEN

VALERIE COLEMAN and FINTAN COLEMAN

Plaintiffs/Respondents

AND

ANN CLOHESSY, VERONICA CLOHESSY and PATRICK CLOHESSY

Defendants/Appellants

JUDGMENT of Mr. Justice Maurice Collins delivered on 6 December 2022

BACKGROUND

1. The issue before the Court is whether it has jurisdiction to entertain this appeal, having regard to the provisions of Section 39 of the Courts of Justice Act 1936 (*“the 1936 Act”*).
2. Section 39 provides that:

“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.”

Section 39 appears in Part IV of the 1936 Act and refers to appeals under that Part from the Circuit Court to the High Court.

3. Decisions within the scope of Section 39 constitute an *“exception”* from the appellate jurisdiction of this Court under Article 34.4.1 of the Constitution: see for example *ACC Loan Management Limited v Fagan* [2021] IESC 20, [2021] 1 IR 781 and the authorities discussed there, including *Andrews Productions v Gaiety Theatre* [1973] IR 295 (which concerned the appellate jurisdiction of the Supreme Court from the High Court prior to the establishment of the Court of Appeal).
4. Before considering Section 39 further, it is necessary to say something about these proceedings and the nature of the order sought to be appealed. Ms Coleman and Mr

Coleman are Plaintiffs in Circuit Court proceedings (Record No 2014/2013) which were commenced in Cork Circuit Court as far back as August 2014 (hereafter "*the Circuit Court Proceedings*"). The proceedings are testamentary proceedings relating to the estate of the late Peter Clohessy ("*the Deceased*"), who died in July 2010. The Deceased had been married to the First Defendant (who died in July 2021 and who had been a ward of court since August 2016) and was the father of the First Plaintiff (who is married to the Second Plaintiff) as well as of the Second and Third Defendants. The Plaintiffs maintain that they are the executors jointly appointed by the Deceased's will and their Testamentary Civil Bill seeks an order setting aside caveats filed by the three Defendants and an order admitting the Deceased's will to probate in solemn form.

5. It is evident from the papers that there were earlier testamentary proceedings brought by the same parties in the Circuit Court in Cork seeking the same relief. Those proceedings were struck out at some point without any adjudication on their merits. It is also apparent that there have been other disputes relating to the estate of the Deceased and/or assets held by him prior to his death.
6. The Circuit Court Proceedings are pending before the Circuit Court in Cork. On 11 January 2019 His Honour Judge O' Donnabháin made an order allowing 6 weeks for the Third Defendant, Patrick Clohessy, to deliver his Defence, with costs reserved to the trial. That order appears to have been made on foot of an application by the Plaintiffs, presumably

one seeking judgment in default of defence. I shall refer to this order as “*the Circuit Court Order*”.

7. On 18 January 2019 Mr Clohessy appealed the Circuit Court Order to the High Court sitting in Dublin. That appeal was given the record number 2019 15 CA (which is also the record number recited in the title above). Mr Clohessy’s appeal came on before the High Court (Meenan J) on 5 November 2021 and on that date Meenan J made an order striking out the appeal. I shall refer to this order as “*the Meenan J Order*”.

8. In July 2021, prior to the determination of the appeal from the Circuit Court Order, Mr Clohessy issued a motion in the High Court seeking discovery from the Plaintiffs “*or any associated relevant potential third party*” of “*all documents, records or other materials (including those in electronic form) which are now or have been in their possession, custody or control ... in relation to the matters at issue herein*” including material obtained from the Legal Aid Board and a number of counsel who (as I understand the position) previously acted for the Plaintiffs in other related proceedings and against whom Mr Clohessy makes various complaints which it is unnecessary to recite. The discovery motion purportedly issued in Mr Clohessy’s appeal from the Circuit Court Order and bore record number 2019/15CA.

9. The question of whether and to what extent discovery is necessary or appropriate for the proper determination of the Circuit Court Proceedings is, of course, a matter for the Circuit

Court in Cork, at least in the first instance. In the course of the hearing before this Court, it was confirmed that Mr Clohessy has not sought discovery in the Circuit Court to date, though he says that he made previous efforts to obtain relevant documentation which were unsuccessful. It follows that Mr Clohessy is entitled to look for discovery in the Circuit Court Proceedings in the ordinary way.

10. In any event, Mr Clohessy's discovery application came before the High Court (Twomey J) on 15 November 2021. The hearing proceeded remotely and Mr Clohessy did not attend. He says that the Plaintiffs' solicitors had agreed to an adjournment of the application to accommodate the fact that he was not in a position to participate in a remote hearing. However, the application was not adjourned and instead the judge made an order striking out the application ("*the Twomey J Order*").
11. On 19 November 2021, Mr Clohessy delivered a "*Conditional Defence*" in the Circuit Court proceedings. The substance of that defence is not relevant to the issues the Court has to decide on this appeal but I note that the "*conditionality*" of that defence is based, at least in part, on the jurisdictional issue that is considered later in this judgment. Logically, one might have thought that the filing of a defence would have rendered moot any issue arising from the Circuit Court Order or the Orders made by the High Court on appeal from it. Mr Clohessy maintains his appeal nonetheless.

THE JUDGMENT AND ORDER OF THE HIGH COURT

12. Mr Clohessy then issued a further motion on 24 November 2021 - once again bearing record number 2019/15 CA - in which he sought to set aside both the Meenan J Order and the Twomey J Order “because of Irregularity in the proceedings” (“the Set-aside Motion”). The motion was grounded on an affidavit of Mr Clohessy sworn on 24 November 2021 in which he suggested that the Circuit Court Proceedings should not have been listed or moved without first being reconstituted to reflect the death of the First Defendant. He also relied on the agreement with the Plaintiffs’ solicitors to the adjournment of his discovery application on 15 November 2021.

13. The Set-aside Motion came on for hearing before the High Court (Phelan J) on 28 March 2022. Mr Clohessy participated in that hearing. The Judge ruled on the motion *ex tempore* and this Court has been furnished with a transcript of her ruling. As regards the application to set aside the Meenan J Order, the Judge was of the view that no basis had been identified in the documents as to why she should interfere with that order. It was a “normal order” made in respect of what was “a routine procedural order” and the Judge was not satisfied that there was any basis for departing from it or seeking to set it aside. As to the Twomey J Order, the Judge noted that the position was different in that Mr Clohessy was not appealing an order of the Circuit Court but was seeking to set aside an order made by the High Court on application for discovery made in the High Court in respect of proceedings in the Circuit Court. The Judge then stated:

“Now, in the normal way, that application for discovery should be brought in the Circuit Court and the High Court has no jurisdiction to make an order for discovery in Circuit Court proceedings except on appeal from an order of the Circuit Court and no order of the Circuit Court has been made in this instance so there’s no basis for interfering, in my view, at all with the order of Mr Justice Twomey. The matter is simply not properly before this Court.”

14. Before concluding her ruling, the Judge referred to a preliminary objection that Mr Clohessy had raised which raised “*fundamental issues*” with regard to the jurisdiction of the Circuit Court and the High Court. She expressed the view that such issues were not properly before her, specifically noting that a motion which had been issued by Mr Clohessy was not before the Court for hearing and noting that, in any event, such issues could not properly be raised in proceedings between private litigants in the Circuit Court.¹ The order made by the Judge did not refer to that motion.

¹ DAR transcript, pages 1-2. The motion referred to by Phelan J was a further motion issued by Mr Clohessy on 22 March 2022 (again within Circuit appeal No 2019/15 CA) in which he sought declarations as to the constitutionality and lawfulness of the “*Statutory District Court and Circuit Court*” and as to the “*purported jurisdiction of the District Court, Circuit Court, High Court, Court of Criminal Appeal and Supreme Court.*” I shall refer further to this motion below.

15. The Judge ordered that Mr Clohessy should pay the costs of the Set-aside Motion. She declined to place a stay on that order. I shall refer to the order made by the Judge on 28 March 2022 as "*the Phelan J Order*".

APPEAL AND ARGUMENT

16. Mr Clohessy seeks to appeal from the Phelan J Order. On 7 October 2022 Costello J directed that the issue of whether an appeal lies to this Court from that Order be determined as a preliminary issue. That is the only issue before the Court at this stage.

17. Mr Clohessy canvasses a variety of grounds in his Notice of Appeal. They are not easy to follow. However, the core contention appears to be that the Courts of Justice Act 1924 (*“the 1924 Act”*) was never commenced and thus never became operative. It follows – so Mr Clohessy says – that all subsequent legislation providing for the jurisdiction of the Supreme Court, the High Court, the Circuit Court and the District Court was ineffective to vest them with any lawful jurisdiction because that legislation purported to (re)vest in those Courts (or, as Mr Clohessy put it in argument, *“to roll-over”*) a jurisdiction that had never come into existence by reason of the failure to commence the 1924 Act. Thus, Mr Clohessy says, the purported transfer of the existing jurisdictions of those Courts to the new Courts established by Courts (Establishment and Constitution) Act 1961 apparently provided for by the Courts (Supplemental Provisions) Act 1961 was an *“impossibility”*. In addition, Mr Clohessy appears to contend that the High Court’s statutory appellate jurisdiction from decisions of the Circuit Court is in any event inconsistent with Article 34 of the Constitution.

18. Following Costello J's direction that the issue of this Court's jurisdiction to entertain this appeal should be determined as a preliminary matter, Mr Clohessy delivered written submissions supposedly directed to that issue. Those submissions purport to identify three "*core matters*".

19. One of those "*core matters*" rests on an assertion that Costello J had acted "*in the role of an Advocate-General*" by expressing a preliminary opinion on the issue of jurisdiction when the appeal came before her on 7 October 2022. In his oral submissions, Mr Clohessy went further, suggesting that the appeal before us effectively involved an appeal from Costello J. and disputing the Court's jurisdiction to hear such an appeal. Such submissions are wholly misconceived. As the Court made clear in the ruling that it gave in the course of the appeal hearing, Costello J did not determine the jurisdiction issue. On the contrary, she listed that issue for hearing and determination by a full Court. It follows that no question of any appeal from Costello J arises. The suggestion that Costello J had acted "*in the role of an Advocate General*" is equally unfounded. It may be that, in the course of the directions hearing before her, Costello J expressed a preliminary or provisional view on the jurisdiction issue. That would, of course, be entirely unexceptional. But this Court was unaware of, and uninfluenced by, any view that may have been expressed. Nothing more needs to be said about this issue.

20. Another of the "*core matters*" identified in Mr Clohessy's written submissions is what he characterised as the unlawful delimitation of the jurisdiction of the High Court when

exercising appellate jurisdiction from the Circuit Court. In his oral submissions – which were almost entirely directed to this issue and to the “*vestiture*” issue said to arise from the alleged non-commencement of the 1924 Act – Mr Clohessy variously described the High Court when exercising such appellate jurisdiction as a “*junior High Court*”, “*the statutory High Court*”, “*a sub-division*”, “*a form of sub-High Court jurisdiction*”, “*nothing more than a jumped up Circuit Court*” and a “*glorified Circuit Court appeal court*”. The essence of his complaint, as I understand it, is that any limitation on the jurisdiction of the High Court when exercising that appellate jurisdiction is inconsistent with the High Court’s constitutionally invested “*full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.*” In his submission, the “*constitutional High Court*” – the High Court vested with that full original jurisdiction – ought properly to be available to an appellant from the Circuit Court and it was unfair that issues relating to the constitutional validity of laws could not be raised in a Circuit Court appeal and had instead to be the subject of separate proceedings initiated in the High Court. Though Mr Clohessy appeared to assert that this amounted to discrimination, he did not suggest that he had been treated any differently to other parties who may bring appeals from decisions of the Circuit Court to the High Court.

21. Mr Clohessy told the Court of his unsuccessful efforts to locate the original of the order commencing the 1924 Act. Only an incomplete draft of the no 5 commencement order had been found. In response to a question from the Court, he disputed that the effect of sections 4 and 5 of the Documentary Evidence Act 1925 (which Mr Clohessy had himself put before

the Court) was to render the production of the original commencement order unnecessary, referring in that context to section 6 of that Act. I refer further to these provisions below. Mr Clohessy also referred to section 13 of the Ministers and Secretaries Act 1924. That section required every order made by the Executive Council under that Act to be laid before each House of the Oireachtas. No orders commencing the 1924 Act had been laid before the Houses in accordance with section 13, Mr Clohessy said. That was, he contended, a further infirmity affecting the jurisdiction of the Irish courts.

22. For good measure, Mr Clohessy also made it clear in his oral submissions that this Court was affected by a similar jurisdictional frailty as the District, Circuit, High and Supreme Courts, due to the fact that the jurisdiction apparently vested in it by section 7A(2) and (3) of the Courts (Supplemental Provisions) Act 1961 (inserted by section 8 of the Court of Appeal Act 2014) did not actually exist.

23. The last of the “*core matters*” identified by Mr Clohessy in his written submissions is the only one that directly addresses the issue before the Court, namely whether section 39 of the 1936 Act precludes his appeal. His submissions refer to the decision of the Supreme Court in *ACC Loan Management Limited v Fagan* [2021] IESC 20, [2021] 1 IR 781, suggesting that the analysis adopted by Baker J in her judgment in that case (with which O’ Donnell, McKechnie, Charleton and O’ Malley JJ agreed) supports his contention that the “*legal blockade*” presented by Section 39 of the 1936 Act does not, in fact, capture his appeal here. Although invited to do so on several occasions by the Court, in his oral

submissions Mr Clohessy showed little appetite to address this issue further or to develop his arguments on it, electing instead to focus on the constitutional and jurisdictional issues already referred to.

24. In their written submissions, the Plaintiffs/Respondents say that this Court has no jurisdiction to hear any appeal from the Phelan J Order. As regards Mr Clohessy's motion of 22 March 2022, they say that that was not before the High Court on 28 March 2022. They refer to the fact that a further motion was subsequently issued by Mr Clohessy returnable for 25 April 2022 seeking the same reliefs. That motion has, it seems, been fixed for hearing in the High Court in March 2023. They further say that even if the constitutional challenge was properly before the Court, the Attorney General should be on notice and, it is said, the attempt to join him at this stage is misconceived. In his brief but helpful oral submissions, the Plaintiffs' solicitor Mr Long made the point that his clients found themselves involuntarily before the Court of Appeal arising from an entirely routine procedural order made in the Circuit Court fixing the time for the delivery of a defence by Mr Clohessy. That order had been appealed to the High Court and the appeal had been determined. The motion for discovery had not been properly brought and the High Court had correctly struck it out. The Judge had been correct to reject Mr Clohessy's attempt to re-open those matters and, it was said, that was – or ought to have been – the end of it.

DISCUSSION

Section 39 of the 1936 Act

25. Section 39 of the 1936 Act has been considered in a number of decisions of this Court and of the Supreme Court, of which *Kinahan v Baila* (Unreported, Supreme Court, 18 July 1985), *Kelly v National University of Ireland (UCD)* [2017] IECA 161, [2017] 3 IR 237, *Bank of Ireland v Gormley* [2020] IECA 102 and *ACC Loan Management Limited v Fagan* [2021] IESC 20, [2021] 1 IR 781 are perhaps the most significant.

26. The Circuit Court is a court of local and limited jurisdiction for the purposes of Article 34.3.4 of the Constitution and was established by section 4(1) of the Courts (Establishment and Constitution) Act 1961. Pursuant to Part IV of the 1936 Act (which continues to apply by virtue of section 48(3) of the Courts (Supplemental Provisions) Act 1961), an appeal generally lies to the High Court from decisions of the Circuit Court in civil cases. Section 37 of the 1936 Act governs appeals in cases heard without oral evidence (where the appeal lies to the High Court in Dublin); section 38 governs appeals in other cases (where the appeal lies to the High Court on Circuit, other than in cases heard by the Dublin Circuit Court, where the appeal lies to the High Court in Dublin). The appeal in each case is by way of rehearing.

27. The High Court’s appellate jurisdiction under Part IV of the 1936 Act is a limited statutory jurisdiction, distinct from the “*full original jurisdiction*” conferred on that Court by Article 34.3.1 of the Constitution: *Kelly*, per Finlay-Geoghegan J (Peart and Hogan JJ agreeing) at para 24; *ACC Loan Management*, per Baker J at paras 22-23.
28. Section 39 of the 1936 Act precludes any further appeal from *any* decision made by the High Court in exercise of its statutory appellate jurisdiction under Part IV of the 1936 Act. As Murray J explained in *Bank of Ireland v Gormley* (Edwards and Faherty JJ agreeing): “*[t]he preclusion on appeal to this Court entailed by this provision is not limited to the final decision of the High Court in allowing or refusing the appeal in question. It extends to any interlocutory application made to, and any decision made by, the High Court exercising its appellate jurisdiction under the 1936 Act in the course of appeals from the Circuit Court*” (at para 6) and Section 39 “*excludes an appeal against a wide range of interlocutory orders made by the High Court in the course of an appeal from a decision of the Circuit Court, including orders for discovery, for particulars, orders seeking to strike out the appeal, costs orders and indeed orders made in the course of the ordinary management of the appeal.*” (para 8).
29. Similarly, in *ACC Loan Management*, Baker J summarised the effect of section 39 in the following terms:

“[86] That the purpose of s. 39 was to bring an end to litigation is reflected in the legislative provision for a complete rehearing by the High Court judge hearing the appeal, subject only to those restrictions concerning the admission of new evidence in cases wholly heard on affidavit. The policy of s. 39 is that the statutory appeal to the High Court be an end to Circuit Court litigation.

87. From the authorities, the principles that emerge are that any decision of the High Court on an appeal from the merits of an order of the Circuit Court, and any decision of the High Court exercising its statutory appellate jurisdiction in the course of the management or running of that appeal which is ancillary to or made in connection with the appeal or which relates to or furthers that appeal, is captured by section 39. Once it can be said that the decision was made within that statutory jurisdiction, the decision is final.”

30. Accordingly, the essential inquiry is whether the decision sought to be appealed was made within the statutory Part IV jurisdiction. If so, section 39 applies so as to preclude an appeal to this Court.² That inquiry can sometimes present difficulty. As *Kelly* and *Bank of Ireland v Gormley* demonstrate, certain orders made within the general rubric of a Part IV appeal

² Section 39 does not exclude an appeal to the Supreme Court from a decision of the High Court in exercise of its Part IV jurisdiction. Rather such appeals are governed by Article 34.5.4 of the Constitution: *Pepper Finance Corporation v Cannon* [2020] IESC 2, [2020] 2 ILRM 373.

may nonetheless fall outside the section 39 preclusion. The dividing-line was explained thus by Murray J in *Bank of Ireland v Gormley*:

“16 .. I think the correct distinction is between Orders which are made in furtherance of, or which are an integral part of, the appeal (such as those under consideration in Kinahan v. Baila) and orders (such as that in Kelly) which, while made within the framework of the appeal, neither advance, determine, dispose of nor are an inherent part of those proceedings. Orders for security for costs, for discovery, for particulars – and indeed almost all orders available within proceedings of this kind – are sought for the sole purposes of furthering the position of the moving party in, or are an integral part of, the proceedings. They have no other point. The Order under consideration in Kelly (insofar as there is jurisdiction to make it at all) was in the nature of an Isaac Wunder order, and it was in its effect external to the proceedings – as demonstrated by the fact that such relief is most usually sought at the conclusion of proceedings. That an order could be made after the appeal had been determined is a strong indicator that it falls within the latter category, but the actual timing of the order appears to me to be irrelevant to that inquiry. By distinguishing between these two types of relief the intention behind s.39 can be given effect to, while also observing the principle articulated by the Court in Kelly that a legislative exclusion on the right of appeal must be expressed in clear and unambiguous terms.”

31. In my view, it is clear that the order sought to be appealed here – the Phelan J Order of 28 March 2022 – was one made within the statutory Part IV jurisdiction and, accordingly, section 39 applies so as to preclude Mr Clohessy’s appeal.

32. The starting point is to consider the orders made by Meenan J and Twomey J which Phelan J was asked, but declined, to set aside. The Meenan J Order determined Mr Clohessy’s appeal from the order made by Judge O’ Donnabháin in the Cork Circuit Court on 11 January 2019. That appeal was brought pursuant to Part IV of the 1936 Act and it is clear therefore that the Meenan J Order was one made within the Part IV jurisdiction. It follows that section 39 precludes any appeal from that order to this Court.

33. The Twomey J Order determined Mr Clohessy’s application for discovery. That application was brought at a time when Mr Clohessy’s appeal from the order made by Judge O’ Donnabháin was still pending before the High Court. No doubt, the High Court is empowered to order discovery to be made in the course of a Part IV appeal, should it consider that such discovery is necessary for the fair disposal of the appeal. Any such order (or an order refusing such discovery) would be captured by section 39, even where discovery is raised for the first time in the course of an appeal under Part IV: see *Kinahan*

*v Baila*³ as well as the passage from Murray J’s judgment in *Bank of Ireland v Gormley* set out above.

34. Here, of course, Mr Clohessy’s appeal was a very limited interlocutory appeal, from a routine procedural order made by the Circuit Court. The appeal was, in any event, no longer extant when his discovery application came before Twomey J. In the circumstances, there was no basis on which the High Court could properly have made an order for discovery. But that does not take away from the fact that the application for discovery was purportedly made within the appeal and for the purpose of it. That was expressly asserted in paragraph 4 of the affidavit sworn by Mr Clohessy on 2 July 2021 to ground the discovery application (“*I say that it is essential in the interests of justice that full disclosure is made for [the] fair trial of the issues and before the Books of Pleadings can be completed and filed in the Central Office*”). It was also expressly stated in the letter seeking voluntary discovery sent by Mr Clohessy on 13 April 2021, which was exhibited to that affidavit (“*The documents requested for voluntary production are necessary and relevant to advance the Appeal of Ann Clohessy, Veronica Clohessy and Patrick Clohessy...* “).

35. However misconceived, the application for discovery was brought in furtherance of Mr Clohessy’s appeal. The only jurisdiction that the High Court had to order discovery was its

³ There is “*no room in the interpretation of Section 39 to make a special exception in relation to matters by way of interlocutory application raised for the first time in the proceedings, provided they are raised in a Circuit Appeal*”: per Finlay CJ (Henchy, Griffin, Hederman and McCarthy JJ agreeing) at page 2.

jurisdiction under Part IV. No other jurisdiction was available to be invoked by Mr Clohessy. That the Part IV jurisdiction was, in the circumstances here, wrongly invoked by Mr Clohessy does not alter that position in my view. The Twomey J Order was therefore one made within the Part IV jurisdiction, from which it follows that section 39 precludes any appeal from it to this Court.

36. What then of the Phelan J Order of 28 March 2022? If, as I have concluded, the Meenan J Order and the Twomey J Order were made within the Part IV jurisdiction, Mr Clohessy's application to set aside those Orders "*because of Irregularity in the proceedings*" necessarily must be regarded as invoking that jurisdiction also. The motion purportedly issued within Mr Clohessy's appeal (that was, of course, the only basis on which the motion could have issued at all). But even leaving that aside, the fact is that, whatever jurisdiction the High Court had to set aside those orders – and it is not necessary to consider whether it had any such jurisdiction or the parameters of any such jurisdiction it may have had – it did not arise independently of its Part IV jurisdiction but was an incident of it. There was no other jurisdiction available to Mr Clohessy to invoke or to available to the High Court to exercise. Phelan J had no appellate or supervisory jurisdiction in respect of the earlier orders. It follows that Section 39 precludes an appeal from the Phelan J Order also. Any other conclusion would allow Mr Clohessy to achieve indirectly what he cannot achieve directly, namely the review by this Court of the Meenan J Order and the Twomey J Order. Such an outcome would, in my view, be irreconcilable with the purpose and effect of Section 39.

The Other Issues Raised by Mr Clohessy

37. The above analysis suffices to dispose of the issue before the Court. However, in light of the far-reaching nature of the other arguments made by Mr Clohessy, it appears appropriate to say something about them here.

Was the 1924 Act commenced?

38. The Constitution of the Irish Free State adopted exactly 100 years ago, provided in Article 64 for the establishment by the Oireachtas of a new court system to exercise the judicial power of the Irish Free State (Saorstát Éireann) and to administer justice. The Oireachtas subsequently enacted the 1924 Act for the purpose of establishing those new courts. The Act was passed on 12 April 1924.

39. Section 2 of the 1924 Act provided:

“2. This Act shall come into operation on such day or days as may be fixed therefor by any Order or Orders of the Executive Council and different days may be fixed for the commencement of the Act for different purposes provided that no such day be later than five months after the passing of this Act.”

40. Four orders appear to have been made by the Executive Council for the purpose of bringing the Act into operation, as follows:

- The Courts of Justice Act, 1924 (Commencement) Order, 1924 (Order of the Executive Council No 5 of 1924) was made on 4 June 1924. It brought the Act into operation for the purposes of sections 1, 2 and 3, Part I and Part IV (except such provisions of Part IV as related only to the Circuit Court or the District Court) on the following day, 5 June 1924. Part I of the 1924 Act provided for the constitution and jurisdiction of the new High Court of Justice and the new Supreme Court of Justice, as well as the Court of Criminal Appeal. Part IV of the Act contained “*Miscellaneous and Transitory Provisions*”.
- The Courts of Justice Act, 1924 (Commencement) (No 2) Order, 1924 (Order of the Executive Council No 6 of 1924) was made on 11 June 1924. It fixed that day (11 June 1924) as the day on which the Act would come into operation in Dublin City and County (being the Circuit mentioned at No 1 in the Schedule to the Act) for the purpose of Part II and the purpose of Part IV so far as that Part related to the Circuit Court. Part II of the Act provided for the constitution and jurisdiction of the new Circuit Court of Justice.
- The Courts of Justice Act, 1924 (Commencement) (No 3) Order, 1924 (Order of the Executive Council No 9 of 1924) was made on 2 August 1924. It fixed 6 August

1924 as the day on which the Act would come into operation for the purposes of Part II and Part IV (so far as Part IV related to the Circuit Court) wherever the Act was not already in force for those purposes by virtue of the Courts of Justice Act, 1924 (Commencement) (No 2) Order, 1924. In other words, it brought the Act into operation in relation to the Circuit Court of Justice outside of Dublin.

- Finally, the Courts of Justice Act, 1924 (Commencement) (No 4) Order, 1924 (Order of the Executive Council No 10 of 1924) was made on 9 August 1924. It fixed 16 August 1924 as the day on which the Act would come into operation for the purposes of Part III of the Act and for the purposes of Part IV so far as that part related to the District Court. Part III of the Act provided for the constitution and jurisdiction of the new District Court of Justice.

41. Copies of these four orders, published by the Stationery Office, can be found in *Statutory Rules, Orders and Regulations 1922-1938*, also published by the Stationery Office. In addition, the orders were published in full in *Iris Oifigiúil* (also published by the Stationery Office) on (respectively) 5 June 1924, 11 June 1924, 5 August 1924 and 12 August 1924.
42. Section 4(1) of the Documentary Evidence Act 1925 provides that:

“Prima facie evidence of any rules, orders, regulations, or byelaws to which this section applies, may be given in all Courts of Justice and in all legal proceedings

by the production of a copy of the Iris Oifigiúil purporting to contain such rules, orders, regulations, or byelaws or by the production of a copy of such rules, orders, regulations, or byelaws printed under the superintendence or authority of and published by the Stationery Office.”

Section 4 applies (*inter alia*) to all rules, orders, regulations and byelaws made under the authority of Act of the Oireachtas by the Executive Council: section 4(2)(b).

43. Section 5(1) of the Documentary Evidence Act 1925

“Every copy of an Act of the Oireachtas, proclamation, order, rule, regulation, byelaw, or other official document which purports to be published by the Stationery Office or to be published by the authority of the Stationery Office shall, until the contrary is proved, be presumed to have been printed under the superintendence and authority of and to have been published by the Stationery Office.”

44. The combined effect of these provisions is that (a) production of a copy of the *Iris Oifigiúil* purporting to contain any order of the Executive Council made under section 2 of the 1924 Act and/or (b) production of a copy of any such order which purports to be published by, or by the authority of, the Stationery Office, constitutes *prima facie* evidence of the order. Production of the original order is *not* required to prove the order, at least in the absence of any contrary evidence.

45. When the Court raised these provisions of the Documentary Evidence Act 1925 with Mr Clohessy in argument, he appeared to suggest that they were somehow nullified by section 6 of the same Act. Section 6 creates certain criminal offences relating to the printing or publication of (*inter alia*) a copy of any order made by the Executive Council which falsely purports to have been published by or by the authority of the Stationery Office (section 6(1)) and the printing or publication of (*inter alia*) of any document which purports to be a copy of such an order “*which is any material respect (whether by addition, omission, or otherwise) not a true copy*” of it (section 6(2)). The knowing tendering of any such document in evidence in any legal proceedings is also an offence (section 6(3) and (4)).
46. These are, no doubt, important provisions but I cannot see how they might affect the operation of sections 4 and 5 in the circumstances here. There does not appear to be - and Mr Clohessy did not identify - a whit of basis for any suggestion that the copies of the four commencement orders contained in *Statutory Rules, Orders and Regulations 1922-1938*, all of which purport to have been published by the Stationery Office, were not in fact so published.
47. The Court was told by Mr Clohessy that the original commencement order No 5 of 1924 cannot be located and that the National Archives holds only an incomplete draft. That is also said in the Conditional Defence filed by Mr Clohessy in the Circuit Court Proceedings. Even if that is the case – and this Court is obviously not in a position to form any view on

the point - and even if that is also the position regarding the other commencement orders referred to above (and Mr Clohessy did not appear to suggest that it was), it would not have the effect suggested by Mr Clohessy. The provisions of the Documentary Evidence Act 1925 provide a means by which those commencement orders may be proved, *prima facie*, without the necessity for the production of the originals.

48. There are, perhaps, many other points that might be made in this context. One is the profound implausibility of any suggestion that the Executive Council failed to commence any part of the 1924 Act. It was under a specific duty to do so within a period of 5 months. Furthermore, under Article 68 of the Constitution of the Irish Free State, it was on the advice of the Executive Council that judges to the new courts were to be appointed. The new appointees to the new Supreme Court and the new High Court were announced on 6 June 1924 and appointed in a ceremony in Dublin Castle on 11 June 1924 in the presence of the President and other members of the Executive Council.⁴ The appointment of the new Circuit Court judges followed on 7 July 1924. One of the appointments made on 11 July 1924 was the appointment of the former Attorney General, Hugh Kennedy, to the position of Chief Justice. In his role as Attorney, ensuring the due commencement of the 1924 Act was surely at the forefront of his responsibilities and it seems reasonable to infer that he was satisfied that it had indeed been commenced. The new courts went into operation, with monies voted for that purpose by the Oireachtas. Countless litigants invoked, and submitted

⁴ Keane, "The Voice of the Gael: Chief Justice Kennedy and the Emergence of the New Irish Court System 1921-1936" (1996) 31 *Irish Jurist* 205.

to, their jurisdiction. Rules of Court were made in purported exercise of the powers conferred by the 1924 Act. Later, the Executive Council proposed, and the Oireachtas legislated for, various amendments to the 1924 Act, on the basis that the Act was in operation..

49. The fact – if fact it be – that the original of any of the commencement orders identified in paragraph 40 above cannot now be located does not establish that such order was not duly made. Even in the absence of the provisions of the Documentary Evidence Act 1925, the matters set out above suggest that all relevant parties proceeded on a common understanding that the 1924 Act had been brought into operation and seem to attest to the fact that commencement orders were indeed made in accordance with the requirements of section 2 of the 1924 Act. However, it does not appear to be necessary to consider that issue any further here, having regard to the means of proof provided by the Documentary Evidence Act 1925 which may be relied on in any legal proceedings in which any issue is raised as to the commencement of the 1924 Act.

50. As to section 13 of the Ministers and Secretaries Act 1924, it had no application to orders of the Executive Council under section 2 of the 1924 Act. The Ministers and Secretaries Act 1924 was enacted subsequent to the 1924 Act. Section 13 of the Act applied to orders made “*under this Act*” i.e. the Ministers and Secretaries Act itself. Commencement orders made under section 2 of the Courts of Justice Act 1924 were *not* made under the Ministers

and Secretaries Act 1924 and the requirements imposed by section 13 as regards the laying of orders before each House of the Oireachtas therefore had no application to such orders.

The “constitutional” High Court and the “statutory” High Court

51. There is, of course, only one High Court. It is, however, vested with a number of different jurisdictions. By virtue of Article 34.3.1 of the Constitution, the High Court is invested with *“full original jurisdiction in and power to determine all matters and questions, whether of law or fact, civil or criminal.”* Article 34.3.2 entrenches the jurisdiction of the High Court in relation to the question of the validity of any law having regard to the provisions of the Constitution and provides that no such question shall be raised in any Court established under the Constitution other than the High Court, the Court of Appeal or the Supreme Court.
52. Thus the jurisdiction of the High Court extends to the determination of questions regarding the validity of any law having regard to the provisions of the Constitution and the High Court is, in fact, the only court of first instance that can determine such questions.
53. Questions of the validity of any law having regard to the provisions of the Constitution cannot be raised in the Circuit Court (or in the District Court). That follows directly from the express terms of Article 34.3.2. Nor is it permissible for the Circuit Court to state a case to the Supreme Court (or, as it now would be, the Court of Appeal) on such a question:

Foyle Fisheries Commission v Gallen (1960) 26 Ir Jur Rep 35. Similarly, the District Court cannot raise such a question by way of case stated to the High Court.

54. The Circuit Court, as a court of local and limited jurisdiction, also lacks jurisdiction to hear and determine a claim that a statute enacted prior to the coming into force of the Constitution is inconsistent with it: *People (DPP) v MS* [2003] 1 IR 606.
55. As the Supreme Court explained in *MS* (per Keane CJ (Denham, Murray, McGuinness and Hardiman JJ agreeing) at 620), the District Court and the Circuit Court have no power to determine issues as to the constitutional validity of legislation or rules of the common law, whether dating from before or after the enactment of the Constitution. Keane CJ continued:

“Unless and until the legislation in question is found to be constitutionally invalid by the High Court or this court, the trial judge discharges his or her constitutional duty by upholding it and applying it to the facts of the case before him or her. There is ample machinery available to the litigant who is advised that any particular law is arguably unconstitutional to institute appropriate proceedings to have that issue resolved in the superior courts.”

56. The “*machinery*” referred by Keane CJ here is, of course, the institution of appropriate proceedings in the High Court, from whose decision an appeal lies to this Court and/or to

the Supreme Court pursuant to Article 34.4 and Article 34.5 of the Constitution.

57. In addition to its constitutionally entrenched first instance jurisdiction provided for by Article 34, various forms of appellate and consultative jurisdictions have been conferred by law on the High Court from time to time. It hears appeals by way of case stated from the District Court, as well as consultative cases stated from that court. It has appellate jurisdiction under many different regulatory regimes, including many in the area of professional regulation and discipline. It also, of course, has a general appellate jurisdiction from decisions of the Circuit Court under Part IV of the 1936 Act.
58. In *State (Browne) v Feran* [1967] IR 147, the Supreme Court (per Walsh J, with those judgment O’ Dalaigh CJ and Haugh, Budd and Fitzgerald JJ agreed) located the power to confer such additional jurisdictions in Article 36 of the Constitution.⁵ While Article 36 did not permit the Oireachtas to restrict or remove any jurisdiction provided for by Article 34, the Oireachtas could “*add jurisdictions to those jurisdictions already derived from the Constitution*” (at page 157). Examples of such statutorily conferred jurisdictions, he added, would be “*an appellate jurisdiction in the High Court and a consultative jurisdiction in the High Court.*” (*ibid*).

⁵ So far as material, Article 36 provides that “*Subject to the foregoing provisions of this Constitution relating to the Courts, the following matters shall be regulated in accordance with law...iii the constitution and organisation of the said Courts, the distribution of jurisdiction and business among the said Courts and judges, and all matters of procedure.*”

59. Article 34.3.4 is also relevant in this context, providing as it does that the courts of first instance “*shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law*”.
60. The Circuit Court is such a court of local and limited jurisdiction and the Oireachtas was entitled to provide for the bringing of appeals from that court to the High Court. That appellate jurisdiction was first provided for in the 1924 Act itself and was then substantially recast by Part IV of the 1936 Act. It was thus an established feature of the administration of justice in the State at the time of the adoption of the Constitution in 1937 and was expressly continued by section 48 of the Courts (Supplemental Provisions) Act 1961 when the “*new courts*” were belatedly established by the Courts (Establishment and Constitution) Act 1961.
61. When hearing appeals under Part IV, the High Court is necessarily exercising a limited jurisdiction. It is, after all, an *appellate* jurisdiction, which proceeds by way of rehearing of the action or matter in which the judgment or order the subject of such appeal was made. The jurisdiction of the Circuit Court is a limited one and such limitations necessarily apply in any appeal under Part IV. Otherwise, the appeal would lose its character as such and involve an entirely different form of proceeding. As issues involving the constitutional validity of any law, whether enacted pre-1937 or post-1937, cannot be agitated in the Circuit Court, they cannot properly be raised in a Part IV appeal. Otherwise, the appeal

would have a wholly different complexion to the action or matter heard and determined in the Circuit Court.

62. As already stated, the High Court's appellate jurisdiction under Part IV of the 1936 Act is distinct from the "*full original jurisdiction*" conferred on that Court by Article 34.3.1 of the Constitution: see *Kelly* and *ACC Loan Management*. Article 34.3.1 cannot therefore be relied on to suggest that the limitations of the Part IV jurisdiction impermissibly entrench on the High Court's original jurisdiction. That original jurisdiction is invoked by the initiation of proceedings in the High Court, not by the bringing of a Part IV appeal from the Circuit Court.

63. Should Mr Clohessy wish to raise constitutional issues as to the validity of any law, whether enacted pre-1937 or post-1937, he is entitled to do so – and only entitled to do so - by bringing appropriate proceedings in the High Court. He is not entitled to raise such issues in the Circuit Court or in the High Court on appeal from the Circuit Court. That simply reflects the basic constitutional architecture of Articles 34 and 36 of the Constitution.

DISPOSITION

64. The Judgment and Order the subject of the appeal was made as part of the High Court's appellate jurisdiction under Part IV of the 1936 Act.

65. Therefore, section 39 of the 1936 Act precludes any appeal from the High Court to this Court.

66. The appeal must therefore be struck out.