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2012/69375

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

BETWEEN:

JOHN ALEX KANE

Petitioning Debtor

and

THE REVENUE COMMISSIONERS

Objecting Creditor

Master Kelly

INTRODUCTION

[1] On 21st June 2012 the petitioning debtor John Alex Kane, otherwise known as Alex Kane, presented a bankruptcy petition to the court in which he sought the making of a bankruptcy order against him pursuant to the provisions of the Insolvency (Northern Ireland) Order 1989 ("the Order") and the Insolvency Rules (Northern Ireland) 1991 ("the Rules").

[2] A hearing of the petition took place on 28th June 2012 in which Mr Kane appeared as a personal litigant. Mr Kane informed the court that although he was from the Republic of Ireland he had left that jurisdiction some years earlier and had no continuing interests there. A bankruptcy order was made on that date.

[3] That order was subsequently rescinded on 26th November 2012 on foot of an application brought by the Republic's Revenue Commissioners (Special Compliance District). At the hearing on 26th November 2012, the Commissioners submitted cogent and persuasive evidence that Mr Kane had misrepresented himself and his financial affairs to the court on 28th June 2012. It transpired at that hearing that Mr Kane had not made full disclosure to the court of his financial affairs. In particular, Mr Kane had not

disclosed that he had substantial assets and business interests in the Republic of Ireland. Moreover, it appeared that Mr Kane was the subject of High Court proceedings in Dublin involving the evasion of the payment of some €5m in tax duties in the Republic of Ireland. Those proceedings were brought by the Revenue and there remains an outstanding warrant for Mr Kane's arrest in connection with them. Mr Kane was constrained to accept that he did mislead the court on 28th June 2012 but denied knowingly doing so.

[4] Following the rescission of the bankruptcy order, which Mr Kane also accepted, the petition was re-instated. The case proceeded thereafter as a contested petition with the Revenue Commissioners exercising their rights under Rules 6.017 (3) and 6.020 to oppose the making of a bankruptcy order. Within the context of this judgment, unless otherwise stated, any reference to the Revenue refers to the Revenue Commissioners in the Republic of Ireland.

[5] For present purposes, the Revenue contends that Mr Kane's centre of main interests ("COMI") does not lie in Northern Ireland. Accordingly, the Revenue argues that this court lacks international jurisdiction to make a bankruptcy order against him. Mr Kane on the other hand argues that his habitual residence is in Northern Ireland and as such his COMI is in this jurisdiction. He submits that this court has the requisite international jurisdiction to make a bankruptcy order on that basis.

[6] The burden of proving COMI rests with the party so contending. Where a debtor invokes the insolvency process by self-petition, the burden of demonstrating the location of his COMI rests with the debtor and he is under a duty of full and frank disclosure to the court of all relevant matters in the discharge of that duty. Failure on the part of a debtor to satisfy the court that his COMI has moved, or to make full and frank disclosure, may lead the court to conclude that the presentation of the petition is an abuse of process and an abuse of the court's jurisdiction. Therefore Mr Kane is required to prove that this court has international jurisdiction to make the order sought.

[7] Following the rescission of the bankruptcy order, the petition was adjourned on several occasions to facilitate Mr Kane's affidavit of 1st March 2013. A rejoinder affidavit from Mr Magee, a senior Revenue Inspector, was sworn on 3rd May 2013 on behalf of the Revenue. There was no sur-rejoinder from Mr Kane. The affidavits thus being closed, the petition was listed for hearing on 10th September 2013. Mr Kane was represented at the hearing by Mr Dunlop and the Revenue Commissioners were represented by Mr Dunford. There was no examination of witnesses and the hearing proceeded by way of counsels' submissions. I am grateful to counsel for their careful preparation and conduct of their case together with their helpful skeleton arguments.

THE RELEVANT LEGAL PROVISIONS ON COMI.

[8] Since 31 May 2002, the rules as to the bankruptcy jurisdiction of the Northern Irish Court are to be found in the jurisdictional provisions of Council Regulation (EC) No 1346/2000 on 29 May 2000. This is referred to hereafter as "the Regulation". However, before turning to the interpretation and application of the Regulation, it should be noted that Recital 4 of the preamble states:

> "It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)."

[9] For the purposes of the Regulation, the making of a bankruptcy order is the "opening" of proceedings in the relevant jurisdiction. If the proceedings opened in one Member State are defined as "main" proceedings then (subject to Article 26(6) of the Regulation) only "territorial" or secondary proceedings may be opened in another Member State against the same person.

[10] There is no definition of COMI in the Regulation other than Recital 13 of the preamble to the Regulation which states that:

> "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis, and is therefore ascertainable by third parties."

[11] The wording of Recital 13 to the preamble denotes that there are two parts to the test for COMI. The first part is the factual question of where the debtor conducts the administration of his interests on a regular basis. The second part is the question as to whether that place is transparent and ascertainable by third parties; in particular creditors and potential creditors of the debtor. Each part of the test is dependent on the other and together should correspond to the place in which the bankruptcy petition is presented in order to establish the court's international jurisdiction to open main proceedings.

Article 3 (1) to (3) of the Regulation reads as follows:

> "International Jurisdiction
>
> 1. The courts of the Member States within the territory of which the centre of a debtor's main interests

> is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.
>
> 2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effect of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.
>
> 3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding up proceedings."

[12] The Regulation was accompanied by a report of Manuel Virgos and Etienne Schmit dated 3rd May 1996 ("the Virgos-Schmit Report"). M Schmit's commentary at paragraph 75 begins with the words of Recital 13 before examining the different possibilities which may apply to an individual debtor:

> "In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence".

Professor Virgos subsequently published with Professor Garcimartin (Kluwer 2004) a text book which at paragraph 56(c) states:

> "For individuals, if the debtor is engaged in an independent business or professional activity, the centre of main interest will normally correspond to the State where he has his business or professional centre (ie. his "professional domicile"), provided that it is the business or professional activity that is at the root of the insolvency. In other cases it will be the individual's habitual residence."

Paragraph 75 of the Virgos-Schmit Report also states:

> “The concept of "centre of main interests" must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.
>
> The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.
>
> By using the term ‘interests’, the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression "main" serves as a criterion for the cases where these interests include activities of different types which are run from different centres.
>
> In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence. Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office.”

[13] While the Regulation provides that the COMI of a company is presumed to be its registered office, it did not make similar provision for natural persons. However, in Case C-1/04 **Re Susanne Staubitz-Schreiber [2006] ECR I-701,** (the first case to be referred to the European Court of Justice for a preliminary ruling on COMI) this particular issue was considered by the ECJ in the course of a referral by Germany requesting a ruling from the court on the question of whether an individual’s COMI can move between the request for the opening of main proceedings and the opening of

main proceedings. At [62] of the judgment, Advocate-General Colomer proposed a presumption in the case of natural persons in the following terms:

> "Regulation 1346/2000 provides no guidance for such a situation. It appears from the 13th recital in the preamble to the Regulation that the decision in question refers to the place where a debtor conducts the administration of his interests on a regular basis, which is straightforward for third parties to ascertain. Thus, the centre of the main interests of an individual who carries on a business activity is deemed to be his or her business address, while, for other natural persons, it is deemed to be their habitual residence."

[14] By use of the word "deemed", Staubitz-Schreiber established a presumption in the case of natural persons similar to that which existed in the case of a limited company. It follows therefore that the presumption of COMI in the case of a natural person may be rebutted in the event of evidence to the contrary. As with the Virgos-Schmit report, Staubitz-Schreiber drew a distinction between natural persons engaged in business activity and natural persons who are not. Colomer A-G continued at [64]:

> "There must be a link between a debtor's business assets and the place of the proceedings, thereby ensuring the best protection for creditors by enabling them to calculate the legal risks they must assume in the event of insolvency. For that reason, academic legal writers argue that where a person engaged in a trade or business (sole operator or trader, for example) is resident in one Member State but carries on his activities from an establishment situated in another State, the latter State is deemed to be the competent forum, provided that the insolvency proceedings concerned result from the exercise of the trade or business."

This distinction between natural persons also appears at paragraph 8.96 of The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide, 2nd Edition, Oxford University, noted by Deeny J in **IBRC –v-Sean Quinn [2012] NICh 1 [20]**. Paragraph 8.96 states:

> "The COMI of natural persons will generally be their place of habitual residence. In the case of 'professionals', however, it will be the place of the

> professional domicile. This suggests that the centre of main interests is linked to the type of activity from which the insolvency or need for rescue/reconstruction arises. Thus, where an individual is carrying on business activities and it is the business that is at the root of insolvency or need for rescue/restructuring, the centre of main interests may well be in the place of business rather than in the place of habitual residence (if different)."

These authorities indicate that if the root of an individual's insolvency lies in the individual's business activities, the COMI of the individual is linked to the jurisdiction of the business and the business assets. This may or may not be the same jurisdiction as the jurisdiction of the individual's habitual residence.

[15] Staubitz-Schreiber is an important authority for two other reasons. First, the case established that there was no principle of immutability in terms of COMI. The ECJ held that an individual's COMI could move even after the date of the request to open main proceedings, and that the court seised of that request could still open main proceedings on foot of that request. Secondly, the court held that the relevant date for determining COMI is the date of the request to open main proceedings. The *ratio decidendi* of the case was that a main objective of the Regulation is to prevent forum shopping by parties in search of a more favourable legal position. The court held that unless there was a decisive point in time for determining COMI, that objective could be undermined as a debtor could keep moving his COMI in search of a jurisdiction with a more advantageous insolvency regime. This could further enable a debtor to defeat and delay a creditor by the creditor having to locate and pursue a debtor from jurisdiction to jurisdiction in order to obtain justice in respect of the relevant indebtedness.

[16] As the Regulation is binding on all Member States (except Denmark) it has the force of directly applicable law in those Member States. It follows therefore that before opening main proceedings, ie making a bankruptcy order, the court must in every case consider whether it has the jurisdiction to do so. In order to consider whether it has jurisdiction to open main proceedings the court is required to undertake an examination of the COMI of each individual. The reasons for this are elucidated in paragraph 41 of **Eurofood IFSC Limited case C-341/04; [2006] Ch. 508**, namely:

> "It is inherent in that principle of mutual trust [between Member States] that the court of a Member State hearing an application for the opening of main insolvency proceedings check that it has jurisdiction having regard to Article 3(1) of the Regulation, i.e. examine whether the centre of the debtor's main interests is situated in that

> Member State. In that regard, it should be emphasised that such an examination must take place in such a way as to comply with the essential procedural guarantees required for a fair legal process."

[17] Where a debtor presents a petition for bankruptcy based on a change of COMI, the court has a duty to scrutinise the facts on which the debtor relies as giving rise to that change, bearing in mind the historical and individual facts of the case. (See **Shierson –v- Vlieland-Boddy [2005] EWCA 974**). While there is no principle of immutability regarding COMI, there is no suggestion in the authorities that an individual's COMI is easily moved, particularly when the individual's insolvency is already known to them. In considering the question of COMI, particularly where there is a recent change of COMI, the court will take into account the place in which the debts giving rise to the insolvency were incurred, and how the debtor conducted himself with regard to his creditors and the liabilities he left behind in that jurisdiction. (See **Bank of Ireland –v- O'Donnell [2013] IEHC 395**).

Background and events leading up to Mr Kane's petition.

[18] The facts in this case are not materially in dispute. It would seem that Mr Kane commenced trading in or around 2000 as a major supplier of specialist 4x4 vehicles in the Republic of Ireland. This business traded as a car dealership under the name of "Kanes of Granard" in Granard, Co Longford. According to the Revenue this car dealership traded at "substantial" premises at Barrack Street, Granard.

[19] In 2004 it seems that Mr Kane's business, and that operated by his brother Pauraig from the same location, attracted the attention of the Revenue. An investigation was initiated by the Revenue into separate sole trader businesses operated by Mr Kane and his brother Pauraig at the premises at Barrack Street, Granard.

[20] The investigation was occasioned by the Revenue's suspicion of possible serious VAT and other tax irregularities taking place in Kanes of Granard. The main concern was that the business had substantial sales of commercial jeeps (which it had converted from passenger vehicles) to persons who were registered for VAT in the Republic of Ireland, and which were being incorrectly recorded as intra-community acquisitions. As part of that investigation, search warrants were obtained under the provisions of Section 905(2A) of the Taxes Consolidation Act 1997 and searches of premises were carried out on 9th December 2004. Extensive documentation was seized during these searches and inspected to ascertain whether there was evidence of serious tax evasion and/or under-declaration of tax liabilities by Mr Kane.

[21] The Revenue discovered from those investigations that Mr Kane was not properly operating the VAT element of his Kanes of Granard business. From its investigation, the

Revenue found that VAT was being substantially under-declared in the business. This gave rise to a Revenue Inspector raising assessments against Mr Kane pursuant to Section 23 of the Value Added Tax Act 1972. Initially Mr Kane appealed those assessments. However on 24th February 2009 Mr Kane unconditionally withdrew all his appeals via a letter from his solicitor. By virtue of section 933(6)(a) of the Taxes Consolidation Act 1997, this rendered the assessments final and conclusive. As this left Mr Kane bound by the amounts claimed, the Revenue issued High Court proceedings against him.

[22] In or about 28 November 2008, Mr Kane and his partner, Lucy Pinfold, apparently set up a limited company known as Kanes of Granard Limited. Mr Kane and Ms Pinfold are recorded as the directors and shareholders of the company. The chronology demonstrates that this company was incorporated between the initial hearing of the VAT appeals and the date on which they were ultimately withdrawn. As a consequence, the Revenue also investigated this new company and discovered that the company's objects were stated to be the business of "sales, repairs and conversion of vehicles. In other words, this was to be the same business as Kanes of Granard.

[23] On 3rd April 2009 the Revenue commenced proceedings in the High Court in Dublin entitled *Harrahill v Kane.* On 20th May 2009 Mr Justice Kelly granted the Revenue a Mareva injunction preventing Mr Kane from disposing of assets pending the Revenue's application for judgment. On 22nd May 2009, on the application of the Revenue (by reason of their concerns that the Respondent and his brother might be taking steps to deliberately remove assets in breach of the terms of the Mareva injunction), Mr Justice Kelly made an order appointing a Receiver of Mr Kane's assets.

[24] On 3rd July 2009, Judgment was obtained by the Revenue against Mr Kane in the sum of €4,941,997.52. On 6 July 2009, Mr Justice Kelly ordered Mr Kane to make full disclosure of all of his assets to the Revenue by 17 August 2009. A disclosure affidavit in purported (though late) compliance with this order was sworn and filed by Mr Kane on 1st September 2009. The Receiver's investigations, however, indicated that Mr Kane had built up a substantial property portfolio and that Mr Kane had misled the court and the Revenue as to his assets. Consequently, on 2nd December 2009, Mr Justice Kelly made an order committing Mr Kane to Mountjoy Prison for contempt of court. Mr Kane was detained in Mountjoy Prison until 9th December 2009 and was only released when he gave an undertaking to the court to comply fully with the orders of the court and to co-operate fully with the Revenue.

[25] Mr Kane did not discharge his undertaking to the court of 9th December 2009. On 12th April 2010 Mr Justice Kelly made a further order finding Mr Kane to be in contempt but imposed a stay on the committal order to allow him a further opportunity to co-operate with the Revenue. The stay on the committal order was extended a number of times by the court, but was ultimately lifted by the court on 28th July 2010. On 29th July

2010, a warrant was issued to An Garda Síochana for execution on Mr Kane. However, before the warrant could be executed, Mr Kane fled the Republic of Ireland without making his whereabouts known to the Revenue or the court.

[26] On 12th August 2010 there commenced an exchange of correspondence by and on behalf of Mr Kane with the Revenue's solicitors, Ivor Fitzpatrick & Co. This correspondence continued for two years. In the course of that correspondence, which was initiated by Mr Kane himself, Mr Kane expressed a desire to purge his contempt and he sought clarification of the outstanding issues which would enable him to do so. As appears from the correspondence, while Mr Kane's engagement with Ivor Fitzpatrick & Co was welcomed and acknowledged by them, Mr Kane is reminded in the correspondence of the warrant for his arrest and the need for him to present himself to An Garda Síochana.

[27] In or about 22nd November 2010 this correspondence is taken up on Mr Kane's behalf by his solicitor in Longford, Leo Branigan & Co. It is evident from that correspondence that it had two main purposes. The first was to secure assistance from the Revenue in enabling Mr Kane to purge his contempt by requesting the Revenue to produce documentation relating to the High Court action. The second was to secure assistance from the Revenue to prevent Mr Kane's company, Kanes of Granard Ltd, from being struck off the Companies Register for failure to submit accounts. The Revenue was asked to produce documentation in relation to that issue also.

[28] The correspondence continued until 28th August 2012 in the midst of which Mr Kane declared himself bankrupt in Northern Ireland. No mention was made of Mr Kane's bankruptcy in Northern Ireland in the course of the correspondence with the Revenue's solicitors. It is however noteworthy that all of the correspondence referred to was conducted in the Republic of Ireland. This included Mr Kane's own letters to Ivor Fitzpatrick & Co written from his business address in Granard despite his claim to have been resident in Northern Ireland at the time.

[29] On 3rd September 2012 another individual known as Dr Michael Grimes of Grimes & Company of Cork wrote to Ivor Fitzpatrick & Co on behalf of Mr Kane. In this letter Dr Grimes informed Ivor Fitzpatrick & Co of Mr Kane's bankruptcy in Northern Ireland and while on the one hand the letter stated: "*Mr Kane wishes to return to the High Court to purge his contempt*.", on the other it stated: "*That (*the bankruptcy*) being the case, we would suggest that the proceedings in the south are moot and that therefore the purging of the contempt by the provision of information and documents is also moot."* It would appear that this letter prompted the Revenue to seek the annulment/rescission of Mr Kane's bankruptcy order.

[30] At the hearing of the Revenue's application challenging the bankruptcy order Mr Kane accepted that he had misled the court on 28th June 2012. Nevertheless he

maintained his argument that his COMI was in Northern Ireland. He submitted that the court had jurisdiction to open main proceedings against him notwithstanding the issue of non-disclosure. Given that the rescission of a bankruptcy order has the effect of returning the parties to the position they would have been in had the order never been made, the court rescinded rather than annulled the bankruptcy order. This enabled the parties to conduct an adversarial hearing of the petition. The decision now for the court to make is whether on the evidence Mr Kane's COMI is in the jurisdiction of this court, bearing in mind that the burden of proof rests with Mr Kane.

[31] It is not a matter of dispute that Mr Kane's insolvency arises from business activity in the Republic of Ireland and that the root of his insolvency is also in that jurisdiction. It is also agreed by the parties that the relevant date for the consideration of Mr Kane's COMI is the date on which he presented his bankruptcy petition to the court. The relevant date therefore is 21st June 2012.

[32] Mr Kane submitted that as at 21st June 2012 he was a natural person whose COMI had moved from the Republic of Ireland to Northern Ireland by virtue of his move across the border. He argued that his evasion of arrest is a self-serving reason for his move to the North and that as he habitually resides in Northern Ireland now his COMI is in this jurisdiction.

[33] There are undoubtedly considerable advantages to Mr Kane if he can persuade the Northern Ireland court that it has international jurisdiction over him. Although the insolvency regime in the Republic of Ireland is currently undergoing transition, it was submitted by the Revenue that Mr Kane would remain bankrupt in the Republic of Ireland for a period of twelve years as opposed to one year in this jurisdiction. Mr Kane did not take issue with this. In order to determine Mr Kane's COMI it is necessary to first, establish from the evidence what Mr Kane's main interests are; secondly, to establish from the evidence where he conducts the administration of those interests on a regular basis; and thirdly, to establish from the evidence whether that place is transparent and ascertainable by third parties; in particular creditors and potential creditors of Mr Kane.

[34] It is accepted by Mr Kane that he did not make full disclosure of his interests on his statement of affairs. While in his affidavit of 1st March 2013 Mr Kane rightly accepts this, he did not remedy the problem in that affidavit. Nor did he did submit to examination in court at the hearing of 10th September 2013. The source of the evidence of Mr Kane's interests is the Revenue's uncontroverted and voluminous affidavit evidence. This evidence is derived in part from evidence arising in the High Court proceedings in Dublin and also from its own investigations. Therefore from the available evidence, Mr Kane's interests as at 21st June 2012 appear to be as follows:

Northern Ireland

1. He held a tenancy agreement for 32 Kellier Park, Derrylin, County Fermanagh;

2. He operated a bank account with Ulster Bank here.

3. He was in receipt of Job Seekers Allowance here.

Republic of Ireland

1. He held a substantial land and property portfolio (with all the attendant economic activity with that) namely:-

(i) a detached bungalow at Granardkill, Co. Longford.

(ii) four terraced properties at a location known as Farrells Terrace;

(iii) land and two residences at Ardagallion, at least one of which is rented out;

(iv) a cottage at Clonfin, Ballinalee;

(vi) a bungalow at Cartron, Co. Longford which is also rented out;

(vii) 7 acres of farmland at Tullygallion;

(viii) 39 acres of land at Cranleybeg, Edgeworthstown;

(ix) 10 acres of land and a newly constructed residence at Cartron;

(x) a farm and 35 acres at Willsbrook;

(xi) an interest in the commercial premises at Barrack Street Granard.

[35] None of these assets were disclosed to the court by Mr Kane at the original hearing of his bankruptcy petition. At paragraph 26 of his affidavit of 1st March 2013 however, Mr Kanes states:

> *"I may not have submitted the details of these properties in the right place on my statement of affairs, however I have disclosed them save for two properties, one of which is Clonfin Banallee*

Granard which is a derelict cottage. I also own a half share in a bungalow in Cartron, Granard which is rented out."

This averment implies that Mr Kane did disclose these assets on his statement of affairs –merely in the wrong place. To this affidavit is exhibited a copy of the statement of affairs which accompanied Mr Kane's bankruptcy petition. Attached to the last page of the copy statement of affairs is an extra sheet with minimal detail regarding some of these properties. The sheet is stamped with the seal of Dr Grimes' office. Having reviewed the original documents filed with the court, I am satisfied that this extra page did not accompany the original documents. Moreover, given that Mr Kane states at section 13 of his statement of affairs (which is the final section): "*I have been involved in properties but no longer am owner*", the attachment of this extra sheet would have been incompatible with that statement. I am therefore satisfied that none of these assets were disclosed by Mr Kane in the original statement of affairs filed with the court.

Returning to Mr Kane's interests in the Republic of Ireland:

2. He held an interest in Kanes of Granard Limited (not disclosed in the statement of affairs).

3. He held an interest in the assets of Kanes of Granard (also not disclosed).

4. He had an interest in the High Court proceedings entitled *Harrahill v Kane.*

5. He was personally (from the Barrack Street, Longford address), and through his solicitors who were based in the Republic of Ireland, conducting correspondence from the Republic of Ireland in relation to those proceedings.

6. He was, on the balance of probabilities, directly or indirectly, still trading Kanes of Granard. The objective evidence of this is the Revenue's unchallenged evidence which includes the following:

> (i) Statements by various Revenue officials following their investigations into his business activities;
>
> (ii) The transcript of Pauraig Kane's evidence to Mr Justice Ryan in Dublin High Court in March 2012 in which Pauraig Kane avers that John Kane conducts business with his own customers by phone;
>
> (iii) The Revenue's unchallenged evidence from invoices (bearing the same mobile number as that on Mr Kane's statement of affairs) and customers;

(iv) Article in the Irish Mail on Sunday 23rd September 2012 entitled "*The €10m tax dodgers banned from selling cars….still selling cars*." The journalist writing this article described how Mr Kane tried to sell her a car and how he told her of his business in Granard.

7. He received post there (namely the exchange of correspondence with Ivor Fitzpatrick & Co.).

8. He is liable for tax and VAT there.

9. His entire indebtedness is there.

10. He conducted the administration of the affairs of his limited company there.

[36] Despite the burden of proving his COMI resting with Mr Kane, Mr Kane filed only one carefully-worded short affidavit throughout these proceedings. Although having every opportunity to do so, Mr Kane did not contradict any of the substantive evidence given by the Revenue. Nor did he offer any evidence as to how or where he conducted the administration of his interests in either jurisdiction, or how he was ascertainable to third parties, particularly creditors. It follows therefore that the evidence of the Revenue should be accepted as determinative of the issue of COMI.

[37] Taking all that evidence into account together with counsels' submissions I conclude that on the balance of probabilities Mr Kane was still engaged in business activities in the Republic of Ireland as at 21st June 2012. There are two bases for this conclusion. The first is the Revenue's evidence supported by objective documentation that Mr Kane was still involved in operating his car business in the Republic of Ireland. He was in my view ascertainable to third parties in the context of that business by phone and also through associates, former employees and his brother Pauraig. He also made himself ascertainable to the Revenue at this time and in that jurisdiction through his solicitor Leo Branigan & Co by the conduct of correspondence in relation to the ongoing High Court proceedings in which Mr Kane expressed his wish to purge his contempt.

[38] The second basis for my conclusion is that even from Mr Kane's own limited evidence he has a significant commercial interest in land and property. From that limited evidence, Mr Kane admits that he continues to derive a rental income from at least two of his properties. This also amounts to business/commercial activity. Given that Mr Kane now contends that his properties are "hopelessly in negative equity," this business is also at the root of his insolvency in the Republic of Ireland. For the reasons

given, I find therefore that Mr Kane's COMI as at 21st June 2012 lay in the Republic of Ireland and that his move to Northern Ireland for self-serving purposes amounted only to a change in his personal circumstances rather than a change in his COMI.

[39] Mr Kane's argument that his COMI is in Northern Ireland was in any case flawed from the outset. By deliberately not disclosing his whereabouts in Northern Ireland to the Revenue Mr Kane could not have been said to have been ascertainable to them. It was submitted by the Revenue that in the circumstances it could only have ascertained Mr Kane's whereabouts by having to employ a private investigator. Thus the second part of the COMI test is not met in this jurisdiction. (See Deeny J paragraph 28 **IBRC –v- Sean Quinn [2012] NICh 1** re: ascertainability and Case C-369/09 **Re Interedil Spl [2011] BPIR 1639**).

[40] Even if I have erred in reaching my conclusion on Mr Kane's COMI, this would not be an appropriate case for the court to exercise its discretion under Article 240 of the Order to make a bankruptcy order. Having reflected on all matters relevant to this case I am led to conclude from the evidence now before me that a bankruptcy order in this jurisdiction would serve no purpose. The making of a bankruptcy order is an equitable remedy and it must therefore be in the best interest of both creditors and debtor. However Mr Kane's assets and liabilities are entirely in the Republic of Ireland and he has no connection of any substance to this jurisdiction.

[41] I am also led to conclude from the evidence that Mr Kane's bankruptcy petition is an abuse of process. This is not due to his presenting a petition to avoid imprisonment in committal proceedings - the presentation of a bankruptcy petition to avoid committal proceedings has in any case been held not to amount to abuse of process (see **Re: Ex parte Painter [1895] 1QB 85**). Rather, the abuse of process arises in this case by virtue of Mr Kane's non-disclosure of material facts and evidence. These non-disclosures are serious and cannot be excused by Mr Kane's personal litigant status at the time the bankruptcy order was originally made. It is now clear that the non-disclosure issues that arose in the course of the High Court proceedings in Dublin have continued to pervade these proceedings. Even Mr Kane's affidavit of 1st March 2013 which purports to regularise the non-disclosure issue not only fails to do so but reveals further non-disclosure. In that affidavit Mr Kane says at paragraph 26 *"Any properties I own are hopelessly in negative equity."* This necessarily infers that he also has secured creditors which he has not disclosed not to mention a whole other avenue of economic activity not disclosed in terms of lenders, banks, bank accounts, insurers and so forth. These non-disclosure issues will remain an obstacle to any resolution to Mr Kane's financial problems until he reconciles the outstanding disclosure issues with the Revenue and the High Court in Dublin. Even if Mr Kane was to genuinely relocate his interests to Northern Ireland, any future petition would necessarily be on notice to the Revenue and Mr Kane would be required to submit to examination under oath in court.

Conclusion.

[42] For the reasons given I find that Mr Kane's COMI does not lie in the jurisdiction of Northern Ireland and as such this court lacks international jurisdiction to open main proceedings in this case. The relief sought in the petition is therefore refused.