

THE HIGH COURT
REVENUE/COMMERCIAL

[2009 No. 324 R]

[2009 No. 161 COM]

BETWEEN

GERARD HARRAHILL

APPLICANT

AND

PAURAIG KANE

RESPONDENT

JUDGMENT of Mr. Justice Ryan delivered on the 30th day of January 2015

1. This is an application by the Collector General of the Revenue Commissioners to commit the defendant for contempt of an order of this Court by activating a suspended sentence of imprisonment for six months previously imposed. The plaintiff claims that the defendant is in breach of one or more of the undertaking and conditions on foot of which the sentence was suspended. This application was heard on the basis of affidavits filed on behalf of the plaintiff and those of the defendant and his wife and the cross-examination of the defendant and his wife on their affidavits.

2. The history of the matter goes back to 2009. Before dealing with the affidavits in some detail, it is useful to set out something of the relevant history. Kane's of Granard is a well-known car dealership which has a modern showroom and yard in a prominent location in the town. The Revenue Commissioners have been taking an interest in the business and the operators of the business for a considerable time. The operation appears to be successful and to have a substantial throughput of motor vehicles, particularly cars and 4x4s. Kane's has a website and advertises its vehicles on the Internet. The Revenue identified the defendant, Mr. Pauraig Kane, as a person operating a business at the premises and obtained a substantial judgment, as mentioned above, because of underpayment of VAT. It recovered judgment against his brother, John Alex Kane, who was also the subject of proceedings brought by the Revenue for contempt of Court.

3. The Revenue Commissioners have had difficulty with Kane's of Granard. It is not clear to them who is operating the business. Indeed, it may be a misnomer to describe 'the business' because on the evidence as given in Court at the hearing in 2012 and in the more recent proceedings, it would appear that a considerable number of persons carry on business or businesses of car sales in the Kane's of Granard facility. The problem for the Revenue is that they have no idea who is actually doing the business and there is not an obvious way of finding out given the range of activities that any of the traders may engage in, either on his or her own behalf or for one of the others. It is important to make clear that this judgment is concerned only with this defendant and not with any other persons who may be operating their businesses from the Kane's premises. The Court is not expressing a view on the mode of trading of anybody operating from there.

4. Despite the difficulties, however, the Revenue did succeed in obtaining judgment against this defendant. On 3rd July, 2009 the plaintiff obtained judgment against the defendant in the amount of €5,271,004.07 in respect of arrears of Value Added Tax plus interest. In the course of those proceedings the Court made orders on 20th May, 2009 restraining the defendant from disposing of assets otherwise than in accordance with the terms of the order.

5. The plaintiff brought an application in this Court in March 2012, seeking to have the defendant found in contempt of Court for knowingly breaching the terms of the Mareva injunction and to have him punished accordingly. The defendant admitted in Court that he had disobeyed the injunction. Those proceedings culminated in an order of the Court dated 16th March 2012. That order recited undertakings that the defendant gave at the hearing to dispose of land and properties and motor vehicles in his possession and to pay the proceeds to the Revenue Commissioners in part satisfaction of the judgment previously obtained.

6. The Court heard evidence at that hearing about the use of the Kane's premises by a number of independent operators and the difficulties experienced by the Revenue Commissioners in dealing with them. Complaints about the plaintiff, as one of the cohort of independent traders, included the use of third party cheques and the impossibility of identifying and distinguishing vehicles with which the defendant was concerned in the course of business from those of the other users of the yard. The plaintiff also complained that the defendant had not paid any money in satisfaction of the judgment. Mr. Kane denied using third party cheques and his evidence was that his involvement in car sales was as an employee of his wife's business, Newline Motors. He also said that he would sell land, buildings and vehicles and give the money to the Revenue.

7. The order of the Court at the conclusion of that hearing noted the admission by the defendant that he had been in contempt of Court by disobeying the order of 20th May 2009, and accordingly found him guilty of contempt. The Court recited the defendant's undertaking to sell the assets and to pay the proceeds to the Revenue. By way of punishment for the contempt, the Court directed that the defendant be committed to prison for a period of six months but suspended the sentence on three conditions as follows:-

"(1) The defendant within four weeks from the date hereof do arrange for the premises known as Kane's Garage, Barrack Street, Granard in the County of Longford to be cleared of all motor vehicles not owned by or in the possession of Caroline Kane and/or Pauraig Kane with the sole exception of motor vehicles in the possession of Brean Kane brought on to the premises for the purpose of maintenance and/or repair only.

(2) The defendant do immediately cease the practice of using or dealing in third party cheques.

(3) The defendant within two weeks from the date hereof do furnish to the plaintiff's solicitors a schedule setting out all the information within his possession power or procurement in relation to the ownership of all of the motor vehicles on the premises known as Kane's of Granard as of 16.00 on this day Friday the 16th day of March 2012."

8. By this motion, the plaintiff claims that the defendant has knowingly breached the order of the Court made on 16th March 2014, and that the suspension of the sentence of six months imprisonment should be removed because of the defendant's failure to observe the terms on which the sentence was stayed. The matter was heard over two days in July 2014, and a further occasion on 17th October 2014, when the parties made oral arguments addressing written submissions that they had earlier provided for the Court.

Issues

9. The questions that arise for consideration are, first, whether the defendant is in breach of one or more of the undertaking that he gave in Court or the conditions on which the sentence of imprisonment was suspended. Secondly, if and insofar as the defendant has been proven to be in breach, whether it is appropriate at this time to apply the sanction of imprisonment or whether some other penalty should be imposed.

10. The Revenue Commissioners maintain that Mr. Kane has been in breach of the undertaking that he gave because he has not sold any of the properties and given money to the Revenue. In fact, he has not paid anything to the Revenue. They also contend that he has been in breach of each of the other conditions. Accordingly, the Revenue applied to the Court for an order lifting the suspension of the term of imprisonment that was imposed in 2012, on the grounds of the breaches of the undertaking and of the conditions in the application procedures on the basis of affidavits sworn on behalf of the plaintiff by Mr. John Magee, Principal Investigator of the Revenue for the area, who swore the main affidavit and supplemental affidavits. The defendant put in an affidavit in response and his wife, Ms. Caroline Kane, also responded. Counsel for the Revenue, Mr Gary McCarthy SC, cross-examined Mr. Kane, the defendant, pursuant to a notice to that effect, and also Ms. Caroline Kane who offered herself for cross-examination at the hearing. Mr Gerry Ryan, Barrister, re-examined the witnesses on Mr Kane's behalf.

11. Mr. Kane's position is that he is not himself carrying on business but is an employee of the business being run by his wife and called Newline Motors. That business was carried on in part of the yard of Kane's of Granard but not in the showroom or in the area of the yard that is close to the showroom and is what Mr. and Mrs. Kane refer to as the upper yard. They maintain that Newline Motors confines its activities to the lower yard.

12. The defendant undertook to the Court that he would sell nine properties and remit the proceeds to the Revenue. None of them has been sold. The defendant submits that a purchaser has been obtained for one of the properties, a parcel of land, for the sum of €40,000, but the sale has not been completed. Although a second property was put on the market a purchaser has not been found. The defendant does however, seek to excuse his failure to sell the other properties by citing first the depressed state of the property market such that the properties were in negative equity and incapable of yielding a net value. Secondly, he says that the process of selling the properties was severely impeded by the death of his auctioneer Mr. Smith in 2013. Thirdly, he refers to the fact that the practice of his former solicitor Mr. Madden was taken over by the Law Society which resulted in difficulty and delay in making title to the various properties. The defendant does say that his present solicitors have instructions to conduct sales of the properties and pass the proceeds to the Revenue.

13. The defendant deposed that he had only five cars at the time of the Court order on 16th March, and that they were subsequently discovered to be practically worthless and only available for scrap. However, it seems clear from the Revenue affidavits and the correspondence that the Revenue officials have pursued this question vigorously and thoroughly and I find the case that they make very convincing. There is also evidence to suggest that the defendant has continued to deal in cars in his own right, if the evidence obtained from the Kane's of Granard internet site is to be accepted. But the Court does not make any finding on that basis.

Affidavits

Mr. Magee's Affidavit

14. The Revenue's motion is grounded on the affidavit of Mr. John Magee who is the Principal Investigating Officer of the Revenue Commissioners in relation to this case.

15. In his long grounding affidavit, Mr. Magee deals in turn with the undertaking that is recited in the order of this Court made on 12th March 2012, and then with the three conditions setting out the basis of the plaintiff's contention that the defendant is in breach of each of those obligations. He first turns to the undertaking in respect of the nine properties. In a letter of 30th July 2013, the defendant's solicitors said that he had instructed them that three of the properties were in negative equity. He had engaged an auctioneer, a Mr. Peter Donohue, to sell one of the other properties and advised that the net proceeds of sale would be paid to the Revenue. Further correspondence ensued relating to the various properties, including a letter of 20th December 2013, saying that another property, in this case, a residence, was on the market being sold by Peter Donohue. Mr. Magee complains that these desultory efforts to sell some properties, and the absence of any attempt to sell the others or to pay anything to the Revenue resulting therefrom, represented a determined breach of the undertaking that Mr. Kane gave to the Court.

16. In respect of the first of the conditions, which was that the premises at Kane's Garage would be cleared of all vehicles except for those belonging to him or in the course of his wife's business, all vehicles brought on site by Brean Kane for repair, Mr. Magee avers that the defendant was in clear breach of this obligation. It soon became apparent, following correspondence, that there was a disagreement between the parties as to what the Court required the defendant to do under this condition. There is nothing in the order, as made by the Court, to draw a distinction between one part of the yard and the other, or even to recognise that there were different parts of the yard or that different persons or parties might have interests in separate areas of the yard. The defendant put forward the proposition that he had actually complied with the order, but he was referring to what he called the lower part of the yard over which he and his wife had control. In regard to that area, Mr. Kane maintained that any vehicles belonging to other parties had been removed therefrom and the only vehicles remaining were those that were used in connection with the business operated by Ms. Caroline Kane plus some vehicles that Brean Kane has brought there or caused to be there for the purpose of repair. The Revenue pointed to the number of vehicles in the yard over which it would appear that Ms. Caroline Kane had no interest or control and neither had the defendant.

17. Mr. Magee pointed out that no such distinction was made in the Court order and neither had the defendant come back to Court to seek clarification, rectification or amendment.

18. On a visit to the premises on 2nd November 2012, Revenue officials made an inventory of vehicles and found 35 vehicles, including one that was attributed to John Alex Kane, but only 14 of them were claimed by Caroline Kane, either by way of ownership or that she had an interest in them, which left 21 vehicles that Mr. Kane, the defendant, said were owned by a variety of third parties and

customers. Clearly, if the order applies to all of the yard, this was an obvious and blatant breach, but if it does not apply to the whole of the yard, then the question arises as to which part of the yard is covered by the terms of the Court order. Mr. Magee avers that the presence of so many vehicles ascribed to the ownership of other parties represents knowing and deliberate breach by the defendant of the order made by the Court.

19. Mr. Magee also avers that the defendant has been in breach of the Court-imposed second condition that he desist from using third party cheques in the course of the business. At paragraph 31 of his affidavit, he says that a Mr. and Mrs. McDonald had informed an officer of the Revenue Commissioners that they purchased a Toyota Land Cruiser by way of trade-in and payment of €4,000 and that they dealt with Pauraig and Mark Kane and that they were asked to make the cheque for the money payable to LP Commercials which, he says, is a quasi-corporate entity that has no entitlement to keep vehicles on the premises or to carry on trade there under the terms of the Court order of 16th March 2012. It must immediately be acknowledged that this information furnished to the Revenue Commissioners may well be a legitimate basis for suspicion on their part of the involvement of Mr. Kane, but it is obviously not sufficient evidence, or indeed not evidence at all, of Mr. Kane's having breached the condition. The evidence is hearsay and it is not specific to the defendant and is simply not evidence of breach of the Court order.

20. I think it is clear that there is no direct or cogent evidence to demonstrate that the defendant has been in breach of the second condition by using third party cheques in the course of business being conducted by him. At its height, the information that came to the Revenue officials gives rise to suspicion, but it does not amount to evidence, and still less, proof, either on the balance of probabilities or on the higher standard required in a motion to commit.

21. At paragraphs 45 and 46 of his affidavit, Mr. Magee gives information about judgment mortgages that the Revenue Commissioners have registered over the garage premises, in actions brought by them against the defendant's brother, John Alex Kane, and his father, Michael Kane. In separate proceedings, the Commissioners have sought a well-charging order and an order for sale of the foreCourt and showroom at the front of the garage premises.

22. At paragraph 47, Mr. Magee accurately encapsulates the approach that the Court took in making the order of 16th March 2012, in averring as follows:-

"It is the respectful submission of the Plaintiff that the intention of the Court in imposing the conditions that were put in place was to try to ensure that any trading activities carried on by the Defendant subsequently would be operated in a transparent and fully accountable manner and that the premises known as Kane's of Granard would not be used by what appeared at that point to be a myriad of different persons and corporate and quasi-corporate entities in what the Court characterised as an arrangement resembling a 'commune'. It is respectfully submitted that it was intended by the Court that the trading activities of the Defendant would be conducted in a manner that would allow the buying and selling of motor vehicles at the premises to be monitored and accounted for on an ongoing basis."

23. Mr. Magee also details the extensive, even Byzantine, correspondence that was exchanged between the solicitors for the parties in respect of the obligation imposed on Mr. Kane by the first condition concerning notification of the vehicles that were present, and that were owned or claimed by him and his wife or her business, Newline Motors. Again, the Revenue argues that there has been not simply a failure or incapacity by Mr. Kane to meet his obligation, but a wilful refusal to address the clear meaning of the condition that was imposed.

Mr. Kane's Affidavit

24. In his affidavit, Mr. Kane described the efforts that he said he had been making to try to sell the various properties that were encompassed by the undertaking he gave and that was recited in the 2012 Court order. His endeavours were hampered by the death of his auctioneer and the fact that the Law Society had taken over the practice of his former solicitor. In addition, there were burdens of debt and charges on the properties and some were in negative equity. He said that the family home did not form part of the undertaking that he gave to the Court. On this last point, whatever about the number of properties involved, it does seem more than a little unlikely that Mr. Kane would have undertaken to the Court to dispose of his family home and pay the balance left over after discharging any mortgage debt to the Revenue Commissioners.

25. Mr. Kane maintained that he had complied with his obligations under the condition relating to the list of vehicles on the premises, but he said that some five of them were of no more than scrap value.

26. Counsel for the Revenue queried what the value of these obligations was if the properties that Mr. Kane was proposing to sell were in negative equity and if the motor vehicles were of no more than scrap value.

27. Mr. Kane turns to what is probably the principal issue in the case at this stage, namely, the use of the yard premises and the extent of the obligation imposed by the Court on Mr. Kane in regard to the use of the yard. He refers to the Revenue contention and correctly describes it as proposing that the Court order referred to the entire yard associated with the Kane's of Granard car sales business, in other words, the condition imposed by the Court applied to the whole of the area of the foreCourt and the yard, but Mr. Kane said such an interpretation was borne out by a consideration of the transcript and the events in Court leading up to and subsequent to the making of the order. The point that the defendant makes is that the area of the yard over which he and his wife – in fact, it is his wife's business, Newline Motors – had any control over was the lower part of the yard, but he did not own or control the foreCourt area around the showroom itself. His understanding of his obligation on foot of the Court order was that it extended to the area over which he and his wife had control, and that was subject to the use of that very part of the yard by Brean Kane for the purpose of repairing vehicles. He was therefore in a position to comply with the condition insofar as it covered the part of the premises that was occupied by his wife's business and that was also used by Brean Kane for repairs. He said, however, that he did not have control over the foreCourt area and could not have given any undertaking or have consented to any condition that covered his use because he did not have any rights over that part of the yard. His understanding was that the Court shared his view that it could be considered as two separate, although not distinctly delineated, areas of use, but it was nevertheless a usage that he and his wife and any others with rights of access to the premises did actually understand.

28. This point has significance in two respects. In the first place, if Mr. Kane is correct in his contention that the transcript of the Court proceedings discloses that this point was made clear, then it means that the Court order, insofar as it did not distinguish between different parts of the yard, imposed a condition that was too wide for the purpose that the Court intended. Obviously, it was not the intention of the Court to make this defendant liable for the conduct of any other parties. Neither was it the purpose of the order to impose an obligation on Mr. Kane to exclude people who might otherwise have some entitlement to use a part of the premises. So, the first question that arises is whether he is actually correct in saying that the Court never intended its condition to impose an obligation on him in respect of the entire yard premises associated with or adjoining the showroom facility. He raises the

question as to whether the Court order, as made, was too extensive of application. This is not a suggestion that the Court order, as drawn up, incorrectly reflected the condition that the Court intended to impose. It is, rather, that in making the order, the Court inadvertently included in the condition too large an area of the yard so that it extended to a part of the premises over which Mr. and Mrs. Kane did not have any control.

29. The second point relates to the motivation of the defendant. If there is something in fact in what he is saying about the actual use of the yard and the entitlement of different parties to conduct business in it, and that his wife's business is confined to the lower yard, as understood by users of the premises, then the issue of intention, insofar as it arises in criminal contempt punishment, is relevant. A person cannot be punished for criminal contempt in respect of something that is beyond his control, and if it was beyond Mr. Kane's control to comply with the condition as actually imposed, whether intended or not to apply to the whole yard, then that would furnish a defence to that part of the complaint.

30. Mr. Kane denies using third party cheques in breach of the condition imposed by the Court.

31. Mr. Kane also deals with the use of the other part or parts of the yard by different persons and businesses and he names some of them. He then refers to some 45 vehicles that were on the yard premises and not owned by Newline Motors. He says that they were "cars left on the premises for the purpose of sale or return, cars in the process of being purchased by Newline Motors but not yet registered in its name and cars present on the premises for the purpose of repair or maintenance or for carrying out work in relation to warranties given with each vehicle. Other cars may have been present without either the knowledge of your deponent or Caroline Kane from persons making enquiries or for other normal purposes relating to our business".

32. Counsel for the Revenue, Mr. Gary McCarthy S.C., cites this paragraph in Mr. Kane's affidavit as encapsulating much of the frustration experienced by the Revenue in trying to deal with the defendant and his wife and the businesses being carried on at this premises. It is impossible for them to know just what is going on or who owns which vehicles or who was dealing with them or even what they are doing on the premises. That is undoubtedly a serious difficulty, but it is not obvious that it is Mr. Kane's responsibility or within his capacity to put the situation right to the satisfaction of the Revenue. Still less is it obvious that he can be punished because of his failure to do so.

33. Mr. Kane concludes his affidavit with two averments. He refers to special summons proceedings brought by the Revenue Commissioners and referred to previously herein against his father, Michael Kane, and his brother, Brean Kane, and seeking well-charging orders. Finally, he says that Ms. Kane's business, Newline Motors, is shortly, that is, as of the time of the affidavit, going to move to entirely new premises in Granard and that they will be moving out of the Kane's of Granard facility entirely. This means that only vehicles of Newline Motors will be present on the forecourt or buildings of the new premises. The Revenue are aware of this move and they have visited the premises so there is no question of this information being introduced newly into the case. It is apparent, therefore, that Newline Motors is turning over a completely new leaf and so is Mr. Pauraig Kane in his capacity as an employee and associate of his wife in the business of Newline Motors.

34. The defendant's wife, Ms. Caroline Kane, swore an affidavit in the motion in which she deposed that she had put together the information about the lists of vehicles on the premises. She was the person who dealt with the lists and who knew the details of the vehicles. In the course of evidence and cross-examination at the hearing, Mr. Kane said that he relied on his wife to provide this information and she confirmed that that was the situation.

35. The defendant, Mr. Kane, and Ms. Caroline Kane were cross-examined by Mr. McCarthy S.C. pursuant to notices to that effect. Mr. Kane described the arrangement of the premises. He said that there is a showroom and forecourt "then you drive out onto the main road, you go down a public lane and into a bottom yard, which has a workshop and a big yard for holding sales". The lower yard has actually got a separate entrance to it. It is not directly behind the other area, but rather to the side of it and it is not connected because there is a public lane between the two premises. They are beside each other but there is a public lane between them. If Brean Kane was bringing a vehicle into his garage to get it repaired, he had to drive it physically onto the main road, drive down a 100 yards into the left, down a public lane, a public road which other people use and go inside the barrier into his yard. There is no way of driving straight from the lower yard to the upper yard without going onto the public road.

36. Mr. Kane was cross-examined as to vehicles that were present in the lower yard premises on the occasion of a visit by officials of the Revenue Commissioners on 11th April 2014, but he said that his wife kept the records and would deal with that query.

37. In regard to the top yard, Mr. Kane said that he had a right to go into it but so had other members of his family. Indeed, it was that confusion that was the reason why he was moving to new premises, to get away from that situation. He said that he would be ready to move in, in a couple of weeks time after the hearing, and that would separate the whole thing out. It would be only Mr. Kane and his wife in business "that's it, no-one else, because you, in fairness to you, you gave me a lifeline, I shouldn't be back here today, but I am back because there are members of my family feel they have the same right to that place as I have. I fought to get it sorted. I am being straight here with you now. That's why I moved. I moved voluntarily. I'm not being pushed out by the Revenue, even though they probably will eventually. I have moved voluntarily. It's serious. It's hard work to set up a place. It took 25 years to build up where I am. It's no joke to get another place and get it set up. It takes time". He went on to say that the Revenue know that this is the truth because they had gone up to the new location and had seen him building a wall, getting it finished off because he had to make it secure for the vehicles. They can visit and inspect and ask about the ownership of any vehicles and they will see that he is doing the right thing. But he said he had other members of his family that he cannot talk to.

38. Mr. Kane said that part of the problem was that there were ten members of the family in all and everyone felt that they had the same share because his father had never sorted things out.

39. In regard to the properties, Mr. Kane was cross-examined and he said that the Law Society had taken over the files of his solicitor although he had put only two properties up for sale. There was a myriad of complications and difficulties about the other properties and even the ones that were up for sale had not actually resulted in completion and net proceeds being obtained. I asked Counsel whether it was open to the Revenue to execute their judgment by registering it as a charge on those properties and then proceeding, if necessary, to sell them, and he confirmed that it was and that the Revenue had judgment mortgages on all the properties. There were, however, as Counsel explained, claims by different members of the family to be entitled to some of the properties.

40. In further cross-examination, Mr. Kane denied that he had used third party cheques in dealing with any vehicles sales.

Ms. Caroline Kane's Evidence

41. On 31st July 2014, Ms. Caroline Kane was sworn and cross-examined by Mr. McCarthy S.C. on her affidavits and on the issues

generally. She defended her preparation of the list of vehicles and the explanations for them that were furnished by the solicitor in response to the condition imposed by the Court. Ms. Kane said that she and her husband had "cleaned up our act. We are trading as Newline Motors. We are running a business correctly. I mean Revenue can look through any of the paperwork with regard to Newline Motors".

42. The net effect of the cross-examination of Ms. Kane was that there was a suggestion by Counsel that Mr. Kane had continued as before and was behaving in manifest breach of the terms of the Court order as made in March 2012, whereas Ms. Kane asserted that they had changed their practices and that they were fully compliant in operating Newline Motors. They were moving out of the Kane's of Granard yard to new premises which the Revenue Commissioners knew about. She had prepared lists of vehicles and she stood over the information in them that was true to the best of her knowledge and ability.

The Submissions of the Parties

43. The parties furnished written submissions and Counsel expanded on them at a further hearing held in October 2014.

44. The Revenue Commissioners submitted in summary that the defendant failed to comply with his undertaking in respect of sale of the properties and he had not disposed of any of the nine real properties or of the motor vehicles. They argue that his defences or his mitigation in respect of these failures are vague and unconvincing and in some respects have been shown to be untrue. He has also failed to comply with each of the conditions on which the Court suspended the order for committal made on 16th March 2012. The order, as made by the Court, contained no distinction between parts of the yard in the premises of Kane's of Granard and there is no actual basis, according to the plaintiff, for making such a distinction, and neither had the defendant come back to Court to seek to clarify the situation or to be relieved of the obligation if he maintained that it applied to a greater area than that over which he had power or control. It is also claimed that he is in breach of the other conditions and that the evidence confirms his contempt in that respect also.

45. In the course of oral submissions, Mr. McCarthy S.C. suggested that the standard of proof might be different in the case of conditions whose breach was in question, as compared with the initial question of contempt. But it would appear to be inconsistent with the authorities to consider that any aspect of an application to commit for contempt of Court could be determined on a lesser standard of proof than the criminal standard.

46. The defendant submitted that the death of Mr. Pauraig Smith, auctioneer, and the cessation of practice of Mr. Madden, whose practice was taken over by the Law Society, which retained all his files, including those of the defendant, represented circumstances in which it was impossible for the Court to make a finding of contempt on the part of the defendant by way of proof beyond reasonable doubt. Relevant to that issue is the contention that the properties, or some of them, were for a substantial period in negative equity. A similar contention is advanced in respect of the sale of motor vehicles and of the lengthy cross-examination of Ms. Caroline Kane in respect of the lists of vehicles that she had produced.

47. In respect of the condition concerning use of the Kane's of Granard yard and the issue that arose as to whether it was to be considered as one unit or in two parts, which is the main bone of contention between the parties and the principal stand on which the Revenue Commissioners maintain that Mr. Kane has been in contempt of Court, the defendant submits that it is a matter of interpretation of the order of the Court as to whether it applied to the whole of the yard or only the part that was actually occupied by Newline Motors and Ms. Caroline Kane who is the employer of her husband, the defendant, Pauraig Kane. The submission refers to the evidence in this respect and argues that the defendant cannot be committed for contempt of an order that is the subject of a disagreement as to the extent of its application. It proposes that Mr. and Ms. Kane have actually respected the order, as far as was within their power to do, but there are real difficulties and they could not prevent anybody using the yard that was occupied by Brean Kane.

48. The written submission states that the defendant's current solicitors are actively seeking to advance the matter of the sale of the properties that were the subject of the defendant's undertaking to the Court in March 2012, as recited in the order. Mr. Kane described in evidence the difficulties that had been encountered in getting the files and his evidence was in accordance with this part of the submission.

49. The defendant's submissions conclude with the statement, confirmed in the evidence of Mr. and Ms. Kane, that Newline Motors was in the process of moving from the current site in the lower yard of Kane's of Granard to a new premises at a different location in the town.

50. The defendant submits that in the circumstances, it is not proven beyond reasonable doubt that the defendant is in contempt of Court in respect of his failure to sell the properties.

The Law on Contempt

51. Both parties accept that breach of an undertaking given to the Court constitutes contempt, a point that was decided in *Competition Authority v. Licensed Vintners Association Ltd. & Ors.* [2009] IEHC 439 per McKechnie J. The learned judge referred to the alleged breach of an undertaking which had been received and made a rule of Court and he declared that for the purpose of enforcement, no distinction arose between an undertaking, an injunction and a Court order. Each of them could be treated as equal for attachment and sequestration purposes. McKechnie J. went on to cite in support of this proposition a number of well-known and long-established authorities. The learned judge referred to the case of *Red Wing Ltd. v. Red Wing Forest Products Ltd.* [1947] 64 RPC 67, and approved the following passage:-

"A defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given, he has broken that undertaking. For the purpose of relief of this character, I think that the undertaking must be clear and the breach must be clear beyond all question."

52. The standard of proof is beyond reasonable doubt. It would be inconsistent with the nature of contempt and the jurisprudence on punishment for civil contempt to allow a different standard to apply to an alleged breach of a Court order or undertaking as opposed to the breach of terms of suspended sentence. In each case, the question concerns contempt and the result of a decision against the party bound is potentially the same. The Court, accordingly, rejects the submission that it can approach the undertaking and the conditions in this case on any basis other than the criminal standard of proof.

53. The plaintiff's submissions refer at length to the judgment of Finnegan P. in *Shell E&P Ireland Ltd. v. McGrath* [2007] I.R. 671, which has been followed and approved in later judgments. The most recent case on this area is *Laois County Council v. Hanrahan & Ors.*, a decision of the Supreme Court delivered on 14th March 2014, which expressly approved the following passage from the judgment of Finnegan P. at p. 687:-

"On a review of the cases, I am satisfied that committal for contempt is primarily coercive, its object being to ensure that Court orders are complied with. However, in cases of serious misconduct, the Court has jurisdiction to punish the contemnor. If the punishment is to take the form of imprisonment, then that imprisonment should be for a definite term. Insofar as O Dhálaigh C.J. in *Keegan v. de Burca* [1973] I.R. 223, and in *In Re Haughey* [1971] I.R. 217, held that the objective in imposing imprisonment for civil contempt was coercive and not punitive, I have regard to the facts of each of those cases. In each case, he was concerned with criminal contempt, and for that reason I regard his definition of civil contempt to be *obiter*; while the definition was sufficient for his purposes, it is not completely accurate. More accurate is the proposition in *Flood v. Lawlor* [2002] 3 I.R. 67, which left open the question as to whether civil contempt is exclusively, as distinct from primarily, coercive in nature. In *Roscco Ltd. v. Swan* [1981] ILRM 416, O'Hanlon J. was of the view that that in an appropriate case, the Court must exercise its jurisdiction to commit for a contempt, not merely for the primary coercive purpose, but in order to vindicate the authority of the Court, and in which case the Court has jurisdiction to make a punitive order."

54. In the *Laois County Council* case, Fennelly J. held that "committal by way of punishment inherently relates to conduct which has already taken place, not to future conduct. A person cannot be punished for his future conduct: that would involve preventive detention". He also referred to the principle that the Court should not make an order committing a person for contempt of an order when it was demonstrable that it was impossible for the person to comply with the order. He also cited with approval Finnegan P's observation in *Shell* that committal by way of punishment should be the last resort. It is also clear from the authorities that punishment for past contempt, if that consists of imprisonment, must be for a definite period.

55. Fennelly J. summarised the position as follows:

"(i) It will normally be a matter for the Court to decide of its own motion whether the case is one which justifies the imposition of punishment, which may be a fine or a term of imprisonment, although there may be cases involving matters of purely private interest where the Court may be invited to exercise the jurisdiction.

(ii) The circumstances justifying the imposition of punishment will almost always include an element relating to the public interest, including the vindication of the authority of the Court. The object is punishment, not coercion.

(iii) A Court should impose committal by way of punishment as a last resort. The contempt must amount to serious misconduct involving flagrant and deliberate breach of a Court order. Mere inability to comply will not amount to serious misconduct.

(iv) Committal by way of punishment inherently relates to conduct which has already taken place, not to future conduct. A person cannot be punished for his future conduct: that would involve preventive detention.

(v) Any imprisonment must be for a fixed term."

Discussion

56. The proceedings between the Revenue and Mr. Pauraig Kane are part of a saga of dispute between the Revenue Commissioners and various businesses conducted at and known as 'Kanes of Granard'. This case concerns only this one defendant and his conduct in relation to the injunction to which he was made subject in 2009, and the terms and conditions that the Court imposed in 2012 when it imposed a suspended sentence on him. Although the Revenue have been pursuing other persons besides this defendant in connection with business carried on at the same location, this case is not concerned with anybody else. It follows that anything said in this judgment does not affect any other person or persons generally who may operate from the premises. It is, nevertheless, relevant to locate the dispute between the Revenue and Mr. Kane in context.

57. The Revenue Commissioners obtained judgment against this defendant in the sum of approximately €5.2m in 2009. In the course of those proceedings, a Mareva injunction was granted by Kelly J. in the Commercial Court whereby the defendant was restrained from disposing of assets consisting of motor vehicles that were present on the premises. He breached that order, as he admitted in the proceedings that the Revenue brought in 2012, in which they sought to have the defendant attached and committed for his contempt.

58. Mr. Kane admitted that he had breached the order of 2009, and that he was accordingly in contempt of Court. He gave evidence at that hearing; he expressed his contrition for what had happened, undertook to ensure that there was no repetition of such conduct and appealed to the Court to be given a chance.

59. On that occasion, Mr. Kane said that he was the owner of nine properties which he intended to sell and use the money for reduction of his liabilities to the Revenue, and an undertaking to that effect was recited in the order of the Court dated 16th March 2012. The Court went on to impose a penalty for the defendant's contempt of a sentence of imprisonment for six months which was suspended on the conditions that are under consideration.

60. The issue at this point is whether the plaintiff has now established beyond reasonable doubt that the defendant is in breach of the order made by the Court in respect of the undertaking that he gave or in one or more of the three conditions on which the order of imprisonment for contempt was suspended. That is the first question. The second is whether, assuming that the plaintiff has established a breach of the undertaking or one of the conditions, it is now appropriate to lift the suspension and order the imprisonment of the defendant for contempt of the order of the Court made in 2009.

61. The Court considers that the second question gives rise to serious issues also and that it is not obvious that in the event that the Court is satisfied about one or other breach, it must necessarily follow that the suspension has to be lifted so that Mr. Kane is committed.

62. Imprisonment for contempt is a last resort. It is deployed in order to assert and vindicate the authority of the Court and promote a respect for its orders.

63. The standard of proof is beyond reasonable doubt and that applies to all the elements of the alleged contempt. If the defendant found it impossible or impracticable to comply with the Court order in the form of the undertaking or of the conditions, he cannot be held in contempt. There may be some hesitation about the word impracticable but it seems to accord with the sense of the authorities above cited.

64. Turning to the terms of the Court order, it is clear that the Revenue has made out a good case that the defendant did not comply with his undertaking to sell vehicles and real property. He did not remit the proceeds of sale of any of the cars. Whatever vehicles were in his possession and whether they were of scrap value or otherwise, the defendant did not comply with his self-imposed obligation. I do not accept that the vehicles were no more than useless scrap cars. I found his evidence on this unconvincing and the point that Counsel for the Revenue made was a good one. He queried what the point was of giving this undertaking about vehicles that the defendant was going to sell if they were actually worthless and there is no real answer to that.

65. The same general observation applies to the properties consisting of land and buildings. He promised to sell nine properties but has not actually sold a single one. However, in this regard there is something in the excuses put forward by the defendant, namely, the death of the auctioneer and the difficulties that his solicitor had with the Law Society. It is perhaps understandable also that some might have been in negative equity or that it was a really bad time to sell them. Having said that, unlike the situation in regard to the motor vehicles it is still possible for those property sales to go ahead and the money to go to the Revenue. The undertaking stands as a solemn declaration of the Revenue's entitlement and Mr. Kane has given evidence that his present solicitors are making progress in disposing of these properties.

66. The Revenue, in addition, continues to have power to protect their position by seeking orders over the property of the defendant and if necessary sales, although it would make things simpler if he were to do the work himself and forward the proceeds.

67. Turning to the conditions imposed by the Court, the submission made by Mr. Ryan, Counsel for the defendant, is that whatever suspicions may arise because of the material put before the Court by the Revenue, there is, nevertheless, something lacking in the evidence required to establish proof beyond reasonable doubt that the defendant is in deliberate breach of the Court orders or any of them. In respect of the condition that is most centrally in dispute, namely, the one relating to the use of the yard, it appears that a reasonable doubt must be entertained or cannot be avoided, whichever expression one prefers, notwithstanding the clarity of the order as actually made by the Court.

68. There does appear to be something in what the defendant says about the yard. The fact that the Revenue had themselves brought proceedings against the defendant's brother and his father, claiming well-charging orders over part of the property would seem to be an implicit acknowledgement that the defendant is not the owner or controller of the whole of the yard area. It is true that there was no explanation at the time of the Court hearing in March 2012, that the defendant was only able to control one part of the area, but the view of the Court is that the defendant and his wife have established that her business and his activity were located in a part of the yard that was separated from the showroom and forecourt. It appears that the defendant himself sometimes operated from the other area and that has given rise to legitimate suspicion on the part of the Revenue officers. However, in respect of contempt and proof beyond reasonable doubt, it is not possible to come to a verdict of deliberate breach by the defendant in this respect.

69. There is no evidence that the defendant acted in breach of the condition imposed by the Court that he should not use third party cheques in the course of his business. As stated above, the grounding affidavit does contain some hearsay evidence on this point, but it is not admissible as proof and is not even specific to the defendant. In fairness, Mr. McCarthy S.C. did not rely on a breach of this condition.

70. In regard to the term about listing the vehicles that were on the premises at the time of the Court hearing in March 2012, the defendant's evidence is that he relied on his wife to keep all the relevant records and was satisfied that she had done so and had furnished the information to the revenue solicitors through his solicitor. In this respect, it was his wife who was cross-examined about the list. This is an area of considerable complexity and it is fair to say that the defendant's wife maintained her position throughout a detailed cross-examination. The Revenue officials have followed up the question of the cars that were in yard with great diligence and the results of their inquiries do give rise to suspicion that Mr. Kane disregarded the Court order. But it is difficult to conclude that Mr. Kane was in deliberate contempt of Court on the basis of the cross-examination of Mrs. Kane, even though he said that she was in a better position to deal with the transactions concerning the cars than he was.

71. In the result, the Court is satisfied that the defendant did not comply with his undertaking in regard to motor vehicles or in respect of land and buildings. He has assured the Court that since the difficulties that he cited in respect of compliance by selling the real property have been removed his solicitor has been making progress on his instructions. His undertaking in that respect remains. Concerning the conditions that the Court imposed, the defendant did indeed have difficulty in complying with the obligation to clear the whole yard and the Court accepts that he has not been in deliberate breach, notwithstanding the clarity of the order and the fact that Mr Kane's inability to exercise control over the whole area was not made clear at the Court hearing.

72. It has not been established that the defendant was in breach of the condition prohibiting third party cheques.

73. On the final condition, the Court has some considerable unease on the basis of the protracted correspondence, but is not satisfied that deliberate breach of this condition by Mr. Kane has been proven beyond reasonable doubt.

74. There are points in mitigation as follows:-

- (a) This matter has now been going on a long time and the suspended sentence that the Court imposed in March 2012 concerned the breach of a Mareva injunction in 2009.
- (b) Mr. Kane admitted his breach of the Mareva injunction and his contempt of the 2009 order during the March 2012 hearing.
- (c) The car sales business in which he is now working and which is in his wife's name or actually his wife's business is moving away from the Kanes of Granard premises to a separate location in the town.
- (d) There can still be compliance with the undertaking as to the properties.
- (e) The Court has found that the evidence establishes beyond reasonable doubt that Mr Kane acted in deliberate contravention of the undertaking and conditions to a relatively limited extent which obviously does not excuse his conduct but does reduce culpability.

75. The authorities emphasise how reluctant to Court ought to be to impose imprisonment for past contempt, that is, as a punishment and not as a coercive measure to ensure compliance with a present Court order. It is a last resort. Punishment for civil contempt is considered to be necessary in order to uphold the authority of the Court. That is most obviously seen when the power is used to

compel compliance but is still available as a punishment for breach of a specific order made by the Court.

76. The dispute between the parties has been gradually shifting away from punishment for the original offence in respect of the Court's order, to one where conditions were imposed that have more to do with ensuring general tax compliance, in circumstances that are quite understandable but which have to be recognised as being somewhat remote from the necessity to uphold the authority of the Court that made the original order.

77. In all the circumstances, the Court is not satisfied that it would now be just to order the defendant to serve the sentence that was imposed but suspended in 2012.

78. Having said that, the breach of the Mareva injunction was a serious contempt of an order of the Court. Even if Mr. Kane is to be regarded as having reformed, to some extent at least, it is necessary for the Court to fix a penalty for the offending behaviour that frustrated the Court's order. The Court considers that a monetary penalty is appropriate in circumstances where it has found the defendant in breach of his undertaking as to the vehicles.

79. The Court accordingly imposes a fine of €25,000 in lieu of the suspended sentence of imprisonment.