# THE HIGH COURT

**[2023] IEHC 149**

**[Record No. 2020/341COS]**

**IN THE MATTER OF PASRM LIMITED**

**AND**

**IN THE MATTER OF SECTION 212 OF THE COMPANIES ACTS, 2014**

**AND**

**IN THE MATTER OF THE COMPANIES ACTS, 1963-2014**

**BETWEEN**

**NEAL CYR**

**APPLICANT**

**AND**

**PLANITAS AIRLINE SYSTEMS LIMITED, LUKE MOONEY, PHILIP CONNELL, BRENDAN DELANEY AND PASRM LIMITED**

**RESPONDENTS**

**JUDGMENT of Mr Justice Mark Sanfey delivered on the 22nd day of March 2023.**

## Introduction

**1.** This judgment concerns an application by the respondents for an order pursuant to O.29, r.1 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of the court directing the applicant to provide security for the respondents' costs of the proceedings. The notice of motion issued by the respondents also seeks "…as necessary, an order fixing the amount of security for costs and stipulating the time within which such security is to be provided by the applicant…".

**2.** In the substantive proceedings, the applicant seeks numerous orders pursuant to s.212 of the Companies Act 2014. The primary relief sought by him is, in effect, for an order requiring the respondents to purchase his shareholding in PASRM Limited ('the company') at a price to be fixed by the court. The proceedings were initiated by an originating notice of motion issued on 21 October 2020. Between then and February 2021, there was a comprehensive exchange of affidavits between the applicant and the respondents, in which the respondents contested the allegations of the applicant fully, and set out their position in detail.

**3.** In this regard, the final affidavit sworn on behalf of the respondents by the second named respondent, Mr Luke Mooney, in relation to the substantive matter, was sworn on 21 January 2021, and a reply to this affidavit was sworn by the applicant ('the applicant' or 'Mr Cyr') on 9 February 2021. The respondents' motion for security for costs issued on 21 December 2020, grounded on Mr Mooney's affidavit of that date.

**4.** The application for security for costs was therefore initiated during the initial exchange of affidavits between the parties in the substantive matter. There was no indication to this Court either in submissions or in the papers that an application pursuant to O.75, r.4(1) of the Rules of the Superior Courts has been made to the court for directions as to the substantive proceedings, and in particular as to whether a

plenary hearing requires to be directed pursuant to O.75, r.4(3) and, if so, what directions as to pleadings or settling of issues may be necessary. It appears that further developments in the substantive proceedings await the resolution of the present application, particularly as the respondents, if successful, seek a stay on the substantive proceedings until security is furnished.

**5.** The security for costs motion itself involved an extensive exchange of affidavits and a two-day hearing, involving oral submissions by senior counsel on both sides, and very comprehensive written submissions.

**The substantive proceedings**

**6.** While the affidavits in the proceedings go into very considerable detail as regards the respective contentions of the parties, I propose to summarise the issues as concisely as possible in as far as they are relevant to the present application.

**7.** The plaintiff, in swearing his grounding affidavit of 12 October 2020, describes himself as a "Company Director of 8759 Redwing Avenue, Littleton, Colorado 80126, USA…". He avers that he is a shareholder and director of the company "…having been one of the original subscribers to the Company's Constitution…". He avers that the company itself was incorporated in Ireland on 8 September 2017, and has a registered address in Lucan, County Dublin. The company has one hundred fully paid up issued shares, of which twenty-five are registered in the name of Mr Cyr, and seventy-five in the name of the fourth respondent, Brendan Delaney. Mr Cyr avers as to his belief that Mr Delaney holds his shares as nominee or trustee for the first respondent; the second named respondent ('Mr Mooney') refers to this issue at paras. 177 to 180 of his replying affidavit on behalf of the respondents of 21 December 2020, and avers that the transfer of the shares to Mr Delaney was done with the applicant's agreement.

**8.** The applicant avers that he is one of the three directors of the company, the second and third respondents being the other two directors. Mr Cyr avers that the second and third respondents are each shareholders of the first respondent ('Planitas'), and that the fourth respondent Mr Delaney, is the Secretary of Planitas. At para. 177 of his replying affidavit, Mr Mooney avers that Mr Delaney "is a reputable professional company secretary of over 40 years experience in Dublin".

**9.** At paras. 12 to 27 of his grounding affidavit, the applicant sets out his account of the "background to the company's formation". It should be said at the outset that the respondents take serious issue with many aspects of Mr Cyr's perspective as expressed in these paragraphs. However, I propose to summarise the applicant's contentions briefly before addressing the areas of disagreement between the parties.

**10.** Mr Cyr avers that he had worked in the aviation industry in the United States for a number of years, and set about designing a software programme with the objective of addressing the issue of collation and processing of data in relation to "revenues and set prices for specific flight routes". He states that, without forecasts in relation to such matters, "…directors of airline companies may find it difficult to know which routes are profitable and where there is room for improvement".

**11.** He avers that he had devised the technical details of the software by 2016, but did not have the resources to finance its development, and thus required third party funding in order to convert the concept into a saleable product. At this time he came into contact with Mr Mooney, who was a director of Planitas, a company which produced and marketed aviation software. He avers that there were numerous contacts with Mr Mooney, culminating in an agreement "to undertake the development through a joint venture company which would be registered in Ireland and owned by

your deponent and the first respondent in the proportion of 25% and 75%, respectively" [para. 16].

**12.** The applicant refers to a "term sheet" which he describes as "…in effect, a shareholders agreement". In his affidavit, Mr Mooney disputes that this or any other document constituted a shareholder's agreement between the parties. Mr Cyr refers to the matters set out in the term sheet, and avers that he and Mr Mooney – acting on behalf of Planitas – agreed that the software would be owned exclusively by the company, and that it was "never part of the agreement that those rights would ever be transferred to any other person, including the first respondent…" [para. 19]. As far as Mr Cyr was concerned, the basis of the agreement "…was that the first respondent would provide the support, including financial support, for developing the software. Apart from that, there was no question of the first respondent taking over the business of the company or otherwise appropriating its assets or customers. Neither was there any intention that the two companies would be treated as a single entity" [para. 20].

**13.** Mr Cyr goes on to aver as to difficulties he had in obtaining a visa so that he could take up employment with the company. He states at para. 24 of his affidavit that Mr Mooney suggested that he take up employment with Planitas in order to obtain the visa, and was assured by Mr Mooney that his employment would be transferred to the company as soon as that became possible for immigration purposes. He avers that he was not a director of Planitas and had no influence in its management; nevertheless, he avers that his workload as an employee was "very substantial", and involved "everything to do with the development and marketing of the software, but excluded any input into decisions concerning the company's business, finances and accounts" [para. 26].

**14.** At paras. 28 to 40 of his grounding affidavit, Mr Cyr sets out his attempts to source customers for the software, and his dealings with them. Ultimately, Mr Cyr procured two customers, whom I shall call customer A and customer B, both of which were airlines. The contract with customer A was dated 24 May 2017, and was made between the airline and the company. The contract with customer B was dated 9 October 2017; however, this contract was concluded between customer B and Planitas, rather than the company. Mr Cyr avers that this decision was made by Mr Mooney subsequent to the conclusion of negotiations. When Mr Cyr queried why the contract had been concluded with Planitas rather than the company, he received a letter from a solicitor for Planitas of 15 July 2017, in which it was stated that the contract was being executed by Planitas "because the company had not yet been registered, making it necessary for the first respondent to be named as the contracting party 'for the moment'". Mr Cyr avers that he did not query this any further, as he had "full trust and confidence in the respondents and their solicitor" [para. 37].

**15.** At paras. 41 to 52 of his affidavit, in a section entitled "statutory filings and dissipation of assets", Mr Cyr refers to downloading the company's statutory return and accounts from the Companies Registration Office website on 30 October 2019, and being "shocked" to discover that the second and third respondents "were reporting that the company had no income for the year". He avers that this was untrue, as the company had substantial income from customer A and customer B, who he knew had both discharged their invoices for that year.

**16.** Mr Cyr sets out his attempts to address the matter with Mr Mooney over the following weeks, and at para. 50 of his affidavit refers to an email he received from Mr Mooney on 15 November 2019. That email summarised the position at that date from the respondents' point of view:

"All income has been logged to Planitas as has all associated PASrm expenditure to date, an [sic] initio.

There are two reasons for this. The first is/was the need to have the Planitas balance sheet and commercial reputation available to stand behind the fledgling PASrm until it can stand alone. The second reason was to avoid the need for an expensive audit until the combined company's strength warranted one.

That's the reason our PASrm shares are held by Brendan Delaney until we want to separate the activities as between Planitas and PASrm. The relevant IP of PASrm is acknowledged and unimpaired by these interim arrangements.

Meantime as a prelude to this I have asked Paddy Sherry our accountant to tabulate the costs and revenues so as to give you an outline indication of the current financial position.

So given we now have two years under our belt and a revenue stream, maybe we can plan to separate by the end of this year such that PASrm can spread its wings next year from 1st May.

An alternative would be to integrate PASrm into Planitas which although logical given your work with Simon on solely Planitas affairs, it would be contrary to what we originally set out to do.

In future as we discussed, we can estimate the time you spend on Planitas affairs and make an adjustment to compensate PASrm for it…".

**17.** Mr Cyr avers that "…what struck and concerned me most about the second respondent's email is that all of these actions and their purported justifications were discussed and approved in my absence. In my view, this was a deliberate ploy. The second and third respondents knew that I would not allow such a course of action

because it was not in line with our original agreement and had the effect of reducing the value of the company to nought…" [para. 52].

**18.** Mr Cyr avers as to his attempts to address his concerns with the respondents over succeeding paragraphs in his affidavit. He refers in particular to an email of 1 April 2020 received by him from Simon Grennan – the 'Simon' to whom reference was made in Mr Mooney's email of 15 November 2019. Mr Grennan is the Chief Executive Officer and a Director of Planitas, and has himself sworn an affidavit on 21 December 2020, together with a further affidavit on 21 January 2021 in response to Mr Cyr's second affidavit of 6 January 2021.

**19.** At para. 63, Mr Cyr refers to a number of statements made by Mr Grennan in his letter, and takes issue with these. At para. 64 of his affidavit, he describes himself as "disappointed and disheartened" by Mr Grennan's email, and that he took legal advice, subsequent to which he resigned his post as employee of Planitas. He avers that he sent a formal letter on 10 May 2020 to Planitas and Mr Mooney "setting out the ways in which they had acted in disregard of my interests as a shareholder of the company". He stated in that letter that he was "terminating the original agreement between me and the first respondent because the latter had violated its fundamental terms" [para. 65]. This prompted a detailed letter from a firm of solicitors acting on behalf of Planitas of 4 June 2020. At para. 67 of his affidavit, Mr Cyr addresses various points made in that letter and sets out his own perspective.

**20.** Mr Cyr avers that he received a letter dated 23 April 2020 from Mr Mooney which he characterises as "…in line with previous correspondences from the second respondent in as much as it contained promises that my concerns would be resolved at some unspecified date in the future" [para 68]. Mr Cyr goes on to aver as to what he considers to be the exclusion by him from management of the company, which he

contends "…was done exclusively by the second and third respondents. In fact, it is probably more accurate to say that the company was effectively being managed by the board of the first respondent" [para. 69].

**21.** Mr Cyr concludes his grounding affidavit by setting out a summary of actions which he contends comprise oppression and disregard of interest. It is a very lengthy summary, and while I have adverted fully to its contents, I consider it appropriate to summarise it much more briefly below. Mr Cyr relies in particular on "the following actions of the first three respondents…":

> (a) Planitas has "…controlled every aspect of the company from the day it was formed – and even before it was formed …this control has always been exercised in the best interests of the first respondent rather than the company…";
>
> (b) Planitas "…has breached the company's intellectual property in the software…there was never any licence agreement and the company has never received a licence fee for the use of the software by the first respondent…[i]t was simply a case of the first three respondents 'deciding' that they would take the software for themselves…";
>
> (c) Planitas "…has diverted the company's customers to itself…";
>
> (d) Planitas "…has diverted all of the company's income to itself. All income from the company's customers is lodged into the first respondent's bank account and is used by it as its own funds…";
>
> (e) the first three respondents "…have consistently and deliberately excluded your deponent from management of the company…all decisions relating to the company are made by the Board of the first respondent…I am not privy to any

of the decisions affecting the company, whether as a director or a shareholder…";

(f) the first three respondents "…have divested the company of all its value…my shareholding has become worthless while any diminution in the value of the first respondent's shareholding is offset by the increased value of the first respondent resulting from its appropriation of the company's assets…;

(g) "the first three respondents have been reporting misleading information to the CRO, the RBO and the Revenue Commissioners…";

(h) "…I am also concerned about the potential revenue consequences arising from the respondents' actions…";

(i) the respondents "…appear to have abandoned the company altogether…";

(j) "all of the first and second respondents' actions fly in the face of the promises made to me by them when establishing the company, which were the reasons I agreed to participate in the project…".

**The respondents' perspective**

**22.** In his affidavit of 21 December 2020, Mr Mooney provides a comprehensive rebuttal of the position set out by Mr Cyr in his grounding affidavit. Mr Grennan also swears a lengthy affidavit of the same date in support of the respondents' position.

**23.** Mr Mooney sets out his professional and business background, which is primarily in accounting, banking and corporate finance. He is a chartered accountant by profession, and spent many years in investment banking and corporate finance. He was also a non-executive director of many companies including a five-year term on the board of An Post.

**24.** He had particular experience in the airline industry as chairman of the airline CityJet between 1992 and 1995. He avers that he became aware that "flight revenue

performance data was inadequate and too slow to inform commercial decision-making by airline management. In the late 1990s, I set out to create a forward-looking realtime flight bookings and associated revenue tool using relational database technology, to link the modern desktops with the older legacy systems used extensively within the industry…" [para. 8].

**25.** Mr Mooney avers that "…this business idea became Planitas, which was incorporated on 30 July 2001…", and goes on to outline the specialisation of Planitas in "products to make airline sales and revenue data accessible in real-time through proprietary applications…". Planitas deals with the revenue and sales departments of airlines, and its main product is ABIS, "…a data analytics platform/solution which has been developed and provided over a twenty-year period".

**26.** Mr Mooney avers that he has been chairman of Planitas from the date of incorporation to the present date, and was chief executive officer until 1 March 2018, when he retired and was succeeded by Mr Grennan. He states that, since his retirement, his day-to-day involvement in the business "has been minimal, and has been much affected by personal and family commitments".

**27.** Mr Mooney's affidavit sets out in detail the perspective of himself and Planitas in relation to all of the matters in Mr Cyr's affidavit. I do not propose to set these out in any detail, as such matters are properly the subject of the hearing of the substantive proceedings. It is fair to say that Mr Mooney, both on his own behalf and on behalf of the respondents generally, robustly rejects any suggestion that Mr Cyr has been oppressed or that the respondents have acted in disregard of his interests. While I have taken the affidavits of Mr Mooney and Mr Grennan fully into account, I propose, in the interests of brevity, to refer only to certain extracts from those affidavits to illustrate the position of the respondents. At para. 33 *et seq* of his

affidavit, Mr Mooney, in a passage which sets out generally the respondents' position in relation to the relationship between the company and Planitas, averred as follows: -

> "33. Ultimately, though the applicant was diligent and motivated, business development has proved very challenging and the software has only secured two customers. As I will outline below, there were also delays in installation and in payment. With the exception of the limited customer revenue when it began to come in, the software development and business development was funded by Planitas. This was an aspect of the joint venture that had developed over time and Planitas had and has no obligation to fund business development. In light of the challenging financial performance of the PasRM project, the need for Planitas to stand behind the software and the attendant cost of operating the PasRM project through the company as a subsidiary, I took the view in early 2018 that it was advisable to cocoon the company.
>
> 34. I explained the reasoning to the applicant in early 2018, including the cost saving, and explained the process of maintaining memorandum accounts so that the company could fledge when it could stand on its own. The applicant agreed with the reasoning and indicated that he trusted me and deferred to my judgment as to what was appropriate in terms of legal, corporate and commercial considerations.
>
> 35. As I recall, the applicant said simply "*I trust you*" or words to that effect. Had he not approached matters on that relatively informal basis, then evidently our own approach would have been more formal."

**28.** Mr Mooney avers at para. 39 that "… [t]he applicant stated regularly that he trusted me and believed that we were acting in all of our collective interests and in the best interests of the company. He repeatedly stated that he was satisfied with our

management of the PasRM project, freely went along with the solution that we devised and was kept fully informed". Mr Mooney denies that he or any of the other respondents "ever sought to marginalise the applicant. Everything that was done in relation to the joint venture and in relation to the development and commercial exploitation of the software was done with [Mr Cyr's] full agreement and knowledge" [para. 41].

**29.** In his affidavit, Mr Mooney responds sequentially to the various allegations levelled by Mr Cyr in his affidavit. He does not accept that the "term sheet" comprised a shareholder's agreement, and points out that the term sheet is actually headed "draft". He contends that a shareholder's agreement was not put in place.

**30.** Mr Mooney avers that "…Planitas has and had no obligation whatsoever to assist in the exploitation and marketing of the software with the provision of staff and loaned funds. However, it did so" [para. 67]. He avers that the possibility of merging Planitas and the company was discussed "two or three times during the period March 2017 to March 2018" [para. 68]. He states that the revenues garnered by the company were "insufficient to sustain the business. Notwithstanding this Planitas continued to fund and practically assist the applicant in his endeavours…I do not think the applicant fully appreciated the impact of the sales deficit on the business and the limiting cyclical nature of prospective customer availability as existing contracts tend to run for three year terms before coming up for tender, thereby increasing the working capital needs. Planitas is financed to carry this and the applicant was a diligent and useful colleague within the office community. He was thus accommodated as he strove to build the PasRM project." [Paragraph 70].

**31.** In relation to paras. 28 to 40 of Mr Cyr's grounding affidavit, Mr Mooney avers that "…fundamentally, and in my view, the applicant was more than happy to

leverage the standing, reputation and contacts of Planitas, to present himself as a Planitas executive (which he was), and to present the software as a Planitas product. The applicant is simply incorrect to claim that the PasRM project only required a couple of customers in order to turn a profit". [Paragraph 100].

**32.** Mr Mooney deals in detail with the signing of customer A and customer B. In response to the applicant's complaint that the customer B proposal is in the name of Planitas rather than the company, Mr Mooney makes the point that the proposal "references both Planitas RM and ABIS. ABIS is a proprietary application of Planitas. The proposal provides customer references from Planitas and refers to the long-standing history of Planitas. As appears from the email [from the chief technical office of Planitas to customer B of 6 February 2017], the applicant was copied on the communication and neither at that time or subsequently did he question or disagree with this approach". [Paragraph 107]. Mr Mooney sets out in detail his basis for believing that the applicant had no difficulty with the contract with customer B being in the name of Planitas rather than the company.

**33.** The applicant's allegations in relation to exclusion from management are rejected by Mr Mooney. He avers at para. 157 of his affidavit that Mr Cyr "attended all major board meetings of Planitas during the period except one convened at short notice to decide on urgent measures to counter the financial affects of Covid on our business". He refers at para. 158 to the applicant having "participated fully in meetings including board meetings which discussed the software and the PasRM project and at no point did he ever seek to draw a distinction between the company and Planitas, or to suggest that discussions in relation to the software or the PasRM project were properly a matter for a board meeting of the company".

**34.** At paras. 182 *et seq* of Mr Mooney's affidavit, he deals with each element of Mr Cyr's summary at para. 85 of the grounding affidavit. All allegations of wrongdoing on the part of the respondents are refuted. A central theme of Mr Mooney's responses is what he alleges are the compliance in and acquiescence with interactions between Planitas and the company by the applicant. He refers to the applicant's involvement in relation to the management of the PASRM project as particularly set out in Mr Grennan's affidavit, and states as follows: -

> "The applicant has been privy to every decision affecting the company save decisions of Planitas as joint-venture partner in respect of its financial investment. In those cases, the applicant is not entitled to be privy to decision making of the Planitas board. The correspondence and in particular the email correspondence of late 2019 and early 2020 shows that your deponent answered every question put to me in a straightforward and speedy way. The narrative of evasiveness and meetings which did not materialise is self-serving and dramatized". [Paragraph 191].

**35.** Mr Mooney rejects any suggestion that misleading information has been reported to the Revenue Commissioners or any other authority, and states that Mr Delaney has filed the appropriate returns.

**Further affidavits**

**36.** As I have indicated above, in addition to Mr Cyr's grounding affidavit and Mr Mooney's reply, further lengthy affidavits were sworn by Mr Grennan (21 December 2020 and 21 January 2021), Mr Cyr (6 January 2021 and 9 February 2021) and Mr Mooney (21 January 2021). I do not propose to refer comprehensively to the detail of these affidavits in this judgment; it is sufficient to say that all of the issues were traversed by the deponents exhaustively.

**Affidavits in the security for costs application**

**37.** The parties have also sworn extensive affidavits in the security for costs application itself. These can be considered relatively briefly in this judgment, as they reiterate many of the points made in the affidavits in the substantive proceedings.

**38.** The application for security for costs is grounded on the affidavit of Mr Mooney of 21 December 2020. This is a separate affidavit to that sworn by him on the same date in the substantive proceedings. In it, he sets out the background to the matter, and addresses various matters which the court must consider in relation to the application. He contends that the applicant is ordinarily resident in the United States and always intended to return there, and in this regard refers to a series of emails sent by Mr Cyr in advance of his moving to Ireland. Mr Mooney avers that the applicant "…is ordinarily resident outside of the jurisdiction, and outside of the European Union. I say and believe that the United States is not a signatory to the Lugano Convention". [Paragraph 20].

**39.** At para. 23 of his affidavit, Mr Mooney sets out a summary of the applicant's allegations supporting his contention that the respondents have acted with disregard for the interests of the company and the interests of the applicant as a minority shareholder in the company. As Mr Cyr does not in his replying affidavits take issue with this summary, and indeed in his main affidavit responds to it sequentially, it may be helpful to set out the summary here:

> "23…The applicant claims:
>
> (a) That Planitas controlled every aspect of the company from the date was [sic] formed, and even before it was formed and acted in its interests rather than those of the company.

(b) That Planitas has breached the company's intellectual property in the software.

(c) That Planitas has diverted the company's customers to itself.

(d) That Planitas has diverted all of the company's income to itself.

(e) That the first three respondents have excluded the applicant from management of the company.

(f) That the first three respondents have divested the company of all its value.

(g) That the first three respondents have reported misleading information to the Companies Registration Office, Register of Beneficial Owners and Revenue Commissioners.

(h) That the respondents' actions have exposed the company to substantial tax liability and potential penalties.

(i) That the respondents have abandoned the company.

(j) That Planitas and I have violated the terms of a shareholder's agreement".

**40.** At paras. 26 to 38 of his affidavit, Mr Mooney summarises the respondents' position in relation to these allegations. The paragraphs are essentially a distillation of the views Mr Mooney expressed at length in his affidavits in the substantive proceedings. He argues that the applicant was "…at all times engaged in selling, promoting and marketing the software as part of the Planitas offering. This was in the interests of the PasRM project, and therefore the applicant's interests, and he was happy to leverage Planitas' trading track record, credibility and customer base on that basis…" [para. 29]. It is in particular denied that Planitas has diverted any income of the company to itself. Mr Mooney avers that the intellectual property in the software "remains in the company", but contends that "…the company would have little or no value to any investor because it has not turned an ongoing or sustainable annual profit.

This is why, with the express agreement of the applicant, the company was cocooned and the Planitas brand and resources are its current lifeline" [Para. 34]. The central contention of the respondents is expressed as follows at para. 28:

> "The slow evolution of the PasRM project over time was due to a combination of factors including the applicant's immigration/employment status, slow sales and the need to shield the company until it achieved viability. At all times I was supportive and encouraging of the applicant. The applicant was fully aware and informed of the corporate strategy. He stated more than once that he trusted me to do what was necessary. I honoured that trust and at all times acted with careful regard to his interests and the interests of the company".

**41.** At paras. 39 to 44, Mr Mooney refers to the correspondence in which security for costs was sought by the respondents' solicitors, and the response for the solicitors for the applicant on 4 December 2020 declining to provide security for costs. Mr Mooney refers to a number of claims in that letter which were addressed by a letter from his solicitors of 17 December 2020.

**42.** In particular, the letter of 4 December 2020 from Mr Cyr's solicitors makes reference to a letter of 4 June 2020 from the respondents' solicitors to Mr Cyr which referred to the fact that Planitas was obliged to notify the relevant government departments of the applicant's current status in Ireland and the fact that he was at that stage no longer employed by Planitas. The letter of 4 December 2020 characterised this statement as "a blatant threat to our client to have him arrested and deported". The letter of 17 December 2020 from the respondents' solicitors refuted this suggestion in the strongest terms, and pointed out that the applicant had his own independent legal advice available to him in June 2020 in relation to his residency status or visa issues. Mr Mooney makes the point that, while the applicant's

grounding affidavit in the substantive proceedings dealt with the letter of 4 June 2020 in considerable detail, it did not refer to any concerns of the applicant in relation to his immigration status or residence after that date.

**43.** Mr Cyr swore a replying affidavit on 13 January 2021. He raised some procedural objections at the start of that affidavit relating to a failure of compliance with the order of this Court of November 2020 in relation to the filing and service of affidavits, and sought an order dismissing the motion on that basis. In his second affidavit of 21 January 2021, Mr Mooney addresses this objection at paras 12 to 19 of that affidavit. He acknowledges that there was a delay and an "unfortunate failure to meet the court's directions", which he states is "regretted". The solicitors for the respondent apologised for the delay in a letter of 7 January 2021 to the solicitors for the applicant. While it does appear that there was non-compliance with the court's directions, this did not have any material effect on the exchange of affidavits, and certainly does not warrant the dismissal of the application.

**44.** The rest of Mr Cyr's affidavit of 13 January 2021 responds item by item to the matters raised in Mr Mooney's grounding affidavit for the application. Although the affidavit is lengthy – 25 pages – it is essentially a reiteration of the matters set out in Mr Cyr's affidavits in the substantive proceedings.

**45.** Mr Cyr acknowledges that he is currently residing in the United States. At para. 61 of his affidavit he avers that "…the circumstances in which your deponent left Ireland were brought about by the respondents and their solicitors. Had it not been for their actions, I say that I would still be resident in Ireland". He acknowledges that his initial plan was to stay in Ireland for two years, but avers that this plan "…changed over time as my wife, Heather, and I came to think of Ireland as home and decided to stay much longer…we decided to extend our stay and apply for additional visas"

[Para. 64]. He avers that "…by 2020, we had no intention of leaving the country. On the contrary, we intended to stay for a minimum of five more years and had even invited family members over to visit us in October 2020…" [Para. 66]. Mr Cyr avers that "all of this changed on 30 July 2020" when he spoke with his solicitor following a settlement negotiation. That solicitor had attended the previous day with the respondents' solicitor, Pat Flynn. Mr Cyr avers that "…my solicitor informed me that Mr Flynn had been aggressive at the meeting and had said that he would 'send the guards around to arrest [your deponent]'" [Para. 70].

**46.** Mr Cyr deals with what he perceived as this "threat" at some length, stating that "Mr Flynn made us feel like we were criminals. His firm had processed our visa application and so we fully believed that he was telling us the truth when he warned that we were no longer entitled to be in the country. For that reason, we did not seek further legal advice about our immigration status prior to leaving Ireland" [Para. 74]. He contends that advice he took from "a lawyer specialising in Irish immigration law" in November 2020 suggested that "Mr Flynn's threats to call the police were, in fact, completely unfounded" [Para. 76].

**47.** This was an extremely serious allegation against Mr Flynn, which he understandably took very seriously. He swore an affidavit in the proceedings on 21 January 2021, in which he strenuously rejected all of the accusations made against him. He made the point that the accusations were made in respect of what occurred during settlement negotiations, which normally would attract "without prejudice" protection, and that the applicant was represented at the meeting by an experienced partner in the firm of solicitors advising him. Mr Flynn rejects the allegation that he "had been aggressive at the meeting" stating that "it is simply not true…I believe that I am firm and resolute in acting for clients but I in no sense engage in personal

aggression. That is a generalised smear" [Para. 10]. Mr Flynn does not accept that the letter of 4 June 2020 "contained or conveyed any threat. I did not at any time advise the applicant in relation to immigration. I do not believe that I ever spoke with the applicant and my colleagues dealing with that area of work dealt with the applicant" [Para. 14].

**48.** An affidavit was then sworn by Robert Browne on 3 February 2021. Mr Browne is the principal of the firm of solicitors advising the applicant, and his affidavit was sworn in order to address dealings between him and Mr Flynn at the meeting to which Mr Flynn's letter referred.

**49.** Mr Browne, who is a very experienced solicitor, averred that "…I sincerely regret that Mr Flynn's attitude at the meeting was described as aggressive. Mr Flynn was definitely not aggressive. He was polite, professional and courteous throughout the meeting…I fully informed the applicant of what transpired at the meeting by a long telephone call on 29 July 2020. I may well have stated that Mr Flynn had adopted an aggressive stance on behalf of his clients but I certainly did not intend to suggest that Mr Flynn had acted aggressively or in an improper manner" [Para. 3].

**50.** However, Mr Browne goes on to aver as follows: -

> "4. I say and believe that a serious impropriety would occur if the respondents' application for security for costs, which relies entirely on the fact that the applicant lives in the United States of America, should succeed in circumstances where overt threats were made to have the applicant deported if he was in this country. I say and believe that such a threat was made against the applicant at the said meeting. This was an allegation of criminal conduct against the applicant that his presence in the Republic of Ireland was illegal".

**51.** Mr Browne goes on to refer to Mr Flynn taking issue with the use of the phrase "a blatant threat" in a letter of 4 December 2020, referring to Mr Flynn's letter of 4 June 2020. Mr Browne avers as follows: -

> "…In that letter of 4 June 2020, from the solicitors for the respondents it stated *'our client is now obligated to notify the relevant government departments* ***of your current status in Ireland*** *and the fact that you are no longer employed by our client"*. [Emphasis added]. In my opinion that constitutes a blatant threat".

**52.** Mr Browne concludes by averring that "…it would be unconscionable for the respondents to rely on the applicant's absence from this country to seek to prevent him from bringing his claim before the courts in Ireland by seeking security for costs" [Para. 8].

**53.** Mr Cyr's position is that he "…would not have contemplated leaving Ireland had it not been for the misconduct of the respondents which is the subject of the substantive proceedings…I came to Ireland on the back of an agreement with the first and second respondents that I would have real input into the management of the company, that I would be an employee of it and help it to prosper. The respondents never honoured that agreement, initially for regulatory reasons beyond their control but thereafter for no reason other than to ensure the first respondent maintained full control of the company…[n]ot only have they failed to honour that agreement, they have proceeded to strip the company of all its value, including the assets I had worked so hard to bring to the company, whether directly (the intellectual property rights I gave up for my now-valueless shares) or indirectly (the customers I introduced to the software)" [Paras. 79 to 81].

**54.** The applicant avers that he "would not be in a financial position to provide security for costs if such an order was made by this Honourable Court" [Para.83]. He claims as of the date of that affidavit (13 January 2021) that he has had no income since resigning his post with Planitas, and that it had become necessary for him to withdraw funds from his life savings in order to meet ordinary living expenses. He had started a new business, which at that stage produced "insufficient revenue to pay your deponent any salary or other income" [Para. 86]. He avers that his one asset in Ireland is his shareholding in the company, and avers that he is advised that the respondents "would have the option of enforcing any costs order against that shareholding", but goes on to aver "that the shareholding has been rendered worthless to me by the respondents' actions". On the other hand, he avers that the shareholding "may have value to the respondents. With my shareholding they would own 100% of the company and its assets". He reiterates the offer made by his solicitors by letter of 7 January 2021 offering the respondents his shareholding as security for the respondents' costs [Paras. 89 to 92].

**55.** Further affidavits by Mr Mooney, sworn on 21 January 2021, and by Mr Cyr, sworn on 9 February 2021, are proffered in support of the parties' respective positions. While I have read and considered the contents of these affidavits, they both comprise for the most part argument in relation to matters already comprehensively rehearsed in the affidavits for both the substantive application and the present application for security for costs. For that reason, I do not propose to refer to them further here.

**The respondents' submissions**

**56.** For clarity, although the respondent parties in the action are the applicants for the purpose of the security for costs application, I propose to continue to refer to them

as "the respondents" when considering the security for costs application, while referring to Mr Cyr as "the applicant", in order to avoid confusion.

**57.** Both sides submitted very comprehensive written submissions, and addressed them in the course of the two-day hearing before this Court.

**58.** Brendan Kirwan SC for the respondents referred firstly to some "preliminary issues" which he submitted had arisen from the exchange of affidavits and written submissions. The first of these was as to whether the court had any jurisdiction to award security for costs in proceedings pursuant to s.212 of the 2014 Act, and whether the court was precluded from ordering security given the way the proceedings had developed over the course of the exchange of affidavits.

**59.** Counsel accepted that there did not appear to be any authority confirming that a court hearing an application pursuant to s.212 had authority to grant security for costs. It was suggested however that there was nothing in Order 29 which suggested that an entitlement to security for costs pursuant to that jurisdiction was confined to proceedings commenced by summons, as opposed to proceedings commenced by originating notice of motion.

**60.** Counsel referred to the dicta of Clarke J (as he then was) in *Harlequin Property (SVG) Limited v O'Halloran* [2013 1 ILRM 124, in which the court stated "…the jurisdiction under Order 29 is based on the practical difficulty of enforcing an award of costs outside the jurisdiction (or nowadays outside the European Union) rather than anything else". Counsel also referred to the dicta of Cooke J at para. 36 of *Goode Concrete v CRH Plc* [2012] IEHC 116, in which the court, in addressing the rationale behind an award of security for costs, stated as follows: -

> "In the view of the Court, the entitlement of citizens to access to the Courts applies to defendants or respondents as well as to plaintiffs. A defendant ought

> not to be forced to forego defending an action against which there is a stateable defence on the merits out of fear of being bankrupted by having to incur substantial costs which will be irrecoverable from an insolvent plaintiff. A plaintiff's right of access to the Courts is not absolute … the Court has jurisdiction to strike a balance between on the one hand, depriving an insolvent plaintiff of a right of access to the Court and on the other, exposing a defendant to an unreasonable or disproportionate degree of financial risk by not requiring an insolvent plaintiff to give security for costs because of the plaintiff's residence within the jurisdiction".

**61.** Counsel for the applicant, Joseph Dalby SC, indicated that he was not saying that the court had no jurisdiction to make an award of security for costs in a s.212 application in principle, although the applicant's position was that no security for costs should be awarded in the present matter for a variety of reasons, which he developed in his submissions.

**62.** Section 212(1) of the 2014 Act is as follows: -

> "(1) Any member of a company who complains that the affairs of the company are being conducted or that the powers of the directors of the company are being exercised— (a) in a manner oppressive to him or her or any of the members (including himself or herself), or (b) in disregard of his or her or their interests as members, may apply to the court for an order under this section".

**63.** An applicant who issues an originating notice of motion pursuant to this section must allege squarely that the affairs of the company are being conducted or that the powers of the directors are being exercised in a manner oppressive to him or any of the members or in disregard of his or her or their interests as members. These

are matters of fact which must be established by the applicant on the balance of probabilities if he or she is to succeed in their application. It will usually be the case that the respondents deny that they have conducted themselves or the affairs of the company in the manner set out in the subsection. There will in such case be a direct conflict of evidence between the parties, and if the applicant does not persuade the court on the balance of probabilities that the respondents have behaved in a manner prohibited by the terms of this subsection, the applicant will fail in their application. Likewise, if for whatever reason the application is misconceived as a matter of law, the application may well be dismissed in favour of the respondents.

**64.** In either case, the respondents may well have been put to considerable cost to vindicate their position. It does not seem to me that, in principle, there is any reason why respondents in those circumstances should not be entitled to apply for security for costs against an applicant in circumstances where they would otherwise be permitted to do so pursuant to the jurisdiction established by O.29 or pursuant to the inherent jurisdiction of the court. The matter is a *lis inter partes* between the applicant and the respondents, and in my view the usual rules in relation to security for costs should apply to such a situation, notwithstanding that the proceedings are initiated by originating notice of motion and brought by the applicant pursuant to a statutory jurisdiction.

**The point at which the application was brought**

**65.** The proceedings were initiated by originating notice of motion of 21 October 2020. The respondents make the point that, very shortly thereafter, they intimated an application for security for costs. By letter of 26 November 2020, the respondents' solicitors wrote to the applicant's solicitors stating that "…it is clear from the pleadings and proceedings to date that any such trial will be factually complex, will

occupy at least a number of days, and will cause the respondents to incur substantial costs…[a]s your client is not ordinarily resident in the jurisdiction, the European Union, or a contracting state to the Lugano Convention, but is resident in the United States of America, where it will be difficult to enforce any order for costs against your client in the event that your client does not succeed in the within proceedings, please confirm that your client will provide appropriate security for costs…should you not provide such confirmation within – as provided for in O.29, r.1 of the Rules of the Superior Courts – 48 hours of service of this notice, we are instructed to make an application to the court for an order that your client do furnish such security…".

**66.** The applicant's solicitors replied by letter of 4 December 2020. The letter did not deny that the proceedings were likely to be complex, but trenchantly rejected the request for security for costs.

**67.** The return date of the applicant's originating notice of motion was 30 November 2020. On that occasion, the court (O'Moore J) gave directions as to the filing of affidavits by the parties in the substantive application, and directed that any motion on behalf of the respondents seeking an order for security for costs should be issued no later than 21 December 2020 and made returnable to 25 January 2021. An order was also made for a replying affidavit in the security for costs application to be filed and served by the applicant by 11 January 2021.

**68.** As we have seen, a number of affidavits had been filed on behalf of the respondents in both the substantive application and the security for costs application by 21 January 2021. By a letter of 22 January 2021, the respondents' solicitors wrote to the applicant's solicitors indicating that they would be applying to the court on 25 January 2021 for the security for costs motion to be determined in advance of the substantive hearing. They also stated that "…we also believe that it is appropriate to

flag to the court that once the security for costs matter has been determined and all directions of the court complied with, then the substantive matter should proceed by points of claim/points of defence". This latter point was reiterated in a letter from the respondents' solicitors to a different firm of solicitors which had come on record for the applicant of 25 February 2021, by which date the matter had been adjourned by the court to 1 March 2021. At the hearing before me, counsel submitted that the High Court on the latter occasion (O'Regan J) was told that the defendant wanted to proceed in the substantive matter by means of points of claim/points of defence.

**69.** The position of the respondents therefore is that, while complying with the court's directions in relation to the exchange of affidavits, they had from a very early stage of the proceedings indicated that they would be bringing a security for costs application before the court, and that the complexity of the matter would require what in effect would be a full plenary hearing. Counsel informed me that the matter came back before the court on a number of occasions as the court monitored progress. However, no order was made determining whether or not the matter should proceed by way of plenary hearing. It appears that both parties have acted on the assumption that the security for costs application should be determined before the issue of whether or not there should be a full plenary hearing, or whether the matter should proceed by way of affidavit, should be decided.

**70.** It is certainly the case that the point at which a security for costs application is brought is relevant to the court's discretion in deciding whether or not to make a security for costs order. The intention to bring the application should ideally be brought to the notice of the applicant as early as possible, so that the applicant is apprised of the risk he is incurring in relation to costs before substantial costs have accumulated. However, it seems to me that this is what the respondents did in the

present case. They made it clear from the outset that they would apply for security for costs, and in filing affidavits in the substantive proceedings, were doing no more than complying with the orders of the court. The situation bears no resemblance to the situation which arose in *Smyth v O'Shea Fishing Company Limited* [2015] IEHC 360, in which Binchy J refused security for costs, in which the court stated: -

> "18… The consequence of the defendants not bringing forward this motion until late June, 2013 is that the plaintiff has had to incur the expense of considering and replying to the defence of the defendants; of seeking discovery of documentation (and in this regard it appears there was a contested motion for discovery of documents); of considering the affidavit of discovery at documents delivered and also of delivering replies to particulars requested by the defendant. Indeed, it appears that the proceedings are all but ready for hearing except for this motion."

**Proportionality**

**71.** The applicant takes issue with the fact that, unlike in many applications for security for costs, no estimate of the likely costs of a hearing from a legal cost accountant has been exhibited to the affidavits on behalf of the respondents. It is certainly the case, in this Court's experience, that applicants for security for costs frequently exhibit such a report by way of demonstrating the expense to which they will be put in the event that they are successful in the application and are awarded costs, but are unable to recover those costs from the unsuccessful plaintiff.

**72.** The respondents in the present matter contend that there is no requirement in O.29 that such a procedure be adopted, and that O.29, r.6 in fact suggests that a two-step procedure is appropriate: -

> "Where the Court shall have made an order that a party do furnish security for costs, the amount of such security and the time or times at which, and the manner and form in which, and the person or persons to whom, the same shall be given shall, subject to rule 7, be determined by the Master in every case".

***73.*** Counsel for the respondents submitted that, if a report had been commissioned and exhibited from a legal cost accountant, the respondents might well have been accused of being presumptuous in the sense of anticipating an award in their favour, and of putting the applicant to the cost of producing his own report, at a time when the court had not decided whether security for costs was necessary. It was submitted that a failure to produce such a report could not be fatal to the application for security for costs in principle, and that the quantum of same can be the subject of a second application. The respondents point out that this was the procedure adopted by Twomey J in *Tom McEvaddy Property Limited t/a Nexus Homes (in liquidation) v NALM DAC* [2020] IEHC 593. Unlike the present application, this was an application pursuant to s.52 of the 2014 Act, *i.e.*, it involved a corporate plaintiff. Nonetheless, the court indicated in its first judgment that it would grant security, and measured it in a second judgment.

**74.** While it may be that courts are often asked to determine all the issues in one sitting, it does seem to me that O.29 provides for a two-step procedure. If the decision of this Court is that security for costs should not be awarded, the extra cost of debating the issues arising from contending reports of legal costs accountants will have been saved. There is no dispute between the parties that, whether the procedure adopted for the trial of the substantive action is plenary or by affidavit, the matter will be extremely complex, hotly contested and likely to give rise to very substantial fees. The court does not require estimates of the exact figures involved at this stage.

**The established principles**

**75.** There is no dispute between the parties as to the fundamental principles which govern an application for security for costs pursuant to O.29, although the parties disagree comprehensively as to how those principles should be applied.

**76.** In his submissions, counsel relied upon the test for security for costs pursuant to O.29 set out in *Collins v Doyle* [1982] ILRM 495, in which Finlay P, having reviewed the relevant authorities, stated as follows: -

> "From these decisions the following principles of law appear to arise.
>
> (1) *Prima facie* a defendant establishing a *prima facie* defence to a claim made by a plaintiff residing outside the jurisdiction has got a right to an order for security for costs.
>
> (2) This is not absolute right and the Court must exercise a discretion based on the facts of each individual case.
>
> (3) Poverty on the part of the plaintiff making it impossible for him to comply with an order for security for costs is not even when *prima facie* established, of itself, automatically a reason for refusing the order.
>
> (4) Amongst the matters to which a Court may have regard in exercising a discretion against ordering security is if a *prima facie* case has been made by the plaintiff to the effect that his inability to give security flows from the wrong committed by the defendant".

**77.** These principles have been distilled over numerous cases in the intervening period to the following propositions:

(1) The plaintiff must be ordinarily resident out of the jurisdiction, the EU or a contracting state to the Lugano Convention;

(2) the defendant must have a *prima facie* defence on the merits to the plaintiff's claim; and

(3) even where these conditions are satisfied, the court retains a wide discretion and can refuse to order security where there are special circumstances justifying such a course of action.

**78.** It is plain from the applicant's affidavit that he is resident outside the jurisdiction, the EU or a contracting state to the Lugano Convention. At para. 94(b) of his affidavit of 13 January 2021, he avers that "…the reason I am resident outside the jurisdiction of this Honourable Court is because of the wrongful threats of the respondents' solicitors to have me deported and the respondents' own misconduct which is the subject of the substantive proceedings…".

**79.** It is clear therefore that the first requirement – that of residence outside the jurisdiction – is fulfilled. However, the applicant has much to say about the circumstances in which he comes to be resident outside the jurisdiction, and strongly urges the court to take these circumstances into account. I propose to deal with this issue when considering the "special circumstances" which the applicant urges should persuade the court not to grant security for costs.

***Prima facie* defence**

**80.** The respondents submit that the test in relation to demonstrating that they have a *prima facie* defence to the plaintiff's allegations is as set out by Cooke J in *Goode Concrete v CRH Plc & Ors.* [2012] IEHC 116. At para. 41 of the judgment – which concerned an application for security for costs pursuant to O.29, albeit that the

plaintiff was an unlimited company incorporated in the State rather than an individual – Cooke J stated as follows: -

> "…the onus lies on the defendants to show that they have a stateable or *prima facie* defence to the claims made. Furthermore, a bald assertion that such a defence will be forthcoming is not sufficient. The defendants must point to evidence which, if adduced and accepted, would deprive the plaintiff of its entitlement to the reliefs sought. Because the matter is considered at an interlocutory stage, the Court makes no decision as to whether such a defence will succeed, nor is it engaged in any comparison between the relative strengths of the cases advanced by the plaintiff and the defendant. The Court is concerned only to verify that the defendants genuinely intend to defend the action and that they have a stateable basis for doing so".

**81.** While this passage suggests that the defence must be merely "stateable" counsel for the applicant refers the court to the decision of Hogan J in the Court of Appeal in *Pagnell Limited v OCE Ireland Limited* [2015] IECA 40. At para. 14 of that judgment, Hogan J, in considering whether the defendant in that case had established a *prima facie* defence for the purpose of an application for security for costs pursuant to s.390 of the Companies Act 1963, stated as follows: -

> "14. The question of what constituted a prima facie defence for the purposes of s.390 applications was considered by Finlay Geoghegan J. in her judgment in *Tribune Newspapers (in receivership) v. Associated Newspapers (Ireland) Ltd.* (ex tempore, High Court, 25th March 2011) in which she summarised thus the approach of the courts to this question:
>
> > 'What appears from the judgments, in a manner similar to the judgments in relation to summary judgment, is that a defendant seeking

> to establish a *prima facie* defence which is based on fact must objectively demonstrate the existence of evidence upon which he will rely to establish those facts. Mere assertion will not suffice.'
>
> If such evidence is adduced, then the defendant is entitled to have the Court determine whether or not it has established a prima facie defence upon an assumption that such evidence will be accepted at trial. Further, the defendant must establish an arguable legal basis for the inferences or conclusions which it submits the Court may arrive at based upon such evidence."

**82.** Hogan J went on at para. 16 of his judgment to say that "…the *prima facie* defence requirement imposes a higher requirement on a defendant than that required, for example, to establish a defence to an application for summary judgment where it is merely necessary to show that the defence is simply arguable: see e.g., *Danske Bank v Durkan New Homes* [2010] IESC 22".

**83.** The applicant addresses the acts which he maintains constitute oppression at paras. 26 to 31 of his written submissions. He claims that the acts "began from 9 October 2017 when the [contract with customer B] was entered into by Planitas". He contends that the company "did not authorise Planitas to enter into [the contract with customer B] and or did not seek to enter into [that contract] itself. In short, neither could have occurred without Planitas exercising the control over the company to ensure that its selfish interest took precedence over its obligations to Mr Cyr in the agreement and through them allowed Planitas to use the software as if it was its own when it is common case that it is vested in the company" [para. 29]. The plaintiff also makes complaint that revenue for both contracts has not been credited to the company, which the plaintiff considers was "admitted [by] Mr Mooney in writing on 15 November 2019…", the email which I have quoted at para. 16 above.

**84.** At para. 31 of his submissions, the plaintiff relies on the alleged acts of oppression which he summarised at para. 85 of his grounding affidavit in the substantive proceedings, and which I in turn have summarised at para. 21 above. Mr Cyr contends that some of these acts have been admitted by the respondents, or that they have "failed to offer any defence beyond a mere denial" [para. 31].

**85.** These alleged acts of oppression were addressed by the respondents in both their written submissions and the oral submissions at the hearing. I propose to set out, as concisely as possible, what the respondents say in respect of each of these acts by way of attempting to demonstrate a *prima facie* defence.

**(A) Control of the company**

**86.** Mr Cyr claims that Planitas has controlled "every aspect of the company", and has always exercised this control in the best interests of Planitas rather than the company. The respondents argue that Mr Cyr agreed with this approach and gave effect to it, particularly when, prior to the incorporation of the company, he had engaged with potential customers on the basis that the software was a Planitas offering. The respondents rely on the averments by Mr Mooney at paras. 33 to 35 of his affidavit of 21 December 2020 in the substantive proceedings quoted at para. 27 above. They contend that Mr Cyr was fully aware of the involvement of Planitas in the affairs of the company from early 2018 onwards, and that Mr Cyr's words and conduct "show his express agreement to running the software project through Planitas and to Planitas using the software for that purpose…" [para. 26 submissions]; alternatively, it is suggested that Mr Cyr's conduct "…gives rise to an estoppel (by representation or alternatively by convention) that bars him from denying his consent to the conduct of the software business and the use of the software for that purpose (paragraph 27)".

**87.** The respondents draw attention to an email of 26 March 2020 written by Mr Cyr to Mr Mooney, in which Mr Cyr intimated that he could "no longer accept employment from Planitas". He went on to say in that email as follows: -

> "There is obviously risk with PASRM operating independently as a company. There were benefits and financial stability provided by Planitas that made PASRM possible. But now, I must be able to take that risk of failure and have the agency of a shareholder and director. That is the only reason that I am here."

**88.** The respondents contend that this demonstrates Mr Cyr's awareness of the role of Planitas in "cocooning" PASRM, and his acquiescence to that strategy.

**(B) Intellectual property**

**89.** Mr Cyr alleges that Planitas has breached the company's intellectual property, and relies on the fact that there was never a licence agreement for the use of the software by Planitas. He alleges that the software was effectively appropriated by Planitas without the consent of the company.

**90.** The submissions of the respondents raise a legal issue as to whether or not the company had any intellectual property which could be protected by copyright. They contend that Mr Cyr "had an idea for a revenue management software program but no code" [para. 33 submissions]. They contend that the software "…was a 'computer programme', a 'work' and a 'literary work' (s.2, Copyright and Related Rights Act 2000) in which copyright subsisted (s.17(2)(a)). The copyright software includes any design materials used in its preparation so that Mr Cyr's 'idea' and any preparatory design materials there may have been were subsumed into the original work which was the software…the author of the software was Planitas but insofar as there was an agreement in relation to future copyright, the copyright in the software may be

deemed to be vested in the company (s.121 CRRA)" [Paras. 34–35 submissions]. The respondents accept that "if legal ownership of the copyright was in the company, any deployment of the software by Planitas would be infringement unless licenced …" [Para. 36], but maintain that the respondents dealt with the software on behalf of the company with the agreement of Mr Cyr, or such acquiescence as renders him estopped from now denying his consent.

**91.** The respondents argue "that there is either an express licence or alternatively an implied licence in favour of Planitas or alternatively that the conduct of Mr Cyr gives rise to an estoppel so that Mr Cyr cannot now deny a licence" [Para. 41]. They point out that Mr Cyr maintains that the software remains in the company, but that by a letter of 10 May 2020 to Planitas Mr Cyr claimed that the intellectual property in the software "reverted" to him and that any further use by Planitas of the company would be a breach of his rights. It is suggested by the respondents that these positions are contradictory.

**(C) and (D) Diversion of customers/income to Planitas**

**92.** In relation to the allegations that Planitas diverted the company's customers and its income to itself, the respondents repeat that there was an express or implied agreement between Mr Cyr and the respondents to this effect, or alternatively acquiescence on his part giving rise to an estoppel. In relation to customers, Mr Cyr makes complaint about the fact that the contract with customer B was concluded by Planitas. At para. 114 of his affidavit of 21 December 2020 in the substantive proceedings, Mr Mooney avers as follows: -

> "114. In relation to paragraph 38 of the grounding affidavit, the applicant avers that *'The respondents and their solicitor [insisted] that [he] sign a contract on behalf of the first respondent even though they were fully aware*

*that I was not a director of the first respondent and had no authority to bind it'*. In fact, [customer B] sent the contract in the name of Planitas to the applicant ready for signing. The applicant then emailed me, stating *'would you like to sign it, or shall I?'*. I responded *'OK, go ahead'*. Neither Planitas nor I insisted that the applicant sign the contract. The applicant did not raise any issue as to the contract being in the name of Planitas."

**93.** Mr Mooney exhibits emails which corroborate this exchange between himself and Mr Cyr. He also refers, at para. 116 of his affidavit, to a draft contract with customer B which "…clearly states, in the description of the parties to the contract, that Planitas is 'the licensor'. It states at recital A that the licensor 'has developed and owns, a software product called the PASRM…'. The applicant did not raise any issue in relation to any aspect of this contract at the time".

**94.** As regards alleged diversion of income, the respondents repeat that there was agreement that income be received by Planitas, or that Mr Cyr acquiesced to this occurring. Reference is made by the respondents to an email of 15 November 2019 from Mr Cyr to Mr Mooney exhibited to Mr Cyr's grounding affidavit in the substantive proceedings, in which Mr Cyr queries how revenue for "the PASRM customers" is being handled, and goes on to state "…I assume all of the revenue is being attributed to Planitas. From a day-to-day perspective, I can see this not making a significant difference. But that is obviously based on the trust I have in you and the way you do business". Mr Mooney responds by the email of 15 November 2019 which I have quoted at para. 16 above in which he explains the position whereby income of PASRM "has been logged to Planitas as has all associated PASRM expenditure to date…".

**(E) Exclusion from management**

**95.** In relation to the allegation that the respondents "consistently and deliberately" excluded him from the management of the company, this is roundly rejected by the respondents, who rely on paras. 157 and 158 of Mr Mooney's replying affidavit to which I refer at para. 34 above. The respondents contend that there was "full and complete involvement of Mr Cyr in every aspect of the business relating to the software…he has been privy to every decision affecting the company, save decisions of Planitas as joint venture partner in respect of its financial investment". [Paragraph 53 written submissions].

**96.** The respondents contend that the correspondence does not suggest that the respondents were unwilling to advance matters or engage with Mr Cyr. Mr Grennan's affidavit sets out considerable detail in relation to the meetings that were held and Mr Cyr's involvement in same. The respondents accept that an AGM of the company was not convened; it is submitted that a failure to convene an AGM may be an example of "negligence, carelessness, irregularity in the conduct of the affairs of the company" as in *Re Clubman Shirts Limited* [1983] ILRM 323, but that it did not form "part of a deliberate scheme to deprive the petitioner of his rights or to cause him loss, or damage and so does not amount to oppression or disregard of interests" [Written submissions para. 56].

**Divestiture of value**

**97.** Mr Cyr alleges that the respondents have divested the company of its value and that his shareholding has become worthless, whereas the value of Planitas has increased due to its appropriation of the company's assets.

**98.** Once again, the respondents' position is that Mr Cyr agreed to "the conduct of the PasRM project through Planitas" [written submissions para. 59]. The respondents

contend that Mr Cyr has always understood and participated in the arrangement, and the question of divestiture does not arise. It is submitted that, insofar as Mr Cyr complains that he would be unable to sell his shares in the company, this is incompatible with the "term sheet" which Mr Cyr contends is binding on the parties, and under which he is not entitled to transfer his shares without the consent of Planitas [Para. 60 submissions].

**(G) Reporting of misleading information**

**99.** Mr Cyr claims that the first three respondents have "been reporting misleading information to the CRO, the RBO and the Revenue Commissioners…", and that some of this information relates to him. At paras. 127 *et seq* of his affidavit, Mr Mooney sets out the circumstances in which the fourth respondent, Mr Delaney, was asked to hold the Planitas shareholding in the company, and the circumstances in which statutory returns and accounts were filed. In relation to assurances given by Mr Grennan to Mr Cyr in an email of 1 April 2020 that separate accounts would be prepared for the company – Mr Cyr avers that "no such accounts have been prepared at the date of swearing hereof" – Mr Mooney avers at para. 152 of his replying affidavit that draft memorandum accounts "have been prepared on three occasions in the three years since the company was incorporated. All revenues and expenditures have been returned to the Revenue Commissioners by submission of annual corporation tax returns by Planitas". At para. 81 of his grounding affidavit in the substantive proceedings, Mr Cyr pointed out that a filing in the Register of Beneficial Owners named him as the sole beneficial owner of the company notwithstanding that he was the owner of only 25% of its shares. At para. 181 of the replying affidavit, Mr Mooney acknowledges this as an error, and avers that he had instructed Mr Delaney to "make the appropriate corrective filing".

**100.** While these errors may or may not be a matter of legitimate complaint by Mr Cyr, it is difficult to see how they are instances of oppression or disregard of his interests. His fundamental complaint is the manner in which the respondents purported to deal with the assets of the company, rather than the manner of recording of its activities.

**Potential revenue consequences**

**101.** Similarly, while Mr Cyr may or may not be correct in alleging that there will be adverse tax consequences for the company arising out of the respondents' actions, in particular that "…the company is being assessed for tax on the basis of the respondents incorrect reporting that it has no assets or customers…" [para. 85(h) of the grounding affidavit], it is difficult to see how actions in this regard could be regarded as instances of oppression or disregard of his interests as a member of the company.

**Abandonment of the company**

**102.** Mr Cyr claims that the respondents have "abandoned the company altogether". He cites a failure to file the company's annual return and accounts for 2019, the deadlines for which had by that stage long expired. The respondents submit that the annual return has now been filed, but once again contend that failure to file an annual return or accounts "…is an irregularity or failing which does not amount to oppression or disregard of Mr Cyr's interests" [Written submissions para. 68].

**Contravention of promises made to Mr Cyr/shareholder's agreement**

**103.** At para. 17 to 20 of his grounding affidavit, Mr Cyr refers to the "term sheet", which he considers to be a shareholder's agreement. This document of 5 February 2017 is exhibited to Mr Cyr's affidavit. It is headed "**DRAFT**" and sets out the "principal terms and conditions under which Planitas Airline Systems Limited and

Neal Cyr propose to work together to develop and commercially exploit the revenue management system developed by Neal Cyr…".

**104.** The term sheet sets out the basis of the agreement between Mr Cyr and Planitas, but acknowledges that it "does not represent a complete summary of the contractual or commercial aims of the parties hereto". The document provides for the registration of a new company in which Mr Cyr would hold a 25% shareholding and Planitas 75%. Mr Cyr was to transfer ownership of all work carried out to date on PasRM and assign all intellectual property rights in PasRM to the company. Planitas was to provide licences to the company of the relevant technology and enabling software development assistance "to enable the development of PasRM". The company was to be used to "jointly develop and commercially exploit PasRM". Mr Cyr was to be engaged as a senior executive of the company pursuant to a senior executive contract, the terms of which were to be agreed. Neither party was to sell its shares in the company to an outsider without first offering those shares to the other party. It is notable that the document envisaged "that all shareholders should enter into a mutually acceptable shareholder's agreement, which shall set out the rights and restrictions attaching [to] the shares to be held by the parties". Some of those rights and restrictions were set out in the document.

**105.** Mr Mooney sets out the respondents' position on the "term sheet" at paras. 54 to 70 of his replying affidavit. As I have already mentioned at para. 29 above, he does not accept that the document comprised a shareholder's agreement, and accepts that such an agreement was not put in place. He avers that "…the applicant engaged actively in seeking to advance the commercial exploitation of the software through Planitas when it became clear that that was commercially necessary" [Para. 66]. He

avers that Planitas had no obligation to provide staff or loan funds for the exploitation and marketing of the software, but that it did so. At para. 70, he avers as follows: -

> "When revenue eventually began to flow, it was insufficient to sustain the business. Notwithstanding this Planitas continued to fund and practically assist the applicant in his endeavours. I was concerned, in view of the poor sales and high costs, that it was necessary to contain expenditure and advised the applicant that Planitas needed to shed its 75% ownership for a period until the company became able to stand alone and fledge. The applicant was made aware in February 2018 that we proposed to transfer our shares to the company secretary to hold them pro-temp [sic]. My belief is that he understood why and while disappointed, did not object as he trusted us. The merging talks were ad hoc discussions we had from time to time; initially when we established the company and subsequently when it might have become necessary to recognise his efforts in the event that the company might not succeed as hoped for. In my view, I do not think the applicant fully appreciated the impact of the sales deficit on the business and the limiting cyclical nature of prospective customer availability as existing contracts tend to run for three-year terms before coming up for tender, thereby increasing the working capital needs. Planitas is financed to carry this and the applicant was a diligent and useful colleague within the office community. He was thus accommodated as he strove to build the PasRM project."

**106.** The respondents acknowledge that there is a dispute in relation to the status of the "term sheet". However, it is submitted that the evidence which they have submitted to date comfortably establishes a stateable or *prima facie* defence which, if

adduced and accepted at trial, would deny Mr Cyr any entitlement to the reliefs sought.

***Prima facie* defence: analysis and conclusions**

**107.** It is worth emphasising that, in deciding the present application, the court does not come to decisions in relation to the numerous substantive matters of controversy between the parties. The court must satisfy itself whether or not there is a stateable or *prima facie* defence which is evidence-based and not dependent on mere assertions.

**108.** The position of the respondents which is fundamental to their defence of the proceedings is that the process by which the company was effectively subsumed into Planitas was one of which Mr Cyr was fully aware and with which he agreed and was complicit. It is accepted that he raised certain queries on 15 November 2019 about how the company's affairs were being conducted; the respondents point out that he received an immediate and full response from Mr Mooney on the same day: see para. 16 above. The respondents contend that Mr Cyr did not commence to complain in earnest until March/April 2020, when he engaged in detailed correspondence with Mr Grennan and Mr Mooney. This culminated in a letter by Mr Cyr to Planitas of 10 May 2020. The letter set out Mr Cyr's grievances in full, and stated as follows: -

> "**PLEASE TAKE NOTICE** that I am hereby terminating the agreement dated 5 February 2017 between Planitas and me. To the extent that I ever actually transferred my IP rights in the software to either PASRM or Planitas, please take notice that those rights hereby revert to me. Any further use of the PasRM software by either company is a breach of those rights for which I will seek legal redress.
>
> In terms of the practicalities of the foregoing, I would suggest that the best way to implement this is for Mr Delaney's 75% shareholding to be transferred

> to me. In this way, Planitas and I will be able to make a clean break and go our separate ways. I appreciate that Planitas has spent funds in developing the software and it may thus be entitled to some monetary compensation for its shares. The amount of that compensation will be a matter for negotiation but will take into account the numerous breaches of duty listed at appendix A [to the letter]."

**109.** The respondents' solicitors responded by a detailed letter of 4 June 2020. As we have seen, the respective solicitors subsequently had settlement talks which, although giving rise to controversy, did not yield any compromise. Ultimately, the present proceedings were issued on 28 October 2020 and served on the respondents.

**110.** The applicant contends that any acquiescence on his part "ceases to apply following the making of a complaint" [para. 49 written submissions]. He cites the judgment of the High Court of England and Wales in *Routledge v Skerritt* [2019] EWHC 573 as authority for this proposition. In that case, the court at para. 29 of its judgment refers to dicta of Warren J in *Southern Counties Fresh Foods Limited* [2008] EWHC 2810 that "…if a course of conduct starting in the remote past has continued to the present time, I see no reason why the entire history of the conduct should not be brought into account in assessing whether the conduct as a whole has been unfairly prejudicial. Of course, the fact that it may have continued without protest for a long period may show there has been acquiescence and no unfair prejudice; but if the conduct met with regular objection, or even resignation but with clear non-acceptance, it is not to be rejected *a priori* as incapable of being entertained by the court as part of the basis for a petition".

**111.** While this seems to me to be an unobjectionable state of principle, it does not in my view amount to more than a statement that acquiescence of an applicant may be

taken into account in assessing the actions of a respondent, with the fact of the applicant ceasing to acquiesce being an important element in that assessment. While there were clearly difficulties in the relationship which are evident from the averments and contemporaneous details between the parties, it does not seem to me that they developed into a full-blown adversarial dispute with the possibility of imminent litigation until the applicant's letter of 10 May 2020, in which he purported to determine the "agreement" on which he centrally relies. Any "acquiescence" certainly dropped out of the equation at that point, and it may well be that a court would decide that any acquiescence on Mr Cyr's part ceased some months prior to that.

**112.** However, it seems to me that there is sufficient evidence in relation to the applicant's alleged acquiescence, both from the averments on behalf of all deponents in the matter, and the contemporaneous documentation exhibited to the affidavits, which, if accepted at trial, could provide a defence to the allegations of oppression and disregard of the applicant's interests as a member. The essence of oppression and disregard of interests envisaged in s.212 is activity, which is carried out by the respondents, often or perhaps usually in a clandestine manner, which is intended to undermine the interests of the applicant and enure to the benefit of the respondents. If the applicant can be shown to have been aware of the activity and to have gone along with it, or at least not objected to it, this would in my view raise the possibility that a court, on a full hearing, would decide that oppression or disregard of a member's interests had not taken place.

**113.** The matters of which the applicant complains had all taken place at the point at which he started to register his objections. The defence of the respondents is essentially that he was aware of what was going on, participated in the process, and made no complaint about it for a prolonged period. I consider that there is evidence, at

least on a *prima facie* basis, to support this position, and that those circumstances, if found proven at trial, would give rise to stateable grounds of defence to a claim of oppression or disregard of interests as a member, to include an argument that the applicant is estopped from relying on any alleged acts of oppression or disregard by his acquiescence in same.

**114.** The applicant points out that it is no defence to a claim pursuant to s.212 that the respondents believe that they were acting, or indeed, that they were in fact acting, in the best interests of the company, and cite the dicta of Kenny J in *Re Irish Visiting Motorists Bureau (High Court, unreported, Kenny J, 1 January 1970)* that "…the affairs of a company may be conducted or the powers of the directors may be exercised in a manner oppressive to any of the members although those in charge of the company are acting honestly and in good faith". The applicant also refers to the decision in *Re Emerald Group Holdings Limited* [2009] IEHC 440, in which the respondent director's actions were held to be oppressive notwithstanding that they were carried out with the specific intention of saving the company from financial ruin by diverting the company's business to another company.

**115.** While all of this may be so, it seems to me that these are matters for the trial judge, who will either have the benefit of a plenary hearing or perhaps cross-examination on the voluminous affidavits to date. The role of this Court is restricted to deciding whether or not there is a *prima facie* stateable defence. In respect of the allegations made by the applicant in these proceedings, I am satisfied that the respondents have discharged their burden in this regard.

**Special circumstances generally**

**116.** It is clear that, in relation to the three fundamental principles in relation to an application for security for costs set out at para. 77 above, the respondents satisfy the

first two criteria: the plaintiff is ordinarily resident outside the EU or a contracting state to the Lugano Convention, and the respondents have established to my satisfaction a *prima facie* defence on the merits.

**117.** Notwithstanding these circumstances, the award by the court of security for costs remains discretionary, and the court can refuse to order security where there are "special circumstances" justifying such a refusal, and the applicant in the present case contends that, in the event that the first two principles are satisfied, there are such special circumstances which should persuade the court to exercise its discretion against awarding security for costs.

**Residence as a special circumstance**

**118.** The main argument of the applicant in this regard is that the court should have regard to the particular circumstances in which the applicant came to be resident outside the jurisdiction following the termination of his employment with Planitas.

**119.** At paras. 21 to 27 of his affidavit grounding the s.212 proceedings, Mr Cyr sets out the circumstances in which he came to work for Planitas rather than the company. He avers at para. 23 that "there had been complications in obtaining a visa for me. The visa I required was a critical skills visa. One of the terms for eligibility was that I should be employed by a company registered in Ireland for at least two years and which was being supported by Enterprise Ireland/IDA". Mr Cyr avers that Mr Mooney suggested that, as the company did not meet those requirements, Mr Cyr should take up employment with Planitas and that Mr Mooney assured him that his employment would be transferred to the company "as soon as this became possible for immigration purposes" [Para. 24].

**120.** This latter allegation in particular is strenuously denied by Mr Mooney in his replying affidavit in the substantive proceedings: see generally paras. 77 to 99 of his

affidavit of 21 December 2020. He deals with the applicant's visa application and residence at paras. 9 to 21 of his grounding affidavit for the present application. It appears that he put the applicant in touch with the solicitors for Planitas for assistance with his visa application. Ultimately, Mr Cyr applied for a "critical skills employment permit" under which he would be an employee of Planitas, and indicated on his application that his "proposed period of employment permit" was 24 months. He was granted the permit on 3 August 2017. The permit itself states that "if this is the named foreign national's first employment in the State, a new application may, apart from in exceptional circumstances, only be made in respect of the named foreign national after a period of twelve months has elapsed since he/she first commenced employment in the State". The permit was stated to be valid from 8 August 2017 to 7 August 2019.

**121.** In his affidavit of 21 December 2020 in the substantive proceedings, Mr Grennan addresses a further issue with Mr Cyr's work permit. Mr Grennan avers that, in April 2019, he became aware that the work permit related to Mr Cyr's employment with Planitas. Mr Cyr had in fact been invoicing Planitas as a contractor. Mr Grennan took the view that Mr Cyr should be formally registered as an employee with Planitas. This caused difficulties with Mr Cyr's renewal of his work permit, and the situation was ultimately resolved by Mr Grennan arranging that Mr Cyr be registered as an employee of Planitas with the Revenue Commissioners from August 2017. According to Mr Grennan, this caused a liability for Mr Cyr for tax and PRSI of €67,216.00, and he avers that this was discharged by the company at no cost to Mr Cyr. Mr Cyr denies that this is so, claiming that monies were deducted by the plaintiff from monthly payments to him [para. 70 to 85 of his affidavit of 6 January 2021 in the substantive proceedings]; Mr Grennan in turn avers that Mr Cyr is incorrect, and that the monthly

payments were made to Mr Cyr without deduction [para. 52 of his affidavit of 21 January 2021 in the substantive proceedings].

**122.** As regards residence, Mr Mooney exhibits an email of 14 February 2017 by Mr Cyr to a firm of solicitors – not the solicitors advising Planitas who subsequently assisted him – in which he identifies himself as a US citizen currently living in San Francisco, California, and indicating that he wished to work on a development of PASRM software, and that "…my plan would be to stay for 1-2 years for development, then move back to the US…", and that he was seeking "advice and guidance" on the process.

**123.** Mr Grennan refers at para. 93 of his affidavit of 21 December 2020 to Mr Cyr having resigned from Planitas by email of 21 April 2021. That email is not exhibited to his affidavit, so it is unclear as to whether the actual resignation occurred on this date. Mr Cyr refers at para. 64 of his grounding affidavit in the substantive proceedings to having resigned following an email from Mr Grennan of 1 April 2020, but does not attribute a date to that resignation. He refers at para. 65 to his "formal letter of 10 May 2020", to which I have referred at paras. 19 and 108 above.

**124.** That letter prompted the reply of 4 June 2020 from the solicitors for Planitas, to which I have referred in a number of contexts above, most notably the suggestion by Mr Cyr, supported by the affidavit from Mr Browne, that it constituted – in the words of Mr Browne – a "blatant threat" to Mr Cyr: see paras. 45 to 54 above. Mr Cyr makes a number of averments about this letter at paras. 62 to 78 of his replying affidavit of 13 January 2021 in the present application: -

> "64. While the initial plan was to stay in Ireland for two years, that plan changed over time as my wife, Heather, and I came to think of Ireland as home and decided to stay much longer. That is demonstrated…by the fact that we

did not move back to the US following the expiration of our two-years visas in 2019. We decided to extend our stay and apply for additional visas.

65. I say that, despite my disagreements with Planitas and the resignation from my employment in April 2020, I was still very happy in Ireland and hopeful of finding alternative employment. My wife and I had lived in Ireland for almost three years by mid-2020 and were very happy there. We were renting an apartment in Dublin 8 and were thinking about the possibility of buying our place in the city. Had we lived in Ireland for another two years we would have been eligible to apply for Irish passports, something we were looking forward to doing.

66. By 2020 we had no intention of leaving the country. On the contrary, we intended to stay for a minimum of five more years and had even invited family members over to visit us in October 2020 … [Mr Cyr exhibits text messages and emails to this effect] …

68. As appears from these messages, we had no plans on leaving Ireland. That did not change after I left my employment with Planitas. I immediately got started on the task of finding alternative employment. I applied to a number of airline companies in Ireland, the United Kingdom, Spain and the United States. The job market was tough at that time – travel restrictions arising from Covid-19 meant that very few companies were hiring and it was impossible to travel to those who were. Despite this, I did secure a number of interviews with two companies, a company based in New York and another in Spain. Unfortunately those interviews did not result in job offers.

69. My plan was to continue looking for work. Ideally this would be in Ireland so we could remain in the country we had come to think of as our home."

**125.** Mr Cyr goes on to address the aftermath of the settlement negotiation attended by Mr Browne with the respondents' solicitor: -

> "70. All of this changed on 30 July 2020 when I spoke with my solicitor following a settlement negotiation he had attended the previous day with the respondents' solicitor, Pat Flynn. My solicitor informed me that Mr Flynn had been aggressive at the meeting and had said that he would '*send the guards around to arrest [your deponent]'.*
>
> 71. The implication in Mr Flynn's threat was that your deponent was in the country illegally and that Mr Flynn would report the matter to the police with the specific intention of having me deported. This was the second time Mr Flynn had made this kind of threat… [a reference to the letter of 4 June 2020, and specifically the portion of the letter referred to by Mr Browne and quoted at para. 51 above].
>
> 72. My wife and I had already become very uneasy at the threat contained in the letter of 4 June. It was particularly distressing because it came from a lawyer, and specifically the same lawyer who had advised us on our immigration into the country in 2017… [Mr Flynn denies this in his affidavit of 21 January 2021, advising that he 'did not at any time advise the applicant in relation to immigration…my colleagues dealing with that area of work dealt with the applicant [Para. 14]];
>
> 73. We were forced to terminate our lease without notice, resulting in the forfeiture of our rental deposit. We had spent more than €2,000 on new appliances for the apartment, which we were forced to abandon as there was no time to sell them.

74. I say that Mr Flynn made us feel like we were criminals. His firm had processed our visa application and so we fully believed that he was telling us the truth when he warned that we were no longer entitled to be in the country. For that reason, we did not seek further legal advice about our immigration status prior to leaving Ireland.

75. It was only in November 2020, following our departure from Ireland, that I contacted a lawyer specialising in Irish immigration law. This was a suggestion made by the lawyers representing me in the within proceedings. They wanted to know whether Mr Flynn had been correct in suggesting that we were in Ireland illegally and threatening to have us deported.

76. I was shocked to learn from the immigration lawyer that Mr Flynn's threats to call the police were, in fact, completely unfounded. I was entitled to remain in Ireland until the expiration of my stamp 4 visa notwithstanding that I was no longer employed by Planitas. The visa expires on 18 September 2021…

77. The respondents, through their solicitor, have chased your deponent out of the country by issuing unfounded threats and suggestions of illegality. Had it not been for those threats, I say that I would not have left Ireland and would have continued searching for employment in the country. It is unconscionable that the respondents should now seek to rely on circumstance [sic] arising from their own misconduct as a reason preventing me from litigating legitimate claims before this Honourable Court.

78. …The only time I have received immigration advice was in November 2020, referred to above, after the lawyers representing me in the within proceedings recommended seeking it".

**126.** As I have mentioned above at para. 47, Mr Flynn swore an affidavit in relation to these allegations, and strenuously rejected all of the accusations made against him. In particular, at para. 6 of his affidavit, he rejects "the claim that I said I would send guards to arrest the applicant", and the claim that "I made or conveyed any threats". He denies the allegations in relation to his demeanour at the settlement meeting, and his position in that regard is supported by the affidavit of Mr Browne, who was acting for Mr Cyr on that occasion. While he professes a reluctance to "go into the detail of what was discussed in the without prejudice meeting", Mr Flynn does aver as follows at para. 11 of his affidavit: -

> "…I conveyed that in the ordinary course an employer would have obligations to the Department of Jobs Business [sic] under the working permit rules to include letting them know when an employee on a work permit resigned his position. I did not in any sense convey this as a threat. I stated that my clients (Planitas and Luke Mooney) were good people and had no present intention to do so".

**127.** This averment is notable, as while Mr Flynn may not have intended it as a threat, his averment does suggest that the possibility of reporting Mr Cyr to the appropriate department was certainly something which Planitas and/or Mr Mooney might consider that they were obliged to do. At para. 12 of his affidavit, Mr Flynn denies that the letter of 4 June 2020 constituted a "threat", and remarks that "…curiously, it does not appear that the letter of 4 June 2020 caused the applicant in any way to explore or query his immigration status at that point. Indeed, as I understand it, that letter went without reply".

**128.** Mr Flynn goes on to aver as follows: -

> "13. I should here note that at the time the letter of 4 June 2020 was written, there was some slight confusion on the part of our clients as to what exactly the applicant had applied for and obtained in Summer 2019. The letter was written on the basis that there was a legal responsibility to inform the authorities when employment the subject of a work permit came to an end. In fact, the applicant had obtained a new stamp four visa only and was not required to obtain a work permit in 2019. Planitas had been involved in the visa renewal in providing supporting documents and this had led to the erroneous belief that Planitas had certain reporting obligations should the applicant's employment cease. My remarks in the settlement meeting were on the same basis".

**129.** The net situation therefore seems to be that Mr Flynn intimated, both in the letter of 4 June 2020 and in the settlement meeting of 30 July 2020, the possibility that Planitas would be obliged to report to the appropriate department that Mr Cyr's employment had ceased, although Mr Flynn now appears to accept that this was not in fact the position. On the other hand, Mr Cyr did not seek his own independent legal advice until he had returned to the US and was advised by his lawyer to do so in November 2020, after the initiation of the present substantive proceedings.

**130.** At para. 46 of his second affidavit, Mr Mooney refers to being told by Mr Grennan "…that the applicant stated on a number of occasions during their period working and travelling together that PASRM was the only reason he was living in Ireland and that when the product development was at a more mature stage, he would seek to return to the US and continue to work on it from there…".

**131.** Mr Mooney also refers to the fact that Mr Cyr's wife's job "…is teaching English online to Chinese nationals who are located in China and…the job is not based in Ireland as such…" [para. 48].

**132.** Mr Cyr addresses these matters in his affidavit of 9 February 2021. He accepts that he would have said to Mr Grennan that the company was the only reason he came to live in Ireland, but that the view of him and his wife on this changed, as demonstrated by the text and emails exhibited to his previous affidavit, and that "we had no plans to leave any time soon" [para. 24]. He accepts that his wife Heather had a job teaching English online from Dublin to students in China, and avers that she has continued to carry out the work since the move back to the United States. He states however that this has become "impractical and stressful as a result of the 15-hour time difference between Colorado and Beijing. It means that Heather is now having to work at 3am in order to support our family. She did not have that problem when living in Ireland".

**Residence: the respondents' position**

**133.** It is not clear that any reference was made by Mr Flynn in his settlement meeting with Mr Browne to sending the gardaí to arrest Mr Cyr. Mr Flynn denies this allegation, and Mr Browne readily and properly acknowledges that Mr Flynn was "polite, professional and courteous throughout the meeting". However, he insists that a "threat" that the respondents would "have the applicant deported if he was in the country" was made: see paras. 50 to 52 above. Mr Flynn does not offer a subsequent affidavit denying this allegation.

**134.** The respondents submit that the letter of 4 June 2020 did not constitute a "threat", but rather "a simple factual statement albeit, as it transpired, erroneous…" [para. 79 written submissions]. They point out that Mr Cyr did not reply to the letter:

that his "…plans to return to America were well advanced by 29 July 2020, by which date he had settled on a business idea, business name, business partner, and business address and had submitted forms to incorporate an LLC in Arizona by the end of the following week…Notably, Mr Cyr has not stated in his affidavits when he in fact left Ireland" [paras. 80 to 81 written submissions].

**Ability to meet security for costs order**

**135.** Mr Cyr acknowledges in his replying affidavit that he has started a new business, Quibble LLC, which he describes as a "revenue management company for vacation homeowners (Airbnb and such like)" [para. 86]. The business, as of the date of that affidavit (13 January 2021) was limited to consultancy work, and "currently produces insufficient income to pay your deponent any salary or other income [para. 86]".

**136.** Mr Cyr avers that, since arriving back in the United States, he and his wife have been staying with family members. He avers that their life savings "have been further depleted by the costs associated with the within proceedings. So far, I have incurred more than €20,000 in legal fees…" [para. 87]. He expresses the view that "…the only reason the respondents have issued the within motion is to prolong these proceedings in full knowledge that I do not possess their financial strength and would ultimately be forced to abandon them [Para. 88]". He pleads that his shareholding in the company has been rendered worthless to him by the respondents' actions, and had it not been for those actions his shareholding "would have a significant value because the company's underlying assets are themselves very valuable. That is the only reason they have been taken from the company by the first and second respondents" [Para. 90]. As his shareholding has, in his view, no value to him, he has offered the shareholding to the respondents as security for his costs.

**137.** This offer has been rejected by the respondents. At para. 55 of his affidavit of 21 January 2021, Mr Mooney avers that the applicant's statement that his only asset in Ireland is his shareholding in the company is "difficult to understand…in light of the applicant's claims…that he personally owns the intellectual property in the software" [Para. 55]. He goes on to aver that "…the software (or more correctly the applicant) have [sic] not succeeded in obtaining a new customer for the software since 2017, while the company has incurred significant debt. The applicant's actions in abandoning the software have done it considerable damage" [Para. 56].

**138.** In respect of the applicant's alleged inability to meet an order for security for costs, the applicant relies on the judgment of Barrett J in *Greene v Highcross Bars Limited* [2015] IEHC 654. In that case, the court refused an order for security against an Irish plaintiff resident in Dubai:

> "20. "…the current cost of legal representation, as already touched upon by the court herein, is now often so great that the scale of a costs order emanating from the High Court in the event of Mr Greene being unsuccessful in his claim is likely to be such that Mr Greene may in any event face *some* difficulty in meeting it to the full. This being so the court finds itself in the curious position that it must conclude that Mr Greene's presently being ordinarily resident in Dubai does not yield the result that the defendant will face 'substantially increased difficulty or expense in enforcing such costs order'. [Wording taken from the dicta of White J in *Jack F McCarthy III v Football Association of Ireland & Ors.* [2014] IEHC 66, quoted at para. 17 of the judgment of Barrett J]. This is because the defendant will likely face some such difficulty anyway. This, in turn, is because there are few plaintiffs who now have the resources immediately to hand to meet in full the type of costs now so often

incurred by an opponent who enjoys legal representation during the course of High Court litigation" [emphasis in original].

**139.** Barrett J went on at para. 21 of his judgment to refer to the observation of Hamilton CJ at p.7 of his judgment in *Malone v Brown Thomas & Company Limited* (unreported, Supreme Court, 25th November 1994), drawing on the judgment of Fitzgibbon J in *Perry v Stratham Limited* [1928] IR 580, that "*'poverty'* (want of resources) is no justification for compelling a party to lodge security for costs".

**140.** The competing interests to be assessed in a security for costs application were pithily expressed by Clarke J (as he then was) in *Farrell v Bank of Ireland* [2013] 2 ILRM 183 at para. 4.20 as follows: -

> "4.20 So far as individual plaintiffs are concerned the jurisdiction suggests that the High Court will not order security against an individual plaintiff unless that plaintiff is out of the jurisdiction (which in this context now includes, in practice, the European Union in respect of EU nationals). See *Proetta v. Niel* [1996] 1 IR 102 and *Pitt v. Bolger* [1996] 1 IR 108. The rationale behind that jurisprudence is that a plaintiff, though impecunious, must be entitled to bring and pursue a case. The awarding of security for costs against plaintiffs from outside the relevant area is based on the difficulty of recovering costs where the plaintiff is not readily amenable to the process of the Irish courts or other courts which, under the provisions of Regulation 44/2001, give a high level of recognition to orders (including cost orders) of the Irish courts."

**141.** It is clear from these dicta, and from a number of cases from *Collins v Doyle* onwards, that inability to meet an award for security for costs is not in itself a reason for refusing the order. If it were, it would in many if not most cases be impossible to make an award in favour of a defendant who otherwise would be entitled to security

for costs, merely because of an insufficiency of assets on the part of the plaintiff. It would be difficult to see how this would be consistent with the many cases in which security for costs has been awarded against impecunious plaintiffs from outside the jurisdiction. In dealing with the competing interests identified by Clarke J quoted above, the court must, in an appropriate case, be entitled to make an award for security for costs in favour of a defendant against a plaintiff who is ordinarily resident outside the EU or any Lugano Convention country, notwithstanding that plaintiff's insufficiency of assets.

**142.** In his judgment in *Greene*, Barrett J emphasises that the award of security for costs is discretionary. It was in this context that the plaintiff's impecuniosity and inability to meet an award of costs no matter where the plaintiff was resident was taken into account. I do not consider that his decision is authority for the proposition that an order for security for costs can never be made against an individual plaintiff on the basis of impecuniosity.

**Analysis**

**143.** There are certain matters which are of particular relevance to the respondent's application. However, it is extremely important that a court, in assessing such an application, does not fall into the trap of making findings on issues which are squarely contested on affidavit. Findings as to disputed facts are the preserve of the trial judge.

**144.** It is necessary therefore to assess the perspectives of the parties as set out at length in their affidavits without determining the issues of contention, and also to identify the uncontested facts which may be relevant or decisive.

**145.** The plaintiff came to Ireland in 2017 as a result of negotiations with the second named respondent. It appears that, in order to obtain a visa, he accepted employment with Planitas. This had the additional benefit that he could avail of the

track record and resources of Planitas, in circumstances where the company was a start up with neither asset. There is no doubt that he accepted this arrangement – although his interpretation of its implementation differs sharply to that of the respondents – and worked diligently for Planitas, advancing the development and marketing of the PasRM software as best he could.

**146.** The affidavits explore exhaustively how the relationship between Mr Cyr and the respondents came to grief. Mr Cyr's view is that his concept and software were effectively taken over by Planitas, and that he was sidelined and frozen out by Planitas which had no licence to use his software, and effectively ignored all corporate governance for the company and treated the software as its own. When Mr Cyr expressed a wish to effect a clean break between the two companies, he was given reasons why this could not be done, not least of which were the failure to attract sufficient customers for the PasRM software and the contention that Planitas was a net creditor of the company.

**147.** We have seen the circumstances in which Mr Cyr resigned from Planitas, and his allegation of "threats", made by the company's solicitors. It appears that Mr Cyr and his wife made a decision to return to America, although it is not clear exactly when this decision was made. Mr Cyr gives some evidence of searching for jobs, and contends that his preferred option was to remain in Ireland. He refers to the Covid-19 epidemic as hindering his search for work; it may be that this also contributed to his decision to return to the US. He suggests that the "threat" made at the settlement consultation was a major influence on his decision to return home, although it is also the case that he appears to have made some preparations for a new business in Arizona at that time.

**148.** It is in my view not necessary to say much more about the respondents' perspective than that they have to my satisfaction established a *prima facie* defence to the s.212 action. It is for the trial judge to determine whether or not oppression or disregard of the plaintiff's interests have taken place.

**149.** Mr Cyr relies on the "improper conduct" of the respondents, stating that he "would not have contemplated leaving Ireland had it not been for the misconduct of the respondents which is the subject of the substantive proceedings" [para. 79 affidavit 13 January 2021]. He refers to the "agreement with the first and second respondents that I would have real input into the management of the company, that I would be an employee of it and help it to prosper" [para. 80]. At para. 82, he avers as follows: -

> "Had the respondents honoured the agreement, or even if they had respected the company's separate legal identity, I would now be employed by the company and would not have been forced to resign from my job and consequently leave the country. Had they not stripped the company of all its assets and reported it as a 'dormant company', my shareholding would have considerable value which would be available to the respondents in the event of a costs order in their favour".

**150.** In circumstances where the respondents have shown a *prima facie* defence, I do not think that I can order security for costs solely on the basis suggested by the applicant at para. 82 of his affidavit quoted above. The issues which he raises are matters for the trial judge, and I cannot come to even tentative conclusions on these issues, and in particular whether the applicant's shareholding would have considerable value but for the actions of the respondents.

**151.** As regards residence, there is no doubt that the applicant is ordinarily resident outside the EU and in a country not party to the Lugano Convention. However, the applicant argues that the circumstances in which he returned to the US constitute "special circumstances" which warrant a refusal of the respondents' application. In particular:

- The applicant, having resigned from Planitas, attempted to find alternative work but was unable to do so;
- Whether it was a "threat" or not, the letter of 4 June 2020 intimated that Planitas would notify the relevant government departments of Mr Cyr's "current status in Ireland" and the fact that he was no longer employed by Planitas; the applicant avers that he accepted the position as outlined in the letter of 4 June 2020, particularly as Mr Flynn's firm had processed their visa application. It subsequently transpired, as Mr Flynn acknowledges in his affidavit, that the position as stated in his letter was incorrect;
- Mr Browne avers that Mr Flynn, the solicitor for Planitas, made a "threat" at the settlement meeting "to have the applicant deported if he was in this country…" [see para. 50 above]. This averment is not contradicted by Mr Flynn.

**152.** While there may have been a number of factors which contributed to the applicant's decision to return to the US, the fact is that the firm of solicitors which had previously provided Mr Cyr with no doubt invaluable assistance in obtaining his work permit and visa wrote to him in response to his letter formally resigning from Planitas to the effect, *inter alia*, that he was not entitled to be in the country. I consider that I am entitled to infer from the evidence of Mr Browne that it was intimated to him by

Mr Flynn that Planitas would cause Mr Cyr to be deported if he remained in the country. Although Mr Cyr does not identify a date on which he and his wife returned to the US, the clear inference to be drawn from his evidence was that the letter of 4 June 2020, if not also the subsequent statement made to Mr Browne at the settlement meeting, was a significant influence on his decision to leave the country. The fact that the position indicated in that letter was incorrect renders it all the more problematic from the respondents' point of view.

**153.** For completeness, I should say that Mr Flynn's affidavit did raise the issue of the propriety of referring in evidence to statements made in the course of without prejudice settlement negotiations. Mr Cyr, at paras. 33 to 34 of his affidavit of 9 February 2021, responded robustly and on the basis of legal advice he said he had received, that statements of the nature made by Mr Flynn were not protected by the privilege. While I would be inclined to think that this is probably correct, the point was not in fairness pressed on the respondents' behalf in submissions.

**154.** It is impossible to say definitively at this point, and certainly without the benefit of oral evidence, whether Mr Cyr would have remained in this country had he not received the letter of 4 June 2020, or had the statements made at the settlement meeting of 30 July 2020 not been relayed to him. It may well be that Mr Cyr, sooner or later, would have returned to the US where he and his wife may have had other resources available to them such as assistance from family, better job opportunities *etc*. However, his evidence suggests that the erroneous statement in the letter of 4 June 2020 was a significant factor in his decision to leave. Even though the statement was made by the solicitor for Planitas, he had no reason to believe that it was inaccurate or untrue. He and his wife made the decision to leave after that, whether before or after the settlement meeting; if they had left before 30 July 2020, Mr

Browne's account of his meeting with Mr Flynn would have suggested to them that they had done the right thing, even though there was in fact no basis for Mr Flynn's statement.

**155.** If Mr Cyr had remained in the country and initiated the s.212 proceedings, the jurisprudence would seem to indicate that a security for costs application could not be brought against him, as he would most likely be regarded as ordinarily resident in this country. In that case, the respondents would be facing the situation often experienced by a well-resourced defendant sued by an impecunious plaintiff, in that an award of costs after a successful defence of the action could not be executed or recovered against the plaintiff. What has given them the opportunity to bring the application is the return of Mr Cyr to the US, in circumstances to which, it seems to me, they themselves have contributed by the erroneous statements as to the legality of Mr Cyr's residence in this country in the letter of 4 June 2020 and the meeting of 30 July 2020.

**Conclusions**

**156.** I am satisfied that the applicant is ordinarily resident outside the jurisdiction, and not in the EU or a Lugano Convention country. I am also satisfied that the respondents have established a *prima facie* defence. However, the jurisdiction under O.29 applications confers a wide discretion on the court to take into account any special circumstances which affect the justice of the matter.

**157.** It is not likely that the applicant will have the financial resources to satisfy fully or at all any order for costs made against him, unless his fortunes have improved very considerably since February 2021. The court must therefore balance the injustice which would be suffered by the applicant if security were awarded against him with the result that he was unable to proceed with the litigation, and the potential injustice which would be suffered by the respondents in the event that they defend the matter

successfully but are unable to recover costs due to the plaintiff's impecuniosity, or the difficulty generally of executing an award of costs in the US.

**158.** In this latter regard, Clarke J in *Farrell* identified a concern which would motivate a court to award security in the case of an impecunious plaintiff: -

> "4.12 … If there were not provision requiring generally for the payment of costs to the successful party then there would be a real risk that the bringing or defending of proceedings could be used as a form of unfair tactic little short, at least in some cases, of blackmail. A plaintiff could threaten proceedings which would undoubtedly put the defendant to significant cost in the hope that the defendant would buy off the case (even it was unwholly [sic] unmeritorious) so as to avoid having to incur the costs of defending. If it were not possible, ordinarily, to recover costs on behalf of a defendant in respect of a failed claim then such a tactic could easily be adopted by many unscrupulous parties…".

**159.** I do not get the sense from the numerous and lengthy affidavits sworn by Mr Cyr that he is the sort of "unscrupulous" applicant to which Clarke J refers. A genuine sense of grievance at how he considers he was treated emanates from those affidavits; whether that sense will be held to be justified can only be determined at trial, and it must be said that it is clear that the respondents will strongly defend the action.

**160.** However, I consider that, in all the circumstances, the greater injustice would be to make an order the effect of which would be to prevent the applicant from proceeding with the matter and to have his grievances determined in a full trial. I do not consider that, if successful in the action, the respondents are entirely without hope of recovering at least part of any costs which may be ordered in their favour. It may be that, as the applicant suggests, there is worth in the intellectual property in the PasRM software or Mr Cyr's shares in the company, and that some order could be

made involving those elements in a costs order in favour of the respondents, if such were made.

**161.** In all the circumstances, and in the exercise of my discretion, I do not consider that I should accede to the respondents' application, which will be dismissed. If the respondents consider that any order other than that the costs of the application should be awarded to the applicant should be made, they should make a written submission of not more than 1000 words within seven days of delivery of this judgment, with the applicant to have the opportunity to reply in not more than 1000 words to those submissions within seven days of receipt of them. The parties may address any ancillary orders which they consider necessary. After receipt of submissions, I shall make orders without further reference to the parties, subject to convening a short hearing if I consider it necessary.