THE SUPREME COURT

Supreme Court Record No. 2018/177
Court of Appeal Record No. 2018/169
High Court Record No. 2017/238 CA
Circuit Court Record No. 120/2014

O'Donnell J.
McKechnie J.
Charleton J.
O'Malley J.
Baker J.

BETWEEN/

ACC LOAN MANAGEMENT LIMITED

Plaintiff / Respondent

AND

PEPPER FINANCE CORPORATION (IRELAND)

DESIGNATED ACTIVITY COMPANY

Respondent

AND

DECLAN FAGAN

First Named Defendant

AND

BERNADETTE FAGAN

Second Named Defendant / Appellant

Judgment of Baker J. delivered the 24th day of March 2021

1. Section 39 of the Courts of Justice Act 1936, as continued by the Courts (Supplemental Provisions) Act, 1961, makes final and unappealable any decision of the High Court on appeal from a decision of the Circuit Court. The central question for determination in this appeal is the scope of that provision and whether a decision refusing to extend time to appeal from the Circuit Court to the High Court is a decision which is, by reason of s. 39, final and unappealable.

2. This is an appeal from the decision of the Court of Appeal that it had no jurisdiction to entertain an appeal of the refusal of Meenan J. ([2018] IEHC 140) to extend time to appeal a decision made by the Circuit Court.

3. This Court has already in *Pepper Finance Corporation v. Cannon* [2020] IESC 2 decided that as a result of the altered constitutional architecture following the establishment of the Court of Appeal, s. 39 does not prevent an appeal to the Supreme Court from a decision of the High Court exercising its appellate jurisdiction in an appeal from the Circuit Court, and that an appeal lies to this Court in exceptional cases and where the constitutional criteria of general public importance or the interests of justice are met. That can mean in some cases that a "direct appeal" can lie to this Court from certain decisions of the Circuit Court when no appeal lies to the Court of Appeal.

4. What is under consideration in the present appeal is a different question, whether the Court of Appeal was correct that the decision of the High Court refusing to extend time to appeal a decision of the Circuit Court was final and appealable within the meaning of s. 39.

The litigation to date

5. The background to the appeal may be briefly stated. The appellant and her husband were adjudicated bankrupt on the petition of ACC on 21 May 2012. An order for possession against the appellant and her husband was made by the Circuit Court on 28 July 2015, and the

Circuit judge decided that, as the premises had at the time of the hearing in the Circuit Court vested in the Official Assignee in Bankruptcy, the appellant and Mr Fagan did not have standing to challenge the order for possession.

6. Leave to seek judicial review in the form of *certiorari* was sought in the names of both Mr and Mrs Fagan, although she now asserts, through counsel, that her husband acted without her authority or consent. The application for leave was dealt with as a telescoped hearing and McDermott J. delivered a written judgment on 10 May 2016 in *Fagan v. ACC Loan Management Ltd* [2016] IEHC 233 in which he refused leave *inter alia* on the grounds that the order of the Circuit Court was not flawed on account of a breach of natural justice, and that as the Circuit Court judge was correct that the appellant and Mr Fagan did not have standing to challenge the order for possession, the order was made within jurisdiction.

7. The Court of Appeal in an *ex tempore* judgment delivered on 17 July 2017 dismissed the appeal from that order.

8. After the conclusion of the judicial review Mrs Fagan by motion of 31 July 2017 sought an extension of time to appeal the order of the Circuit Court and on 7 December 2017 the Master of the High Court granted the extension of time, a decision reversed on appeal by Meenan J. in his judgment of 7 March 2018. Meenan J. was satisfied on the evidence that Mrs Fagan had formed a bona fide intention to appeal the possession order within the time allowed by the Rules of the Superior Courts ("RSC"), and was aware that the time had expired. He noted that her stated reason for not lodging an appeal was incapacity or illness and considered that this did not constitute a "mistake" for the purposes of the second limb of the test in *Éire Continental Trading Company v. Clonmel Foods Limited* [1955] IR 170. He found that she had "deliberately and consciously" decided to challenge the order of the Circuit Court not by way of an appeal but by judicial review, and that it followed that no "mistake" had been made by her in not lodging the appeal on time. While that conclusion was dispositive, Meenan J. did

consider the proposed grounds of appeal sought to be advanced, and came to the conclusion that these did not constitute good grounds. He therefore allowed the appeal and discharged the order of the Master of the High Court extending time.

9. Mrs Fagan's appeal of that order was dismissed and the *ex tempore* ruling of the Court of Appeal (McGovern J., McCarthy and Kennedy JJ. concurring) ([2018] IECA 353) forms the basis of the appeal to this Court as it concluded that it did not have jurisdiction by reason of s. 39 of the Act of 1936 to deal with the appeal which the Court of Appeal characterised as an appeal from a decision of the High Court exercising its statutory appellate jurisdiction from the Circuit Court.

10. This is Mrs Fagan's appeal from that decision of the Court of Appeal, and concerns the jurisdictional issue only.

The statutory provisions

11. Part IV of the Courts of Justice Act 1936, as continued by the Courts (Supplemental Provisions) Act 1961, provides for and regulates appeals from the Circuit Court to the High Court.

12. The enabling provision is section 38 by which an appeal lies "from every judgment or order… of the Circuit Court". The section regulates the conduct of the appeal, the location in which the appeal is to be heard, and provides that the appeal is heard and determined by one judge of the High Court and by way of a rehearing of the action in which the judgment or order was given: Section 38(2).

13. For the purposes of this judgment I will where convenient use the expression "Circuit Appeal" although two types of appeals from the Circuit Court are envisaged: an appeal to the High Court on Circuit, i.e. the High Court travelling out of Dublin to provincial centres; and an appeal to the High Court sitting in Dublin hearing appeals from the Dublin Circuit Court or

from provincial Circuit Court orders made in causes or matters where no oral evidence was heard at first instance.

14. The procedures for making an appeal are set out in order 61 RSC which provides for the service of a notice of appeal within 10 days from the date on which the judgment or order appealed from was pronounced in open court. Provision is made for the lodgement of books of appeal, for the making by the Circuit Court judge, or on appeal by the High Court judge, of a stay on the judgment or order, and for an application to submit fresh evidence where no oral evidence was given at first instance (O. 61, R. 8).

15. The judgment or order of the High Court on Circuit or of the High Court sitting in Dublin hearing the Circuit Appeal is drawn by the County Registrar (in the case of High Court on Circuit matter) or by the High Court Registrar in the case of a Dublin Circuit appeal, but it is notable that the order is thereafter transferred to the County Registrar of the appropriate county, and is not retained as part of the High Court record.

16. Rule 12 provides for the taxation of costs by the relevant County Registrar, taxation to be on the scale applicable to a matter commenced and heard in the Circuit Court with such necessary additions as may be appropriate. Execution is enforced through an order issued by the Circuit Court and under the Rules of the Circuit Court "as if it were a judgment or order of the Circuit Court" (rule 20).

17. The appeal is a *de novo* hearing: s. 37(2) and s. 38(2). Leave is required for the admission of new evidence: s. 37(2). A question of law may be referred to the Supreme Court: s. 38(3) and see *Irish Life and Permanent Plc v. Dunne* [2015] IESC 46, [2016] 1 IR 92. The court hearing the appeal has full powers of amendment in respect of summons and civil bills and pleadings: s. 40(e).

18. I mention these ancillary orders and procedural matters to highlight the fact that while orders made in an appeal from the Circuit Court are made by a High Court judge, he or she

exercises a special statutory jurisdiction and in many respects the order is treated as if it were an order of the Circuit Court, and not an order made in the original jurisdiction of the High Court.

19. It is well established that the High Court exercising its statutory appellate jurisdiction does not have original or inherent jurisdiction derived from Article 34.3.1° of the Constitution and is constrained to act within the limited and local jurisdiction of the Circuit Court: see for example *per* Finlay Geoghegan J. in *Kelly v. National University of Ireland Dublin aka UCD* [2017] IECA 161, [2017] 3 I.R. 237.

20. The time limit for the making of an appeal from an order of the Circuit Court is contained not in the Act or in the Rules of the Circuit Court but in O. 61 r. 2 and 3 RSC which provide a ten-day time limit for the bringing of an appeal from the Circuit Court which, in their terms, applies to every appeal under Part IV of the Act. No special provision is made for an application for an extension of time to appeal save by the general power of the High Court in O. 122 RSC to extend the time for the doing of any act or thing.

21. These provisions, and the fact that no special statutory procedures and time limits on appeal, or for the extension of time, are provided may be the source of some of the difficulty of interpretation in the scope of s. 39 as the nature of the jurisdiction exercised by the High Court is not always immediately apparent.

Section 39 of the Courts of Justice Act, 1936

22. The section is short and does not appear to lack clarity:

> "39. 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."

23. O'Malley J. in *Pepper v. Cannon* described "the general policy of the legislature, unchanged since 1936, is that Circuit Court litigation should not be appealed beyond the High Court" (para. 37).

24. In many cases it may be readily ascertainable that an order made by the High Court in its appellate jurisdiction is properly described as part of an appeal of a Circuit Court order. *Eamon Andrews Productions Ltd v. Gaiety Theatre Enterprises Ltd* [1973] IR 295 is a useful illustration of the type of order that sits squarely within its ambit, where an application to extend time to appeal a decision of the High Court on appeal from the Circuit Court, in the context of a landlord and tenant dispute, was refused as this Court considered those "were validly excluded" from its appellate jurisdiction (*per* Henchy J. at 304), and the excluding provisions were not "too vague or uncertain" (*per* Walsh J. at 301).

25. In a similar vein this Court in *B (N) v. B (M)* [2002] IESC 31 refused to enlarge the time to appeal certain orders made in matrimonial proceedings by the Circuit Appeal judge as the order would have been pointless because it had no power to hear the appeal on the merits from the decision of the High Court exercising its appellate jurisdiction.

26. As will appear in the discussion that follows, the jurisprudence of the Superior Courts shows a range of difficulties that can arise in characterising the scope of the exclusion.

Exclusion of right to appeal: constitutional considerations

27. Any analysis of the scope of s. 39 must have regard to the importance in the constitutional order of the right to appeal, and the case law which has grappled with the interpretation of the section has for the most part taken the constitutional right to appeal as a starting point, with the result that any restriction on that right must be clearly prescribed by law.

28. The dicta of Walsh J. in *People (Attorney General) v. Conmey* [1975] IR 341 at p. 360, is often quoted as reflecting the importance of the constitutional right to appeal to the Supreme Court:

> "Any statutory provision which had as its object the excepting of some decisions of the High Court from the appellate jurisdiction of this Court, or any particular provision

> seeking to confine the scope of such appeals within particular limits, would of necessity have to be clear and unambiguous. The appellate jurisdiction of this Court from decisions of the High Court flows directly from the Constitution and any diminution of that jurisdiction would be a matter of such great importance that it would have to be shown to fall clearly within the provisions of the Constitution and within the limitations imposed by the Constitution upon any such legislative action."

29. While that dicta relates to the constitutional source of the right to appeal from the High Court to the Supreme Court, the new architecture of the courts permits a reading of the principle by reference to a right to appeal to the Court of Appeal: See the recent analysis in *Pepper Finance v. Cannon.*

30. In *Hanafin v. Minister for the Environment* [1996] 2 IR 321, Hamilton C.J., commenting on *Campus Oil Ltd. v. The Minister for Industry (No. 1)* [1983] I.R. 82 and *Minister for Justice v. Wang Zhu Jie* [1993] 1 I.R. 426, stated the proposition as follows:

> "None of these cases affect the fundamental position that if it is the intention of the legislature to oust, except from or regulate the appellate jurisdiction of this Court to hear and determine appeals from the decisions of the High Court, such intention must be expressed in clear and unambiguous terms and it is a matter for interpretation by the Court as to whether or not any provision of any law which purports to except from or regulate the appellate jurisdiction of this Court is effective so to do."

31. An exclusion or restriction on the right to appeal may arise from a construction of the relevant statutory provisions, provided on a true construction there is no lack of ambiguity or clarity, and an exclusion can be discerned by necessary implication from the words of the statute itself. Geoghegan J. thought this to be the case in his judgment in *A.B. v. Minister for Justice* [2002] 1 IR 296 (at p. 317), and the authors of the 5th edition of Kelly, The Irish Constitution (Hogan et al 2018) at para. 6.3.69 consider this to be correct. An example

proffered by the respondent of such necessary implication is the decision of this Court in *Irish Asphalt v. An Bord Pleanála* [1986] 2 IR 179, where it was held that no appeal lay from the decision of the High Court to certify a point of law.

32. In *A.B. v. Minister for Justice*, McGuinness J. described the right to appeal as "an inherent part of the right of access to the courts" (at p. 313) an exclusion or restriction of which must be provided in "the most clear and unambiguous terms". Geoghegan J. said that the construction of a statutory provision excluding or regulating the right of appeal must not have "any lack of clarity or ambiguity". Fennelly J. stressed the vigilance that has correctly been exercised in the interpretation of Article 33.4.3° so as to "protect the constitutional rights of litigants to bring an appeal against judicial decisions affecting them", and considered that that right should not be "lightly encroached upon or invaded by ambiguous language".

33. More recently in *Stokes v. Christian Brothers High School Clonmel* [2015] IESC 13, [2015] 2 IR 509 this Court considered that s. 28 of the Equal Status Act 2000 did not exclude an appeal to the Supreme Court as it was not sufficiently clear and unambiguous. The test Clarke J. (as he then was) drew from the authorities is that the wording of any statutory provision which excludes or restricts the right of appeal "must be very clear" (at p. 533).

34. Indeed, in *L O'S v. Minister for Health and Children* [2015] IESC 61, Clarke J. (at para. 2.3) considered that the standard was so exacting as to lean in favour of there being an appeal, although he did not go so far as to state that a presumption in favour of an appeal was to be the starting point.

35. In *Eamon Andrews Productions v. Gaiety Theatre Enterprise*, this Court held that the restriction contained in s. 39 was a valid exception to the right of appeal in Article 34.4.3° of the Constitution.

36. The appellant relies on these authorities to support the general proposition that the Court should be slow to find that s. 39 of the Act of 1936 has such a wide reach or scope as to exclude

the right of appeal now under consideration, and that the language of the section neither clearly nor unambiguously excludes an appeal.

37. The respondent argues that permitting further appeals against refusals to extend time to appeal would fail to protect the principles behind the legislation. The appellant argues that as the right of appeal is of high constitutional value and cannot be abrogated except by express and clear statutory provisions, the present appeal lies outside its ambit.

38. The interpretation of s. 39 taken against that backdrop must be seen as one that involves a consideration of a number of issues, including the nature of the statutory appeal, as well as arguments relating to logical anomalies shown to arise on certain constructions of the section.

The case law: interlocutory and final orders

39. The leading judgment is that of Finlay C.J. in *Kinahan v. Baila* (Unreported, Supreme Court, 18 July 1985), where what was under consideration was a decision made by Lardner J. in the course of an appeal from the Circuit Court that the appellant should give security for the costs of the appeal and that the appeal be stayed until such security was given. The appeal of that decision came before this Court and the defendant/appellant argued that s. 39 of the Act of 1936 did not apply to the decision of the High Court to order security as no order of the Circuit Court was under appeal.

40. As Finlay C.J. noted the section had the appearance of being "very clear and unambiguous", but it was less clear whether an interlocutory order made by the High Court was an order to which s. 39 applied. The question of awarding security for costs had not been the subject matter of any application or any decision in the Circuit Court itself, but Finlay C.J. considered that there was no room in the interpretation of s. 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".

41. He held that the interlocutory application in question was captured by s. 39 "as is every other decision by the High Court on a Circuit Appeal". It is that phrase which gives rise to the argument in this appeal: the appellant argues that the decision in *Kinahan v. Baila* can be distinguished, but as an alternative that it was wrongly decided insofar as the Court did not engage the question of whether a constitutional interpretation of the section could deny a right to appeal a decision, whether of an interlocutory or other type, which was not, or could not have been, the subject of the Circuit Court order itself. Whilst it is true that no discussion of the constitutional importance of the right to appeal was had in the judgment, as will appear, I do not consider that *Kinahan v. Baila* can be said to have been wrongly decided merely on that account.

42. The respondent argues that the rationale of *Kinahan v. Baila* is that every decision which is made within the course of the appeal to the High Court is governed by s. 39.

43. That decision was followed by a number of judgments where interlocutory orders of a similar type were held not to be appealable by reason of s. 39.

44. By way of illustration, in *JK v. KW* (Unreported, Supreme Court, 19 December 1989) this Court concluded that no appeal lay from the decision of the High Court on a pre-trial application for leave to adduce new evidence on a Circuit Appeal under s. 37(2) and O. 6 r. 8 RSC. The reasoning of the Court is not available but it is recited in the reported decision of *JK v. VW* [1990] 2 IR 437 where the Court answered a case stated from the High Court hearing the appeal on an application under Guardianship of Infants Act, 1964 and Barron J. refused to admit fresh evidence when the matter came back to him. That refusal is recited also in *WJ Prendergast & Son Ltd v. Carlow County Council* [1990] 2 IR 482, where it is recorded that the appeal was struck out for want of jurisdiction "thereby affirming the finality of the High Court decision in a circuit appeal, such finality attaching to all matters ancillary to the determination of the appeal" (*per* McCarthy J. at p. 490).

45. In *L.P. v. M.P.* [2002] 1 IR 219, the question was whether a decision of a High Court judge hearing a Circuit Appeal to refuse to recuse himself was captured by s. 39 and Murray J. regarded it as being so in the light of the "comprehensive and definite" terms of s. 39 itself (at p. 224). That appellant had sought to argue that the statutory appellate jurisdiction of the High Court was limited to the determination of the issues in the appeal and that the decision regarding recusal was not part of the matters under appeal, nor was it within the framework of the appeal.

46. Murray J. said that once the High Court had embarked upon the hearing of the appeal from the Circuit Court it was acting exclusively within the jurisdiction conferred by section 38 of the Act of 1936 and that "all decisions in and in the course of that hearing" were governed by section 39 of the Act. Issues arising in the course of the hearing such as the admissibility of evidence and applications for recusal were not to be considered to be separately appealable as such an approach would be inconsistent with the clear intention of the legislation (p. 266).

47. The appeal was dismissed, but from the report it does not seem that *Kinahan v. Baila* was opened and it was not mentioned in the judgment.

48. In an *obiter* comment Murray J. observed 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" other considerations would arise. That comment anticipates the question in the present appeal where the order of Meenan J. was made before a valid notice of appeal had been lodged and the question arises whether Meenan J. had embarked upon the appeal, to borrow the phrase of Murray J..

Cases outside s. 39

49. Two recent decisions of the Court of Appeal deal with appeals which were held not to be restricted by s. 39. In *Kelly v. National University of Ireland Dublin aka UCD* that court held that it did have jurisdiction to hear an appeal of a form of Isaac Wunder order made by

the High Court after a Circuit Appeal had finally concluded notwithstanding that the decision of the High Court judge had its origins in that appeal.

50. Finlay Geoghegan J. regarded the decision of the High Court as not falling within Part IV of the Act of 1936 and distinguished *Kinahan v. Baila* because the appeal from the Circuit Court to the High Court had been finally determined, and there was no longer extant in any sense an appeal before the High Court. Her analysis of the jurisdictional problem shows that the High Court judge had purported wrongly to exercise its original jurisdiction to compel the Circuit Court to dismiss part heard proceedings still before that court.

51. The scope of s. 39 was also considered by the Court of Appeal *per* Murray J. (Edwards and Faherty JJ. concurring) in *Bank of Ireland v. Gormley* [2020] IECA 102. What was under appeal was the decision of the High Court judge who had heard and finally determined a Circuit Appeal to then refuse an application for access to the DAR recording.

52. Murray J. decided that the application came within those categories of appeals "so disconnected in its legal basis and effect from the course of the underlying appeal" as to be outside the provisions of s. 39, and that there exists a "narrow category of orders" which although they are made within the Circuit Appeal proceedings "do not further the appeal itself and stand independently of it". He thought a distinction could be made between orders "made in furtherance of, or which are an integral part of, the appeal" and orders "which, while made within the framework of the appeal, neither advance, determine, dispose of nor are an inherent part of those proceedings".

53. Murray J. came to that conclusion partly in reliance on *Kelly v. National University of Ireland Dublin aka UCD* although he did not think the decision under appeal could even arguably have been made by the High Court in its original jurisdiction. In that regard his decision has a different jurisdictional basis from that in *Kelly*, but the reasoning is broadly

similar as it relied on the fact that there was no Circuit Appeal in being and the application for the DAR was not made in furtherance of, or to any way advance, that already concluded appeal.

54. This brings me to a consideration of the nature of the jurisdiction engaged by Meenan J. when he made the decision to refuse to extend time to appeal. As will appear I am of the view that the jurisdiction he exercised in refusing to extend time was one vested in him by Part IV of the Act of 1936.

What jurisdiction is exercised on the application to extend time?

55. The respondent argues that, on a literal interpretation of s. 39, Meenan J. was making a decision "on" a Circuit Appeal and thereby exercising the statutory appellate functions of the High Court and not its original jurisdiction. It is argued that procedural orders regarding the conduct of the appeal are part of the appellate function, and that proposition must be seen as broadly speaking correct, particularly in the light of the judgment in *Kinahan v. Baila* and the provisions of the RSC which expressly provide for the making of procedural orders incidental to an appeal, and as the application to extend the ten day time limit under O. 61 itself provides for the regulation of Circuit Appeals. To that extent an analogy can be drawn with the decision in *JK v. KW* where the Court was hearing an application under O. 61 r. 8 of the RSC to admit new evidence in the course of an appeal, and that order itself was made for the purposes of an appeal and was not appealable.

56. There is no doubt that the matter of substance which Meenan J. addressed is Circuit Appeal itself, and that the subject matter of the appeal is a Circuit Court order. Whether that means that the High Court is exercising its original or appellate jurisdiction in considering whether to admit an appeal in the first place is less clear.

57. Meenan J. heard the appeal from the Master of the High Court extending time to appeal. The role of the Master is purely administrative and no matter of principle can be derived from the intermediate step provided by the RSC which vests the power to extend in the Master.

58. I do not consider that any conclusion as to the scope of s. 39 can be drawn from the fact that the appellant had lodged a notice of appeal after the Master made his order extending time, as the matter is one of principle which could not depend on this fact, which, while it is not atypical, is only one possible consequence of the decision of the Master of the High Court to extend time, and where he might equally have refused to extend time. The question of principle cannot depend on whether an application to extend time was made before a notice of appeal is filed, and indeed a vigilant court officer might reject an out of time notice. But it could be anticipated that in many cases where the Master extends time an applicant who had been granted an extension of time would act immediately and lodge an appeal. It seems equally clear however that the application to extend time can be heard and determined before the appeal is lodged, and that fact therefore does not lend support for the proposition that the court in extending time is acting outside the appellate process.

59. Further, the fact that the application to extend time was headed up with a Circuit Appeal record number cannot be determinative, as the choice of record number is made by a court official and does not involve the making of a judicial determination.

60. However, Meenan J. was undoubtedly not hearing an appeal from any order or determination on the merits or any order made in the course of the hearing of the Circuit Court case, and the appellant argues therefore that the decision of the High Court to extend time to lodge an appeal is not the determination of any appeal under Part IV, but is rather a condition precedent to the service and lodgement of a notice of appeal, and is to be seen as the commencement of the appellate process, but outside the process itself.

61. This argument does not seem to me to offer any solution to the question in the appeal. It is true that the judge hearing an application for an extension of time is applying the principles set out in *Éire Continental v. Clonmel Foods* as modified and explained in the recent decision of this Court in *Seniors Money Mortgages v. Gatley* [2020] IESC 3, and that at least two of the

limbs of the test identified in *Éire Continental v. Clonmel Foods* are wholly unrelated to what occurred in the Circuit Court, but relate to whether, after the Circuit Court hearing had concluded, the applicant had formed an intention to appeal, and the reasons for not lodging the appeal on time. As Geoghegan and Fennelly JJ. pointed out in *A.B. v. Minister for Justice* the issues on the application to extend time would often be quite different from the issues on the application for leave itself.

62. Drawing those threads together, it can be said that Meenan J. was not making a decision in proceedings which had originated in the High Court, and that he was therefore not exercising his original jurisdiction as a High Court judge.

63. He was seised of the appeal in that he was exercising the statutory jurisdiction vested by Part IV of the Act. Whilst it cannot be said that an appeal was pending (although the notice of appeal had in fact been lodged), as that would logically happen only if the order extending time had been made, the jurisdiction exercised by Meenan J. was one concerning proceedings which had commenced in the Circuit Court, and on that basis, it seems to me that he was engaged in the management or processing of a Circuit appeal, and was not engaged in a standalone or independent application, but rather one ancillary to, or supportive of, the jurisdiction in a Circuit Appeal.

64. I conclude therefore that the jurisdiction exercised was that of the statutory appellate role of the High Court under Part IV of the Act of 1936. This does not fully answer the question in this appeal as to whether s. 39 precludes the appeal.

The appeal has not yet commenced

65. But what of an appeal that had not yet started or is not yet validly constituted? The decision to extend time could not strictly be said to be an interlocutory application in the sense in which that concept was analysed in *Kinahan v. Baila*. This factor was considered in *Hughes v. Money Markets International Stockbrokers Ltd* (Unreported, Supreme Court, 15 July 1998*)*

where the High Court granted an extension of time to appeal a judgment given in default of appearance by the Circuit Court subject to the condition that money be lodged in court to abide the outcome of the appeal. The defendant appealed the imposition of that condition. The Court divided on the issue of whether an appeal was admissible in the light of *Kinahan v. Baila*. Lynch J. thought it "very doubtful" if an appeal lay, although it was stateable at least that *Kinahan v. Baila* could be distinguished as there was no extant or actual appeal then in being, but he preferred to follow its "strong terms". Lynch J. did not think that a distinction could be drawn between a case where there was an extant appeal and one where no valid extant appeal had yet commenced.

66. Barron J. thought that the High Court was exercising its original jurisdiction and not an appellate jurisdiction, but the anomalous consequence of the Court reversing the decision of the High Court on the extension of time when it could not interfere with the decision of the High Court on the appeal itself led him to the view that he should not interfere with the decision of the High Court.

67. O'Flaherty J. seemed to agree with both judgments, although as both judges came to the same conclusion on the result of appeal, it is unclear whether O'Flaherty J. agreed with the observations of Barron J. regarding the nature of the jurisdiction and whether that decision was open to appeal.

68. For my part, and for the reasons explained above at paras. 57 to 66, I prefer the analysis of Lynch J. that the decision on the application to extend time is one made within the statutory jurisdiction conferred by Part IV of the Act of 1936, and the decision in a real sense is made for the purpose of an appeal from a Circuit Court order, and s. 39 precludes a further appeal.

The anomalous consequence of permitting an appeal

69. It is true to say that no order of the Circuit Court was under consideration, and some of the matters which fell for consideration by Meenan J. had not arisen at all in the Circuit Court

and could not be said to arise from the merits of the Circuit Court order. This is precisely what happened in *Kinahan v. Baila* itself, but the anomalous consequence of permitting appeal of an interlocutory order, when no appeal lies on the merits, suggests that the Oireachtas did not intend that section 39 should be read so narrowly as to exclude from its ambit interlocutory orders made in the course of, or touching, an extant appeal.

70. This anomaly offers a useful prism through which to see some of the case law, and it affords support for the broad interpretation of s. 39 preferred by the majority of the decisions considered in this judgment, and with *Kinahan v. Baila*.

71. In *Irish Asphalt Limited v. An Bord Pleanála* [1996] 2 IR 179, this Court unanimously held that the High Court alone had power to issue a certificate giving leave to appeal under s. 82B of the Local Government (Planning and Development) Act 1963 (as amended by the Act of 1992). It considered that to permit an appeal from a decision of the High Court to grant a certificate to appeal would involve the Court to at least engage some consideration of the merits of the substantive decision of the High Court, and that this was not just entirely contrary to the philosophy of the Act, but also could create an anomaly where those merits were not capable of being appealed by reason of the statutory exclusion, yet the certificate to appeal could be.

72. Keane J. made a similar observation in *Irish Hardware Association v. South Dublin County Council & Barkhill Ltd* [2001] IESC 5, albeit what was there under consideration was an appeal of a High Court refusal to grant a certificate to appeal a decision on a judicial review in planning matters in the light of s. 82B.

73. The scenario that might emerge is most acute in the case of interlocutory applications made in the course of a Circuit Appeal where, for example, as in *Kinahan v. Baila* the appellate court directed security for costs in the course of an appeal, and that order was appealed whilst the order on the substance of the appeal could not be. The difficulty immediately presents of

the court setting aside the order requiring security for costs, while the substance of the appeal is undoubtedly itself unappealable and final.

74. The possibility of these anomalous circumstances supports the interpretation in *Kinahan v. Baila* and the other cases here discussed that regard interlocutory orders to be final by reason of s. 39 which is neither absurd nor unjust.

Unfair or discriminatory?

75. But there is another anomaly identified in the case law and in particular in the comprehensive review by this Court in *A.B. v. Minister for Justice*, albeit the analysis was concerned with quite a different statutory regime.

76. The appeal concerned whether jurisdiction existed to appeal the refusal by the High Court to extend time for the making of an application for leave to bring judicial review under the Illegal Immigrants (Trafficking) Act 2000, s. 5(2)(a) whereof provided for a 14-day time limit, and s. 5(3) that the decisions on an application for leave to apply for judicial review and on the application for judicial review are final and unappealable.

77. The Court found that no clear prohibition of the general right of appeal from a refusal to extend time could be found in the legislative provisions. The majority considered the test for the extension of time under the legislation to be severable from the application for leave to apply for judicial review, and while the decision on leave was final and unappealable, the decision to extend time was not, Keane C.J. agreeing somewhat reluctantly with the decision of the majority that an appeal lay against a decision to extend time.

78. The contrary view meant in practice that an order refusing an extension of time was dispositive of the application for judicial review while an application extending time could be appealed without limit, so that depending on the decision of the Court one party would have a right to appeal and the other party would not. Geoghegan J. thought that result would be unfair, and Fennelly J., as a result of the "troublesome anomalies" flowing from treating the refusal of

an extension of time as a determination of an application for leave, felt that this consequence did not support an interpretation of the Act which made that the cornerstone of interpretation.

79. McGuinness J. (at p. 313) took a similar view:

> "If one were to accept that a refusal to grant an extension of time amounted to a 'determination' of the entire application for leave, this would create a situation where, depending on the decision of the court, one party to the proceedings would have a right to appeal while the other party would not."

80. I am not persuaded that the analysis of this Court in *A.B. v. Minister for Justice* offers support for a reading of s. 39 that does not preclude an appeal from an order to extend time to appeal. There the question was whether the subsection providing for the extension of time to bring judicial review could, in the absence of express statutory provision, be said to carry an implication that the decision to refuse to extend time was final and unappealable. The implication risked an anomalous or unfair consequence that an order refusing an extension of time was final, save where leave to appeal was granted, while an order extending time could be appealed without limit.

81. In my view no unfair or discriminatory result arises from a conclusion that s. 39 precludes an appeal of a decision on the extension of time to appeal an order of the Circuit Court. If an intended appellant succeeds in an application to extend time the appeal to the High Court will proceed and the decision to extend time is not dispositive of the appeal. If an intended applicant fails in the application to extend time the appeal is thereby concluded and the order refusing to extend time is dispositive. It seems to me that it is not unfair to either an intended appellant or to a respondent that there be no appeal from the decision on the extension of time. If neither party has a right to appeal there is no unfairness or invidious discrimination. Further, to permit a respondent to appeal an extension of time continues the appellate process beyond the High Court and cannot be easily reconciled with the finality envisaged by s. 39. I

do not consider that the Oireachtas contemplated the continuation of any aspect of a separate appeal beyond the jurisdiction of the statutory High Court. The statute provides that the case or the litigation would end in that court.

Conclusion and summary

82. 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.

83. 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.

84. To that extent the answer to the present appeal might lie in the fact that, as I concluded above, the High Court judge was exercising his statutory appellate jurisdiction, and the broad brush approach in *Kinahan v. Baila* would suggest that the decision to refuse an extension of time, having been made within that statutory jurisdiction, and not otherwise, must be seen as conclusive.

85. The decision to refuse to extend time is one intrinsically bound up with the result on the appeal and a further appeal is capable of impacting on its result. Such an appeal is precluded by statute.

86. The time at which an order is made could not be dispositive as that would not give a complete answer when the appeal had not yet commenced (e.g. extension of time appeals), but

would when the appeal had concluded. But an appeal after the statutory appeal has concluded and which does not impact upon the result of the decision on that appeal, or does not reopen the merits of any decision in the course of that appeal is not excluded by s. 39 as it concerns a matter extraneous or external to the appeal itself, *per* Murray J. in *Bank of Ireland v. Gormley.*

87. The test is not therefore when the order is made but whether it decides the case, or is capable of having an impact upon the result. If it does, the decision of the High Court is final. The clear intention and policy of the legislation is finality in the decision making powers vested in the High Court by the Act.

88. Section 39 may accordingly clearly and unambiguously be understood as restricting the right to appeal a decision of the High Court extending time for leave to appeal from a decision of the Circuit Court. A decision to refuse to extend time is one made by the High Court exercising its appellate jurisdiction and by way of case management of a Circuit Appeal, and is a decision "on" the appeal, and is dispositive of the appeal as a whole. Similarly a decision to extend time, if appealed, would be capable of affecting the finality of the appeal. If the High Court extended time and decided the appeal, but the Court of Appeal could reverse the decision to extend time that would undermine both the decision of the High Court on the appeal and its finality. It follows that a decision to extend time for the appeal is a decision captured by the provisions of s. 39.

89. I would therefore dismiss the appeal from the decision of the Court of Appeal.