THE HIGH COURT

[2022] IEHC 495

Record No. H:IS:HC:2021:000726

H:IS:HC:2021:000727

IN THE MATTER OF PART 3, CHAPTER 4 OF THE PERSONAL INSOLVENCY ACTS 2012-2021
IN THE MATTER OF THOMAS COLTON OF THE PARK, ST WOLSTON ABBEY, CELBRIDGE, KILDARE
AND
IN THE MATTER OF LINDA COLTON OF THE PARK, ST WOLSTON ABBEY, CELBRIDGE, KILDARE
("THE DEBTORS")
AND
IN THE MATTER OF APPLICATIONS PURSUANT TO SECTION 122 OF THE PERSONAL INSOLVENCY ACTS 2012

JUDGMENT of The Hon. Justice Alexander Owens delivered on the 18th day of July 2022

1. On 7 February 2022 the High Court confirmed Personal Insolvency Arrangements (the Arrangement(s)) for Thomas Colton and his wife, Linda Colton under s.115A(9) of the Personal Insolvency Act 2012 (the 2012 Act). These applications have been brought by their personal insolvency practitioner under s.122(1) of that Act to terminate the Arrangements because of admitted failure to disclose a Spanish property transaction. A creditor which holds security over the Irish residence of Thomas Colton and Linda Colton has joined in these applications.

2. This type of application may be brought a personal insolvency practitioner of a debtor or a creditor at any time during which a Personal Insolvency Arrangement is in effect.

3. The grounds on which a court may terminate a Personal Insolvency Arrangement are limited by s.122(1) of the 2012 Act to the following:

   "…(a) a material inaccuracy or omission exists in the debtor's Prescribed Financial Statement which causes a material detriment to the creditor; (b) the debtor, when the Personal Insolvency Arrangement was proposed, did not satisfy the eligibility criteria specified in section 91; (c) the debtor did not comply with the duties and obligations imposed on him or her under the Personal Insolvency Arrangement process; (d) the debtor has since the coming into effect of the Personal Insolvency Arrangement been convicted of an offence under this Act; (e) the debtor is in arrears with his or her payments for a period of not less than 3 months; (f) the debtor has failed to carry out any action necessary to enable a term of the Personal Insolvency Arrangement to have effect; (g) the debtor has unreasonably refused to consent to a variation of the Personal Insolvency Arrangement."

4. The only stateable ground relied on by the personal insolvency practitioner in these applications is that specified in s.122(1)(c) of the 2012 Act. While the personal insolvency practitioner referred to inaccuracies in the in the Prescribed Financial Statements, the ground specified in s.122(1)(a) is only available to a creditor.

5. The other grounds of application are available to the personal insolvency practitioner. It is not necessary for me to decide in these applications whether these grounds are also available to a creditor.

6. There is a degree of overlap between the provisions of s.122(1)(a) and (c) of the 2012 Act. Failure by a debtor to adhere to statutory obligations of good faith and full and honest disclosure will often result in material inaccuracies or omissions in a Prescribed Financial Statement. These may materially adversely affect creditors. However, it is not necessary for a creditor who relies on s.122(1)(a) to establish that a material inaccuracy or omission in a Prescribed Financial Statement resulted from breaches of debtor duties of good faith and honesty.

7. The phrase "…a material inaccuracy or omission exists in the debtor's Prescribed Financial Statement which causes a material detriment to the creditor…" in s.122(1)(a) of the 2012 Act connotes a relationship between an inaccuracy or omission as cause and detriment as effect. It must be demonstrated by the creditor that inaccuracies in or omissions from the Prescribed Financial Statement have caused material detriment to that creditor because of the manner in which the resulting Arrangement affects that creditor.

8. The test for materiality is whether the inaccuracy or omission is likely to have made a difference to the way the creditor or the court, where relevant, considered and assessed the terms of the proposal. The creditor must also show material detriment. It is sufficient for the creditor to establish that, objectively assessed, their position as a result of the Arrangement is materially detrimentally affected. The loss to a creditor of a small advantage would not count for much. When examining this issue, a court can look at the likely shape of an Arrangement which would have passed muster with the body vested with power to approve if the true position was known at the time of the proposal.

9. A submission was made that the personal insolvency practitioner could rely on failure to satisfy eligibility criteria under s.91 of the 2012 Act if evidence demonstrated that statutory declarations of the debtors, as required by s.91(1)(e) of the 2012 Act "…confirming that the [Prescribed Financial Statement] is a complete and accurate statement of the debtor's assets, liabilities, income and expenditure" were incorrect to the knowledge of the debtors.

10. I do not accept this. Once this statutory declaration is made, the formal requirement which satisfies this element of eligibility criteria under s.91 of the 2012 Act is met. The basis of any complaint that a debtor made that declaration dishonestly is that "…the debtor did not comply with the duties and obligations imposed on him or her under the Personal Insolvency Arrangement process." This ground is set out in s.122(1)(c) of the 2012 Act.

11. Some of the grounds on which a court may terminate a Personal Insolvency Arrangement relate to matters relevant to the circumstances in which that Arrangement came to be approved. Others relate to conduct of a debtor during the course of an

Arrangement. Section 122(3) of the 2012 act gives a court hearing an application under s.122(1) three options. It "…may- (a) dismiss the application, (b) terminate the Personal Insolvency Arrangement, or (c) order that the personal insolvency practitioner prepare a proposal for a variation of the Arrangement in accordance with section 119."

12. It is unclear whether s.122(3)(c) of the 2012 Act applies to Arrangements confirmed under s.115A(9) of that Act. By s.119A(1), variation of this type of Arrangement is permitted "…in accordance with its terms and subject to this section."

13. Section 119A(2) of the 2012 Act incorporates the provisions of s.119(2) to (5) and (6)(a) and (b) into s. 119A of that Act. One effect of this is that a personal insolvency practitioner only has power to propose a variation of a s.115A Arrangement "…where- it appears …that there has been a material change in the debtor's circumstances, …"

14. Section 122(3)(c) of the 2012 Act allows a court to override the power of a personal insolvency practitioner to initiate a variation process. Review may be an alternative to an order terminating an Arrangement in an appropriate case. This might happen as a result of some change in circumstances of a debtor for the better or for the worse during an Arrangement which makes variation appropriate.

15. I have concluded in these applications that the appropriate and proportionate course is to terminate the Arrangements. The evidence demonstrates significant omissions from the Prescribed Financial Statements which misled the applicant secured creditor into agreeing to Arrangements which caused material detriment to that creditor. These omissions also involved serious non-compliance by the debtors with duties of good faith and full and honest disclosure in the Personal Insolvency Arrangement process.

16. The statutory system which gives debt relief is conditioned on honesty of debtors. Debtors must fully disclose their affairs and put their best foot forward to meet their commitments in accordance with their means. If courts do not uphold these standards, statutory provisions designed to safeguard creditors and public interest in a rigorous process which is subject to meaningful judicial oversight are set at nought.

17. Even I have jurisdiction under s.122(3)(c) of the 2012 Act to direct a variation in accordance with s.119 of that Act as an alternative to granting an order terminating the Arrangements, I would not be disposed to exercise such a power in these applications for three reasons.

18. Firstly, the non-disclosures by the debtors are so significant as to make it impossible to conclude that they deserve a second chance in the form of some sort of revised Arrangements.

19. Secondly, any variations which might pass muster would involve such significant changes as to be, in substance, new Arrangements. This result would be contrary to the policy of s.90 of the 2012 Act which specifies that a debtor may enter a Personal Insolvency Arrangement once only.

20. Thirdly, the affidavits of the debtors do not show a clear path forward which could produce a result which is fair to creditors.

21. It is appropriate to make some general comments. Provisions in the 2012 Act make clear that the approved forms which debtors must complete are framed with a view to promoting public confidence in the operation of statutory schemes which may lead to a measure of debt forgiveness. This public confidence is achieved by a statutory requirement that a debtor applying for relief makes full and honest disclosure of his or her affairs, using the forms provided.

22. The long title to the 2012 Act specifically refers to "…the need to enable creditors to recover debts due to them by insolvent debtors to the extent that the means of those debtors reasonably permits, in an orderly and rational manner..." Courts given powers of confirmation or other oversight must ensure adherence to this policy of the law where it is relevant to exercise of discretion.

23. The means of a debtor to repay creditors may be derived from a business controlled by that debtor. Courts, when exercising powers under ss.115A, 120, and 122 of the 2012 Act, are concerned to ensure that disclosures mandated law give sufficient information about the capacity of any such business to contribute to the assets or income of a debtor. Any proposal for an Arrangement should be based on full assessment by a personal insolvency practitioner of the potential role of such a business as part of the financial resources of a debtor.

24. In cases within s.115A of the 2012 Act, evidence must establish that the Arrangement will provide a return for creditors which the means of the debtor reasonably permit. Where a creditor objects to an Arrangement, failure to disclose relevant information in the statement of affairs in the form of the Prescribed Financial Statement, which is referred to in s.120(c), may enable that creditor to show material detriment on the basis that the means of the debtor were not fully taken into account.

25. The evidence shows serious failures by Thomas Colton and by Linda Colton to disclose information relevant to their means during the process which led to confirmation of the Arrangements. It is most unlikely that this Court would have confirmed the Arrangements if the information now available had been revealed. The Arrangements were premised on salary figures provided by Thomas Colton and Linda Colton being the means available to them to meet living expenses and mortgage commitments.

26. It is impossible to form any reliable view the means of Thomas Colton and Linda Colton to make repayments to creditors from business receipts. All that can be said is that business receipts having a value in excess of twenty-two times that of the amount made available for unsecured creditors under the Arrangements have been used to buy and refurbish a villa in Lanzarote, Spain.

27. The information now disclosed makes nonsense of figures for gross and net monthly salary or earnings of Thomas Colton and Linda Colton which are set out in their

Prescribed Financial Statements and in the Arrangements. These figures did not give a true and fair view of the means available to them to repay creditors.

28. Thomas Colton and Linda Colton appointed Eugene McDarby as their personal insolvency practitioner. After the statutory consultation process, they completed Prescribed Financial Statements under s.50 of the 2012 Act on 15 September 2021. They then sought protection from creditors. They did not disclose in their Prescribed Financial Statements that they had just bought a villa in Lanzarote or identify the cost of the property or the status of their ownership of that property or the loan which they had obtained to buy the property or the Spanish bank account which was opened to service this asset.

29. They failed to disclose that the Company provided significant funding for this purchase. They failed to correct all these omissions in their statements of affairs for creditors accompanying proposals for the Arrangements. By this stage significant further money had been spent on renovating the villa. Their statements of affairs should have disclosed these further activities.

30. The Arrangements advise that both debtors are employed by Grá agus Solas UC (the Company). Thomas Colton's gross monthly salary or wages are recorded in his Prescribed Financial Statement as €5,276.79. Linda Colton's gross monthly salary or wages are recorded as €5,524.34. The Arrangements record net total monthly income as €2,601.49 for Thomas Colton and €2,601.49 for Linda Colton. The Arrangement for Linda Colton states that she "is employed as Accounts Administration". The Arrangement for Thomas Colton states that he "is employed as an Operations Manager". It is unclear whether creditors were aware of their ownership and management role in the Company.

31. Thomas Colton and Linda Colton were obliged at the outset of the process under the 2012 Act to disclose everything relevant to their capacity to repay indebtedness from current and future income or other resources. Their income came from wages paid through the Company. The wages figures did not necessarily equate with their means. Information indicating their true means was central to acceptability of the Arrangements.

32. The Company arranges spiritualist weddings. Linda Colton is the sole member. She holds two issued shares in the capital of the Company. She is also a director. The evidence indicates that the other director does not take an active role in the company.

33. As liability of members of the Company to contribute in the event of winding up is unlimited, its solvency is relevant to financial commitments of Linda Colton. Thomas Colton and Linda Colton run the Company and set its shareholder and employee remuneration policy. They determine whether profits will be retained and whether directors or others get value or benefits.

34. If they decided during the Arrangements to pay themselves more than the amounts disclosed as income in the Arrangements, then 50% of additional net monthly income in excess of €100.00 would become payable to the personal insolvency practitioner for distribution to unsecured creditors. This is provided for in Clause 12 of the standard terms of the Arrangements.

35. Thomas Colton and Linda Colton do not have to give themselves pay rises. However, success of the Company and choices which they make to retain profits within it or receive benefit in other ways may result in material changes in their circumstances which may result in applications to vary the Arrangements under s.119A of the 2012 Act.

36. Applications under s.119A of the 2012 Act arising from material changes in circumstances or increases in salary resulting in payments for the benefit of unsecured creditors under Clause 12, were unlikely to happen because of the short duration of the Arrangements. If Thomas Colton and Linda Colton did not disclose earning capacity in excess of their salaries as indicated in the documents leading to the Arrangements, the prospect of their being required to pay more into the Arrangements would be remote and purely theoretical.

37. The Arrangements reduce the secured capital sum on a charge on the family home in favour of Mars Capital Ireland DAC (Mars) from €678,500 odd to €640,000. This lower sum was the agreed value of their home. The difference is treated as unsecured debt. Mars agreed to this. The total restructured monthly mortgage payment is reduced to €2,673.06.

38. Where other charged properties are sold, relevant creditors are treated as unsecured for post-realisation shortfalls. Unsecured creditors owed €2,881,000 odd are to receive once-off nominal payments representing 0.19% and 0.27% of debt. These payments are funded by once-off contributions from family into the Arrangements totalling €15,000. This also funded the fees of the personal insolvency practitioner.

39. The duration of the Arrangements is 12 months. The return for unsecured creditors under the Arrangements is so close to zero as to make no difference from what the outcome would be if Thomas Colton and Linda Colton became bankrupt.

40. Any court asked to review a proposed Personal Insolvency Arrangement under s.115A of the 2012 Act is concerned that the proposal will "…enable the creditors to recover debts due to them to the extent that the means of the debtor reasonably permit…" (see s.115A(9)(b)(ii)). The words "the means" refers to financial resources of whatever sort, including business assets which are sources of potential capital or income.

41. Where a debtor is reliant on income from a business it will usually be appropriate to provide more than basic details of gross and net salary in the Prescribed Financial Statement and other documents leading to creditor approval or court confirmation of an Arrangement. It is necessary to disclose enough information to enable correct

assessment of the capacity of the business to fund drawings or distributions from capital or income. An Arrangement may include measures to counter capacity of an entity controlled by a debtor to retain profits or adopt other strategies to reduce availability of contributions for the benefit of creditors.

42. Sections 49(1) and 50(1) of the 2012 Act set out obligations of any debtor who wishes to become a party to a Personal Insolvency Arrangement under Chapter 4 of that Act and after a personal insolvency practitioner has been appointed under s.49(3) of that Act.

43. Section 49(1) of the 2012 Act specifies as follows:

> "(1) A debtor…shall submit to a personal insolvency practitioner a written statement disclosing all of the debtor's financial affairs, which statement shall include- (a) such information as may be prescribed in relation to- (i) his or her creditors, (ii) his or her debts or liabilities, (iii), his or her assets, and (iv) guarantees (if any) given by the debtor in respect of a debt of another person, and (b) such other financial information as may be prescribed."

44. This provision imposes an obligation to disclose all of a debtor's financial affairs, including the prescribed information set out in The Personal Insolvency Act 2012 (Written Statement Disclosing All of the Debtor's Financial Affairs) Regulations 2015 (S.I. No. 416 of 2015) (the Regulations of 2015). The disclosure obligation is not confined to the information specifically prescribed in the Regulations of 2015.

45. Information thus disclosed forms the basis on which a debtor engages in a preliminary way, prior to formal appointment of a personal insolvency practitioner under s.49(3) of the 2012 Act. Section 49(2D)(e) refers to a statutory policy objective of promoting public confidence in the operation of processes under the 2012 Act. This policy objective is also referred to in ss.27(2D)(e) and 161(1) of the 2012 Act. This policy objective applies to the power of the Insolvency Service to make regulations.

46. The Insolvency Service is obliged by s.49(2D)(e) of the 2012 Act to have regard to "the need to ensure that public confidence in the operation of the Debt Settlement Arrangement and Personal Insolvency Arrangement processes is maintained" in making any regulations prescribing financial information to be provided by debtors under s.49(1).

47. Section 50(1) of the 2012 Act provides as follows:

> "As soon as practicable after the personal insolvency practitioner has been appointed under section 49(3), the debtor shall provide information that fully discloses his or her financial affairs to the personal insolvency practitioner."

48. Section 50(2) of the 2012 Act provides as follows:

> "The personal insolvency practitioner, on receipt of the information referred to in subsection (1), shall examine that information, and having regard to the obligation of the debtor under subsection (3), assist the debtor in completing a Prescribed Financial Statement."

49. Section 50(3) of the 2012 Act provides as follows:

> "The debtor, when completing the Prescribed Financial Statement referred to in subsection (2), is under an obligation to make a full and honest disclosure of his or her financial affairs and to ensure that, to the best of his or her knowledge, the Prescribed Financial Statement is true, accurate and complete."

50. This refers to disclosure in the Prescribed Financial Statement. The Prescribed Financial Statement is a core document in the statutory scheme for Debt Settlement and Personal Insolvency Arrangements. On receipt of an instruction by a debtor to prepare a proposal for an Arrangement under s.53 of the 2012 Act, the personal insolvency practitioner must complete a statement confirming that practitioner's opinion that the Prescribed Financial Statement is complete and Accurate. This opinion can only be formed if the personal insolvency practitioner has made all appropriate inquiries to ensure the completeness and accuracy of its contents.

51. In the Arrangements, "…full and honest disclosure of … affairs…" in the processes leading to the Arrangements included full and honest disclosure of the financial affairs of the Company. The financial affairs of the Company were one and the same thing as the financial affairs of Thomas Colton and of Linda Colton. They were obliged to make full disclosure of these matters to their personal insolvency practitioner.

52. The personal insolvency practitioner was obliged to make enquiry relating to the affairs of the Company as part of his obligation to "examine" information and assist Thomas Colton and Linda Colton in completing their Prescribed Financial Statements under s.50(2) of the 2012 Act. They were obliged by s.50(3) "…to make a full and honest disclosure of their affairs and to ensure that, to the best of (their) knowledge the Prescribed Financial Statement is true, accurate and complete."

53. Even if they had used the Company as the direct vehicle to buy and hold the Spanish property, this transaction should have been disclosed as it was part of "their affairs". This property was part of the fixed assets of the Company. The activities of the Company and resources deployed the purchase of this property had a direct bearing on the means of Thomas Colton and Linda Colton and it was necessary to set out the true position in the Prescribed Financial Statement.

54. It was also necessary to form some view of the value of Linda Colton's shareholding in the Company in the Prescribed Financial Statement. That shareholding should have been disclosed in her assets with an appropriate explanatory comment. Disclosures mandated by S.50(3) of the 2012 Act should have been made in the appropriate "Comment" columns of the Prescribed Financial Statement form, as provided for in the

Personal Insolvency Act 2012 (Prescribed Financial Statement) Regulations 2014 (S.I 259/2014) (the Regulations of 2014). The current form is prescribed by the Personal Insolvency Act 2012 (Prescribed Financial Statement) (Amendment) Regulations 2022 (S.I. No. 228/2022).

55. Any potential calls on her to contribute in a winding up as a member of the Company should have been disclosed in her prospective debts with the appropriate explanatory "Comment", as allowed for by the 2014 Regulations.

56. Disclosure of capacity of the Company to fund drawings was also necessary. This information was relevant to the monthly salary or wages figures given by Thomas Colton and Linda Colton in their Prescribed Financial Statements. The "Comment" column in the Regulations of 2014 allowed both Thomas Colton and Linda Colton to explain that their salaries or wages were derived from the Company and that it was controlled by them.

57. There was nothing in the format of the Regulations of 2014 which in any way prevented or inhibited "full and honest disclosure of …financial affairs" by debtors who wanted to make such disclosure. Debtors were obliged to provide as much "comment" in their Prescribed Financial Statements as was necessary to comply with their obligations to make full disclosure.

58. While a debtor has an obligation to provide accurate information in a Personal Financial Statement, failure to do so is not necessarily fatal to a subsequent Arrangement. Sometimes an important matter such as a liability to a creditor may have been overlooked. Information may subsequently become available which shows that a Prescribed Financial Statement is inaccurate in some respect.

59. Where an error comes to light, it must be corrected in the statement of affairs referred to in ss.107(1)(a) and 120(c) of the 2012 Act. This "…completed statement of the debtor's financial affairs, showing the debtor's position of insolvency, in the form of the Prescribed Financial Statement" is one of the documents provided to creditors prior to a creditors' meeting to consider any proposed Arrangement. The same prescribed form is used, and any appropriate explanations can be provided in the appropriate "Comment" columns. It is essential to update information provided in a Prescribed Financial Statement to reflect the true financial position of a debtor at the time of the statement of affairs.

60. Other relevant sections of the 2012 Act which have a bearing on duties of debtors engaging in the processes under the 2012 Act to be candid in relation to their affairs are s.91(1)(e) which I have already referred to and s.118(1), (2), and (3) which provide as follows:

> "(1) A debtor who participates in any process under this Chapter is under an obligation to act in good faith, and in his or her dealings with the personal insolvency practitioner concerned to make full disclosure to that practitioner of all

of his or her assets, income and liabilities and of all other circumstances that are reasonably likely to have a bearing on the ability of the debtor to make payments to his or her creditors.

(2) A debtor who participates in any part of the process of applying for or operating a Personal Insolvency Arrangement shall co-operate fully in the process, and in particular comply with any reasonable request from the personal insolvency practitioner to provide assistance, documents and information necessary for the application of the process to the debtor's case or the carrying out of the personal insolvency practitioner's functions, including any debt, tax, employment, business, social welfare or other financial records.

(3) A debtor in respect of whom a Personal Insolvency Arrangement is in effect is under an obligation to inform the personal insolvency practitioner as soon as reasonably practicable of any material change in the debtor's circumstances, particularly an increase or decrease in the level of the debtor's assets, liabilities, or income, which would affect the debtor's ability to make repayments under the Personal Insolvency Arrangement."

61. The Prescribed Financial Statement for Linda Colton did not disclose her shareholding in the company. Thomas Colton has deposed on affidavit that his personal insolvency practitioner was aware of his wife's shareholding in the company. Correspondence which he exhibits confirms this.

62. I do not have material which would allow me to form a view on the information made available to the personal insolvency practitioner when the Prescribed Financial Statements and the proposed Arrangements and accompanying statements of affairs were prepared. I assume that the figures appearing in these documents for gross and net monthly income were verified by material given to the personal insolvency practitioner. It is clear from what has since emerged that these figures did not give anything like a full picture of the means potentially available to Thomas Colton and Linda Colton.

63. Following the approval of the Arrangements it emerged that Thomas Colton and Linda Colton, using the Irish versions of their names, were registered with Spanish land title authorities as owners of the villa in Lanzarote on 1 September 2021 and that they had borrowed €178,500 from a Spanish Bank on the security of this asset to assist in funding its purchase. This came to light as a result of an investigation by a journalist.

64. It is difficult to understand why a provider of spiritualist wedding services-controlled Thomas Colton and Linda Colton bought and renovated for letting a holiday villa in Lanzarote. An explanation proffered was that the villa in Lanzarote was bought in trust for the company as an investment of deposits taken for weddings but not treated as income of the company for accounting purposes.

65. The affidavits do not adequately explain why it was necessary for the Spanish property to be vested in Thomas Colton and Linda Colton personally. If the Company was running the spiritualist wedding business, demonstration to the Spanish bank of capacity to service the loan should have shown the Company as the source of funds and of capacity to repay the loan. There is no indication that the Spanish bank was made aware that the property was being bought in trust for the Company. Loan finance seems to have been advanced on proof of capacity to repay based on receipts by Thomas Colton and Linda Colton. Their affidavits are vague on this.

66. The affidavits and exhibits demonstrate that Thomas Colton has business experience and some knowledge of accountancy matters. He has exhibited a balance sheet and some other information relating to activities of the Company in 2021. I infer that he has prepared this document himself.

67. He has not exhibited full accounts of the Company for the year ended 31 December 2021 or any accounts for any earlier year. No profit and loss account or statement of affairs has been provided. I am unable to come to any view on the large figures appearing in the balance sheet for goodwill and amortisation of goodwill. While I understand that deposits in relation to services not yet provided should be treated in accounts as liabilities and not receipts, use of money held to meet these liabilities in acquiring land seems inconsistent with proper accounting policy relating to deposits.

68. I was not given enough information to enable any reliable assessment of the financial state of the company or its capacity to fund payments and other benefits for its controllers.

69. A spending spree on Spanish property and renovations was taking place while the personal insolvency practitioner was formulating proposals for the Arrangements. The affidavits indicate that an investment of this was planned over a period in advance of the eventual purchase.

70. While all this activity was taking place in Lanzarote, Thomas Colton and Linda Colton were representing in the process under the 2012 Act that they were pulling the devil by the tail. They could only raise €15,000 to pay fees for the Arrangements and their unsecured creditors. They could not afford existing monthly mortgage payments

71. The affidavits state that the total cost of the property was €263,185 plus fees and taxes. The company has paid €226,778 to upgrade and renovate it. The property is said to be worth €400,000. If these figures are correct, the Company has spent €311,463 from its own resources in buying and renovating this property, plus the fees and taxes.

72. It is important to compare these figures with the outcome for creditors in the Arrangements. The total of amounts which unsecured creditors got in the Arrangements came to just in excess of €10,200.

73. The current estimated value of the Spanish property is over 39 times the amounts made available for these unsecured creditors in the Arrangements. The spending in buying and renovating the property is over 30 times this amount. This spending was over eight times the amount which Mars was prepared to write down to unsecured debt on the charge on the Colton family home.

74. In a letter dated 14 April 2022, Thomas Colton gave a different figure of €406,278 as total cost of the property and refurbishment. This would reduce the total spend from Company resources to €227,778. Taking this lower figure as the correct figure, the disparity between this sum and the Mars write-down is still very significant. It is also over 22 times the total amount made available for unsecured creditors.

75. While I am prepared to assume that the trust Arrangement is genuine and that it was necessary to proceed in this way to get loan finance, ability to fund these transactions points to control by Thomas Colton and Linda Colton of considerable assets within the Company.

76. For reasons already explained, I take the view that even on this benign view of the trust arrangement, Thomas Colton and Linda Colton were seriously remiss in not advising their personal insolvency practitioner of these transactions. They were obliged by law to provide as much information as was necessary to enable those examining their affairs and their creditors to form an accurate view of the value of their business and its capacity to contribute to the Arrangements. They should have provided a reliable business plan which addressed these issues.

77. If the information which was withheld had been made available, it is most likely that the structure of proposals to creditors would have been radically different to the Arrangements. It is unlikely that Mars would have agreed to any reduction in monthly payments, or a write-off of any element debt secured on the family home. It is likely that the duration of any Arrangements would have been longer and that they would have involved periodic payments over a period of years in line with funds available to the debtors, based on a proper statement of affairs and viable business plan for the Company.

78. It is likely that the Arrangements would have contained terms obliging the debtors to sell the Lanzarote property and repatriate net proceeds for eventual use in a lump sum payment to creditors and would not have provided for such massive write-offs of unsecured debt.

79. Mars and the personal insolvency practitioner have proved grounds under S.122(1)(a) and (c) of the 2012 Act which fully justify the making of an order terminating the Arrangements under s.122(3)(b). None of the alternative orders under s.122(3) are appropriate.