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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (COMPANY INSOLVENCY)

IN THE MATTER OF COLERAINE FOOTBALL AND SPORTS CLUB LIMITED

AND IN THE MATTER OF THE INSOLVENCY (NORTHERN IRELAND) ORDER 1989

WEIR J

The Background

[1] The Coleraine Football and Sports Club Limited ("the Company") was incorporated on 13 April 1946. Its principle activity in the years since incorporation has been the playing of football and the club is a member of the Irish Premier League. There is no dispute that in recent years the financial affairs of the Club have not been well conducted with the result that it is now indebted to the approximate extent of more than £1M. The exact amount has yet to be ascertained. A major element in that indebtedness arises from a persistent failure to account to the Inland Revenue and Customs and Excise for PAYE, Corporation Tax and Value Added Tax. Accounts for the Company have not been prepared for any period after 30 April 2002 nor in recent years have the necessary returns been made to the Inland Revenue or Customs and Excise so that the extent of the indebtedness to them is not certain but is presently estimated at a figure approaching £400,000. There is also a sum of £206,000 claimed by the Sports Council for Northern Ireland and there are allegations by that body that grant in aid provided by it has been misapplied which allegations are presently the subject of a police investigation. The Company has no realisable assets to set against its debts and indeed the very grounds at which it plays, which are the property of the North Derry Agricultural Society Limited, have been the subject of an action for possession due to non payment of the rent in which judgment was given on 19 January 2005 for possession of those premises together with a sum for unpaid rent and other matters amounting to £32,224.

[2] Earlier this year, for reasons that I will explain later, the patience of Her Majesty's Revenue and Customs (Enforcement and Insolvency Service) ("the Revenue") became exhausted and a winding-up Petition was issued on its behalf on 18 May. That step appears to have belatedly galvanised the Directors into a degree of long overdue activity with the result that a proposed company voluntary arrangement ("CVA") was put forward on 22 June 2005. At an adjourned meeting of creditors held on 2 August 2005 the proposed resolution did not receive the necessary level of support and was accordingly rejected. Among the largest creditors Inland Revenue and Customs and Excise both voted against the proposal whereas the Sports Council voted in favour subject to certain safeguards.

[3] Arrangements for the hearing of the winding-up Petition were then put in train and the matter was listed to be heard before Master Redpath on 30 August. However, on 26 August the present petition was issued seeking the making of an administration order under Article 21 of the Insolvency (Northern Ireland) Order 1989 ("the Order"). By virtue of Article 23(1) (a) of the Order the presentation of a petition for an administration order has the effect of preventing the making of an order for the winding-up of a company and the hearing of that application was accordingly adjourned by the Master on 30 August to await the outcome of the present proceedings.

The Basis for the Petition

[4] The Court has power to make an administration order in relation to a company if it is:

(a) satisfied that a company is … unable to pay its debts (within the meaning of Article 103,) and

(b) it considers that the making of an order under this Article would be likely to achieve one or more of a number of specified purposes. Those purposes are:

(i) the survival of the company, and the whole or any part of its undertaking, as a going concern;

(ii) the approval of a voluntary arrangement under Part II of the Order;

(iii) the sanctioning under Article 418 of the Companies Order of a compromise or arrangement between the company and any such persons as are mentioned in that Article; and

(iv) a more advantageous realisation of the company's assets than would be effected on a winding-up.

In this case the grounds relied upon in the petition are those in (i), (ii) and (iii). The purpose described in (iv) was not included in the petition for the rather obvious reason that the Company effectively has no realiseable assets. While the purpose at (iii) is included in the petition it was not relied upon at the hearing and the case was advanced on the basis that purposes (i) and (ii) are those which are likely to be achieved if an order is made.

Preliminary Issue Relating to Jurisdiction

[5] The petition is described as being presented by "the directors and a creditor". Article 22 (1) of the Order provides that an application for an Administration Order "shall be by petition presented either by the Company or the directors or by a creditor or creditors … or by all or any of those parties, together or separately." Mrs Anyadike-Danes who appeared in support of the petition very properly drew attention to the fact that under the Company's Articles of Association the number of Directors shall not be less than three and the quorum of Directors for transacting business shall unless otherwise fixed by the Directors (which it has not been), be three. She pointed out that since the resignation some time ago of the third Director, a Dr Maurice Laverty, there have only been two Directors, a Mr David Cameron and a Mr Ivor Reilly. Attempts to replace Dr Laverty have been unsuccessful because of the understandable reluctance of others to become involved in what was rightly perceived to be a failed or failing business. Counsel submitted that nonetheless the Directors have a freestanding statutory right under Article 22(1) to bring the present application that is not dependent upon their powers under the Articles of Association. Furthermore, Mr Cameron is also a creditor of the Company and brings the application in that interest also. In their submissions Mr Gibson and Mr Dunford of counsel who appeared for objectors did not contend that the petition had not been validly presented and I conclude that the petitioner's counsel is correct in her submission and find that the petition has been validly presented.

The Evidence

[6] A report to the Court pursuant to rule 2.02 of the Insolvency Rules (Northern Ireland) 1991 dated 25 August 2005 was presented. It was prepared by David McClean of Messrs Moore, Stevens, Chartered Accountants, who in it signifies his consent, if appointed, to act as administrator. He was assisted in the preparation of the report by Darren Bowman who is the Director of the Business Recovery Insolvency Division of Moore Stevens and he gave evidence in support of the petition. The report included a cash flow projection indicating that the Company could trade free of debt for the next 12 months or one season and it was Mr Bowman's opinion based on that projection that it ought to be possible to make an improved CVA proposal within 9 to 12 months. The cash flow statement projects a

surplus at the end of twelve months' trading due to an injection of funds raised by a body known as the Friends of Coleraine ("the Friends"). The nature and activities of that group will be described later in this judgment but it should immediately be said that the provision on a permanent ongoing basis of sponsorship and donations from interested bodies and individuals would seem on the figures presented to the Court to be essential to the financial viability of the Company. Trading receipts alone would not be sufficient to enable the Company to balance its books.

[7] The essential thrust of the objection to the petition both by Mr Gibson on behalf of the Revenue and by Mr Dunford who appeared for Adrian Joseph Stewart, a creditor, was to the effect that, the Company having been mismanaged to the verge of extinction over an extensive period, there is no realistic prospect of its survival nor of its putting itself in a position to obtain approval to any revised voluntary arrangement and that the only consequence of allowing it to continue to trade would in all likelihood be that its debts would yet further increase. Dr Laverty, who as earlier mentioned had prior to his resignation been a Director of the Company and who is also a creditor, appeared in person. He was not opposed in principle to the continuation of the Company and was particularly supportive of the efforts of the Friends but expressed pessimistic views similar to those of Mr Gibson and Mr Dunford and was particularly concerned lest the present Directors be permitted to continue to be involved in the affairs of the Company since he believed that such involvement would not augur well for whatever prospects of recovery the Company might have.

[8] Mr Bowman sought to address those concerns by stating that if an administration order were made it would be Mr McClean's intention to dismiss the present Directors and to ensure that during the administration there would at all times be sufficient monies in hand to deal with at least the following two weeks' expenses of the Company including any liability for Income Tax, Corporation Tax, VAT or other debts incurred but not yet due for payment. In the event that the funds in hand fell below this level he would immediately return to Court. The witness was questioned closely by Messrs Gibson and Dunford about the projections contained in the report and his attention was drawn in particular to the fact that at the time of the June CVA proposal very different figures for projected income and expenditure in the coming twelve months were put forward. The explanation which he gave for this discrepancy was that the figures in the June proposal had been provided by the Directors whereas those of August came from the Friends and the basis for the latter was more detailed and better substantiated. He agreed that the June figures would not have led him to support an application for administration whereas the present figures did in his view justify that course. In his opinion the realisable value of the assets of the Company on a winding-up would be little or nothing. He agreed that the main thrust of the application must be to enable more money to be raised for the purpose of

putting forward an improved proposal for a CVA which would secure the requisite approval of creditors. The purpose of the survival of the Company was subsidiary though essential to that main purpose and he also agreed that the third ground included in the petition, namely Article 418, had not been given much thought. In re-examination Mr Bowman summarised his view of the various possibilities as follows:

(a) If administration is refused there will be no additional money for creditors.

(b) If administration were granted the Friends have already made provision for an additional £32,106 to be added to the amount that had been available for the June CVA proposal provided that such an augmented proposal were to prove acceptable to creditors.

(c) If, with the assistance of the Friends, the Club were able to get back on its feet there was the prospect of being able to propose a yet further enhanced CVA.

[9] Mr John Mairs, the Vice-Chairman of the Friends gave evidence that they had been active in soliciting support and sponsorship from well-disposed businesses and individuals anxious to see the football club continue in existence. They had received both pledges and cheques made out to the Friends and he provided to the court a schedule indicating pledges or cheques totalling £111,000 to date, £56,600 of which would be payable in the coming twelve months. He was questioned about the estimates of running costs and the discrepancy between those figures and those presented in last June's proposed CVA and explained that the figures now advanced were based upon actual figures obtained by the Friends directly and not through the Directors. He said that he did not consider that the present Directors should have any continuing role in the Company and that he was confident that all the sponsors who had pledged money to the Friends (as opposed to actually writing cheques) would honour their pledges in the amounts they had promised. He explained that the Friends had become actively involved in raising money to endeavour to secure the continuation of the Company when, contrary to what he had been led by Mr Reilly to expect, the June CVA proposal had been rejected by the creditors' meeting in August. He did not accept Mr Gibson's suggestion that the level of sponsorship and donations would inevitably decline in future.

[10] Dr Laverty emphasised that his principal concern was as to who would be running the Company if its business were to be allowed to go forward. He indicated that he had resigned in the knowledge that the quorum of directors under the Articles of Association is three and that his resignation would reduce the remaining number below that minimum with the object of bringing down the two remaining Directors. In the event they had continued

in office and the Company had, improperly in his view, continued to trade while its board was inquorate. Mr Dunford expressed similar concerns and sought a direct indication as to whether the Directors would resign or not and whether they would be involved in the future running of the Company. The response of Mrs Anyadike-Danes was that if they did not resign "they may be assisted".

[11] Mr Gibson called Mrs Bernadette McAuley, an Assistant Director of the Revenue who explained that she was the person with the responsibility of deciding whether or not to accept any proposed CVA. The June proposal had been rejected on three main grounds:

(a) The amount put forward was not attractive.

(b) The compliance history of the Company in persistently failing to make deductions of PAYE and account for them to the Revenue was most unsatisfactory. The Company had had difficulty in paying its PAYE over a period of years and following a Revenue inquiry the Company had said in about 2004 that it would appoint accountants to deal with the outstanding matters but had not done so. No returns had been made since the year ended April 2003 and a substantial amount in respect of PAYE, Corporation Tax and VAT is outstanding.

(c) A grave concern as to the ability of the Company to trade forward in a viable fashion. She pointed out that already there is a sum of £12,000 outstanding for PAYE in the current year. Since the Company has little or nothing in the way of assets it would continue to be be dependent upon sufficient monies being introduced by way of voluntary subscriptions and she doubted whether this could be achieved although she accepted the sincerity of Mr Mairs and had confidence in the firm of Moore Stevens. In her view a fresh CVA proposal improved to the extent predicted by the introduction of the £32,106 via the Friends was likely also to be rejected by the Revenue. She considered that the Revenue had in the past afforded the Company considerable leeway in an attempt to assist it to deal with its failures because it appreciated that the football club is a valued community resource but the Revenue must also have regard to its duty to act equitably in its approach to all taxpayers.

Submissions

[12] Mrs Anyadike-Danes submitted that on the evidence this is a proper case for the court to make an administration order. So far as the statutory requirements are concerned, it had been clearly established that the Company is unable to pay its debts and in her submission the court could properly consider that the making of an order would be likely to achieve the purposes in Articles 21(3)(a) and (b) of the Order (as set out at para. 4 above). If an

administration order were made there would be at least £32,000 in additional monies available for an improved CVA if such proved acceptable to the creditors and, if the Company succeeded in trading forward successfully, then further monies for the same purpose might well become available.

[13] Mr Gibson submitted that the evidence did not establish either that an improved CVA was likely to be approved given Mrs McAuley's evidence in that regard nor that the Company was likely to be able to trade forward successfully. He referred to the case of Re: Harris Simons Construction Limited [1989] 1 WLR 368 in which Hoffmann J (as he then was) had construed the expression "considers that the making of an order … would be likely to achieve" did not mean that the court has to be satisfied that "it is more likely than not" that one of the specified purposes will be achieved but rather imposed the less stringent requirement of considering "that there is a real prospect that one or more of the stated purposes may be achieved". Mr Gibson submitted that the reasoning of Peter Gibson J in Consumer and Industrial Press Limited [1988] BCLC 177 which posits a more stringent test is to be preferred. The test which that judge devised, but which was not adopted by Hoffmann J in Re: Harris Simons Construction Limited, was that the section did not mean that it is merely *possible* that such a purpose will be achieved, "the evidence must go further than that to enable the court to hold that the purpose in question *will more probably than not* be achieved". (emphasis supplied). Mr Gibson further submitted that if, contrary to his primary submission, the court did decide to make an administration order it should be very closely controlled and the company should not be allowed to be in administration indefinitely.

[14] Mr Dunford stated that his client was concerned to ensure the most effective method of his being repaid the monies due to him. He was concerned about the reliability of the material upon which the present application is based and in particular upon the figures which, given their significant variation from those used in the proposed June CVA, must be of dubious accuracy. His client was further concerned about the haste with which the proposal had been assembled. If time were afforded to enable his client to satisfy himself as to the robustness of the cash flow projections then he might be supportive of the proposal and his suggestion was that the use of the court's power under Article 22(4) to adjourn the hearing to enable further enquiries to be made and possibly the holding of a further creditors' meeting might be a preferable mode of proceeding. In agreement with Mr Gibson, his view was that if an immediate administration order were to be made the administration should be tightly controlled and either be restricted to one month's duration or at least made the subject of a report to the court within that period. He drew attention to a passage in *Corporate Administrations and Rescue Procedures* by Fletcher, Higham and Trower 2nd Edition where at para. 1.38 the authors suggest that if it is clear that whatever proposals an administrator puts forward are likely to be voted down at the initial creditors'

meeting the court may decline to make an administration order. He stressed the relevance of this passage in the context of the evidence of Mrs McAuley. However he also fairly pointed out that in the same paragraph the authors state that the court may appoint an administrator but require him to report back to the court within a short period so that the court can consider whether to allow the administration to continue or to order that the administration shall cease to have effect and discharge the order. In Mr Dunford's submission, if an immediate administration order were to be made in the present case an early report would be essential.

Decision

[15] I have not found this an easy matter to decide. Undoubtedly the business affairs of the Company have not been well conducted for some years past. Whether that has been due to carelessness, incompetence or dishonesty or a combination of some or all of these is not a matter upon which I have heard evidence nor does it fall to be decided in these particular proceedings although those may well be matters upon which adjudication will be required in the future. It is plain from the evidence of Mrs McAuley, which was given in a commendably professional and objective fashion, that in the past the Revenue has done all that it could reasonably have been expected to do to assist the Company to put its tax affairs in order. So far from doing so it has allowed matters to further deteriorate. It has also run up large debts with other bodies and individuals, including the present two Directors, which it has no prospect of paying except to the extent of a very small proportion.

[16] There is no doubt a strong public interest in the Coleraine area and further afield in seeing this long-established football club continue. That is not one of the specified purposes for whose achievement an administration order can be made, however sympathetic the court may be to the feelings of the club's supporters about the unhappy prospect of it having to go out of existence.

[17] What is however relevant and, in my view decisive, is the involvement of the Friends. Mrs McAuley generously acknowledged the evident sincerity of Mr Mairs, its Vice-Chairman, and I agree with her assessment. It is also clear that the Friends have in a short time done considerable effective work in assembling monies that will be potentially available for an improved CVA together with further monies to assist in the running of the Company should it be allowed to trade forward. The availability of those additional monies voluntarily promised or provided is an exceptional circumstance that derives from the considerable public interest in the club's survival to which I have already referred and which would not be present in the case of any ordinary commercial company. The cash flow projections, which seem to have been prepared on a more scientific and realistic basis than those associated with the June proposed CVA, underscore the fact that even if prudently managed in

future the Company cannot break even in the absence of significant ongoing sponsorship and donations. I accept Mr Mairs' evidence of the extent of the already promised donations described at para. 9 above and also the genuineness of his belief (which I hope will prove justified) that the pledges that comprise part of that total will all be forthcoming.

[18] However, looking at the history of this Company, the finely balanced cash flow projections and the significant permanent requirement for regular voluntary financial support, I would not find it possible to conclude that the survival of the Company and the whole or any part of its undertaking as a going concern will "more probably than not be achieved" I reach the same conclusion in relation to securing the approval of an improved CVA given Mrs McAuley's present view on that question. Therefore, if I were to accede to Mr Gibson's submission that I should adopt a "balance of probabilities" test rather than what Hoffmann J described as "a modest threshold of probability" I would feel it impossible to say that the statutory foundation provided for in Article 21 (1) of the Order for the making of an administration order had been laid.

[19] I have however concluded that, for the reasons given by him at p.370 of the report and which I need not repeat here, the approach and reasoning of Hoffmann J is to be preferred. Applying his "modest threshold of probability" to the facts of the present case I have concluded that it is crossed in respect of the purpose at Article 21(3)(a) of the Order. I have less confidence in my finding that it is also satisfied in respect of the purpose at Article 21(3)(b) given Mrs McAuley's present attitude. Having said that, it may be that, if the purpose at (a) is achieved and more funding becomes available and also, importantly, if the Company regularises its tax and VAT affairs and meets its obligations going forward, the Revenue may come to feel it appropriate to take a more positive attitude to an improved future proposal.

[20] My decision has also been contributed to by the assurances from Mr Bowman that if an administration order is made the Company will not be allowed to trade forward in an insolvent manner and, in particular, that if the resources in the hands of the administrator are at any time insufficient to discharge current liabilities together with anticipated liabilities for the ensuing fortnight then the matter will immediately be referred back to the court. There is much force in the submission by Mr Gibson supported by Mr Dunford that the fragility of this Company and its ongoing dependence upon promises of gratuitous financial support mean that it requires the closest possible supervision both by the administrator and by the court. I invited all counsel to discuss what provisions ought to be incorporated in an administration order, in the event that one were made, in order to ensure the necessary high level of control and supervision. I am grateful to Messrs Dunford and Gibson for co-operating and reaching agreement with Mrs Anyadike-Danes in that process notwithstanding their fundamental

submission that no administration order should be made and after careful consideration I have incorporated all their agreed suggested terms in the order that I now make.