

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF THE SPIRIT OF ENNISKILLEN TRUST

IN THE MATTER OF CHARITIES ACT (NI) 1964

IN THE MATTER OF TRUSTEE ACT (NI) 1958

BETWEEN:

DENIS STEWART and others

Plaintiffs;

-and-

HER MAJESTY'S ATTORNEY GENERAL FOR NORTHERN IRELAND

Defendant.

DEENY J

[1] The plaintiffs herein are the trustees of the Spirit of Enniskillen Trust. On foot of the affidavit of Denis Stewart of 14 May 2013 they set out convincing reasons for concluding that this charitable trust, set up in 1997 on a cross-community basis in memory of the dreadful bombing at Enniskillen in 1987, is now insolvent.

[2] Mr Michael Arlow has averred that The Trust won an award as Guardian Charity of the Year in 2011. But the financial statements to 31 March of that same year show that its cash resources were by then depleted. It had five employees, which had seemed reasonable to the Trust when it received block grants from the International Funds for Ireland, government departments in Northern Ireland and other bodies. A change in funding had led to more project funding which was less suitable to these arrangements. It has to be said that the Trust does not seem to have altered its staffing to reflect that changed funding approach.

[3] The staff members were paid superannuation by the Trust. As was common in charities in Northern Ireland in and around 2000 these arrangements provided for pensions for the employees on the basis of their final salary at a credit of one year's pension for every one of sixty years i.e. building up to a pension of two-thirds of final salary if 40 years' service had been given. These pension arrangements were with the Northern Ireland Charities Pension Scheme. The terms of that scheme provide that if one of the participating charities ceases to contribute the liabilities fall on the remaining members of the scheme. The court was told that the Scheme closed to new members in 2009.

[4] The accounts to 31 March 2011 disclosed a contingent liability to that fund of £98,000. While the trustees were apparently aware of this and the funding trends described above they had hitherto been somewhat relaxed about this developing situation, in part because the Trust owned its offices at 97 Malone Avenue, Belfast. This building had been bought in the year 2000 in the sum of £215,000. At the height of the property boom it would have been worth considerably more. It is now estimated to be worth £180,000 to £190,000.

[5] From the minutes of the Trust it would appear that the then Director, who retired shortly afterwards, did not put forward to the trustees any proposal to increase income or reduce expenditure to address these pending difficulties.

[6] The financial statements for the year ending 31 March 2012 were subsequently prepared and put before the trustees in June 2012. They showed that the contingent liability to the NI Charities Pension Scheme had now increased sharply to £232,000. This was in part due to the difficulties of the North Belfast Partnership, another charity in the Scheme, adding to the liabilities of others. Meanwhile the value of this Trust's principal asset had fallen and its income had fallen. The pension exposure was confirmed by a letter from the Pension's Trustee in July 2012. The trustees consulted experienced insolvency solicitors but only in November 2012. The Trust ceased to operate following a Resolution of the Trustees of 14 March 2013 and made its staff redundant. The Pension's Trustee now assesses the pension's liability at £289,827, which clearly exceeds the Trust's assets.

[7] There is now in place a Charity Commission for Northern Ireland with duties in respect of the supervision of charities. The Attorney General, who was helpfully represented at the hearing before me by Ms Ellison of counsel, intends to liaise with the Commission on the circumstances that have arisen here. He did not, however, oppose the application of the plaintiffs. His counsel invited the court "to shine a spotlight" on these events.

[8] The application is to appoint Mr John Gordon, solicitor, of Napier and Sons as liquidator and/or trustee of the Trust for the purposes of winding it up. I have considered whether that appointment should be conditional on Mr Gordon reporting to the court on whether there was any neglect or default on the part of the trustees pursuant to Section 31 of the Trustee Act 1958. If there was such neglect or

default that would expose a trustee to liability, although, pursuant to Section 61, if he or she “has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.”

[9] It may well be, with hindsight, that the Trust should have left the Scheme in 2011 paying the sum of £98,000 and should have altered the terms and conditions of any continuing employees thereafter by agreement or made some or most of them redundant. The trust could then have survived in altered form with the co-operation of its principal funders. As I have said no significant steps were taken. However, I do not direct Mr Gordon to investigate these matters. I do so partly because of the statutory role of the Charity Commission and partly because counsel for the plaintiffs, Mr William Gowdy, in his learned submissions, adverted to the personal liability the plaintiff trustees are now under for any deficit in the pension arrangements for their former employees.

[10] There is no express provision for the application before the court under the Insolvency Order 1989. Counsel located a decision of Sir Andrew Morritt V.C. in Butts Park Ventures (Coventry) Limited v Bryant Home Central Limited [2003] EWHC 2487 (Ch). That case involved the former Coventry Football Club (Rugby Union). It was an unincorporated association which had got into difficulties. In 1998 a deputy High Court Judge of the Chancery Division ordered it to be wound up under the court’s general equitable jurisdiction. He appointed two joint liquidators and conferred on them “the powers set out in Schedule 1 to this Order for the purpose of acting as joint liquidators”. Such powers closely followed those set out in Schedule 4 to the Insolvency Act 1986. This appointment was attacked by counsel for Bryant but the Vice-Chancellor rejected those submissions. He concluded that the court was entitled to wind up the unincorporated association under its inherent jurisdiction and to attach to those persons charged with the winding up “such name, description or label as it thinks fit”.

[11] Neither counsel for the plaintiffs nor counsel for the Attorney was able to suggest any good reason why I should not rely on this authority as a precedent for the application by the plaintiffs in respect of a charitable trust. I am satisfied that I should do so to provide a just and effective remedy at this time.

[12] It was apparent from the papers that the ownership of the property was vested in trustees at the time of acquisition none of whom are now trustees. For the avoidance of doubt I propose to appoint Mr Gordon not only as liquidator under the court’s general equitable jurisdiction but as trustee and to vest in him pursuant to Section 43(1) (a) of the Trustee Act (Northern Ireland) 1958 all the property currently held by the Spirit of Enniskillen Trust including and in particular 97 Malone Avenue, Belfast. He is to realise the assets of the Trust and distribute the same according to law. He is to have the powers of a liquidator appointed by the court as set out in Schedule 2 to the Insolvency Order (NI) 1989.

[13] I feel some sympathy for the non-pension creditors of this trust. I give Mr Gordon leave to apply to the court in chambers with regard to distributing the assets of the Trust if it would assist in this regard.

[14] This case obviously raises questions regarding the operation of the Northern Ireland Charities Pension Scheme which go beyond the particular case and upon which I will not comment. Suffice it to say that it acts as a warning to trustees of charities to be alert to take active steps to address any threats to the solvency of a trust in a timely and expeditious way. This, of course, should be the advice they are getting from their own chief executives or finance directors. I reach no conclusion on those individuals here, who in any event have, at least in one case, changed recently, but it is right to mention that such persons, although working in admirable endeavours, will inevitably be in a conflict of interest situation where their own personal interests will favour remaining employed and members of this valuable scheme but where the best interests of the Trusts may be directly contrary. Trustees would be well advised to bear this in mind.