THE HIGH COURT

[2026] IEHC 486

Record No. 2025/108COS

IN THE MATTER OF HOMELAND GROUP HOLDINGS LIMITED AND

IN THE MATTER OF THE COMPANIES ACT, 2014 AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 212 OF THE COMPANIES ACT, 2014

Between:-

ISON INNOVATIONS LIMITED

Applicant

-and-

NEIL COLLINS

AND

HOMELAND DEVELOPMENT FINANCE LIMITED

Respondents

AND

HOMELAND GROUP HOLDINGS LIMITED

Notice Party

Judgment of Mr. Justice Oisín Quinn delivered on 16 July, 2026

I. INTRODUCTION

1. This judgment concerns an application for security for costs in proceedings under section 212 of the Companies Act, 2014.

2, Homeland Group Holdings Limited ("HGHL") has two shareholders, the Applicant ("Ison") which owns 26.86% of HGHL and the second respondent ("HDFL") which owns the balance. The first respondent ("Mr. Collins") is a director of HGHL and he owns the shares of HDFL. The sole shareholder of Ison is a Mr. Crossan.

3. Ison seeks relief against Mr. Collins and HDFL pursuant to section 212 claiming that its interests as a minority shareholder in HGHL have been oppressed in two respects. Firstly, Ison claims that some property assets of HGHL were transferred out of HGHL at an undervalue and with a view to disadvantaging Ison and benefiting Mr. Collins and HDFL. Secondly, Ison claims that a debt of HGHL with a lender was renegotiated by Mr. Collins and HDFL in a manner that was oppressive to and disregarded the interests of Ison. These claims are disputed by Mr. Collins and HDFL and, for the purposes of the security for costs application, Ison accepts that the respondents have established a *prima facie* defence to the section 212 proceedings.

4. The respondents seek security for costs pursuant to section 52 of the Companies Act, 2014 on the basis that they contend that Ison will not be able to pay their costs if they successfully defend the section 212 proceedings. They estimate the costs of the section 212 proceedings at €474,622 inclusive of VAT.

5. Ison's only asset of any substance is the shareholding it holds in HGHL. In its financial statements for the year end 2023, Ison valued this shareholding at over €2million. Ison does not trade and has no sources of income. Ison accepts that if it loses the case that it could only meet an order for costs by this shareholding being "monetised".

6. HGHL has one substantial asset, namely an interest in a substantial property development currently underway in Dublin called Berwick Pines.

7. The respondents claim that while Ison may not be insolvent, it is, for the purposes of a security for costs application, "impecunious" because it does not have cash or income or any other liquid assets to meet an order for costs if the respondents are successful. Specifically, the respondents contend that a minority shareholding in a private company such as HGHL, which only has one other shareholder (HDFL), which is subject to a shareholders' agreement that would limit the rights of any new incoming shareholder,

which is dependent on an ongoing residential development, and which has debt that has to be repaid, is not an asset, irrespective of its value or potential value, of a sufficiently liquid nature to satisfy the requirement that Ison would be able to pay the respondents' costs for the purposes of security for costs.

8. Ison disputes this and claims that a way could be found to "monetise" this asset should Ison be unsuccessful. Furthermore, Ison propose that its shares in HGHL could be charged in favour of the respondents.

9. Finally, Ison submits that, to the extent that the value of the shares might be considered below the amount of the likely costs, this is because of the wrongdoing complained of. Ison had argued in its affidavits and written submissions in advance of the hearing that an order for security for costs would "stifle" the proceedings as Ison would not be able to meet an order for security costs because its only substantial asset was the shareholding in HGHL and it could not realistically monetise that while the proceedings were ongoing (see the second Affidavit of Mr. Crossan at para. 70). That argument was withdrawn mid-way through the first day of the security for costs hearing.

10. The security for costs hearing took place over two days on 23 and 24 June, 2026.

II. BACKGROUND

11. Ison, is a minority shareholder in HGHL, the company at the top of the Homeland property group, which is a property development group set up and run by Mr. Collins. HGHL's principal remaining asset is a residential development site at Berwick Pines in Dublin. Ison's 26.86% shareholding in HGHL is its only substantial asset. Mr. Crossan is the owner of the entire issued share capital in Ison. Mr. Crossan says that he is in fact the beneficial owner of this 26.86% shareholding in HGHL. Accordingly he is the person who stands to lose or gain as a result of the section 212 proceedings.

12. Mr. Crossan describes himself as a technology professional, investor and a "high net worth individual". While Mr. Crossan explained in his affidavits that Ison was his "investment vehicle", in recent years at least, based on Ison's financial statements, this minority shareholding in HGHL has been its only substantial asset.

13. The majority interest in HGHL is held through entities associated with Mr. Collins. The relationship between the shareholders deteriorated in the context of financial pressures arising from substantial secured indebtedness owed to a third-party lender.

14. Against that backdrop, the group undertook a series of transactions between 2021 and 2024. These included the disposal of certain development assets from the group structure and, subsequently, the restructuring of the debt. The asset disposals were carried out under pressure from the lender as part of a deleveraging process. This process involved the acquisition of the group's debt by an entity associated with the majority shareholder at a significantly reduced figure. The parties are in dispute as to the circumstances in which these steps were taken, the extent of the minority's knowledge and participation, and their effect on the overall value of the group.

15. Ison contends that these transactions, when viewed cumulatively, had the effect of diminishing the value of its shareholding and excluding it from meaningful participation in the HGHL's affairs. It is said that information was not fully disclosed, that Ison and Mr. Collins were placed under pressure to accept disadvantageous proposals, and that value was diverted away from the company.

16. The respondents, for their part, maintain that the transactions were commercially necessary, undertaken in difficult financial conditions, and designed to preserve the viability of the business in circumstances where enforcement by the lender was a real and imminent risk.

17. The respondents also say that Mr. Crossan and Ison were informed of these developments, offered the opportunity to participate in them, declined but nonetheless consented to them.

18. During the hearing, the respondents contended that the inference from the financial statements of Ison (which disclosed no trade, activity, income or source of cash or liquidity) was that Mr. Crossan was funding the litigation. That inference was not disputed.

19. The respondents estimated that the costs of the litigation will be in the order of €474,622 inclusive of VAT and this figure was not disputed.

20. It is within this factual context that the underlying proceedings under section 212 of the Companies Act 2014 have been brought, and against which the present application for security for costs falls to be determined.

III. Submissions of the parties

(i) Summary of the submissions of the Respondents

21. Mr. Neil Steen, SC (with Mr. Chris Mills, BL) made very helpful oral and written submissions.

22. Mr. Steen, SC's submissions were directed to the relatively confined inquiry which arises on an application for security for costs, and he emphasised that, notwithstanding the breadth of the factual background, the court's task ultimately resolved into a practical assessment of whether there was reason to believe that the applicant would be unable to meet an adverse costs order.

23. The applicable test, as he put it, required the respondents to establish by credible evidence that there was reason to believe that the applicant would be unable to pay the respondents' costs if successful, together with the existence of a *prima facie* defence. As this latter requirement was not in dispute, this meant that the application focused squarely on the question of ability to pay.

24. In developing that issue, Mr. Steen, SC placed particular reliance on the distinction drawn in the authorities between formal solvency and practical ability to discharge costs. Citing decisions such as *Flannery v Walters* [2015] IECA 147 and *James Elliott Construction Ltd v Irish Asphalt Ltd* [2010] IEHC 234 and later referring also to *Quinn Insurance Ltd. v PwC* [2021] 2 IR 70, he submitted that a positive net asset position did not of itself answer the statutory test. What was required, he contended, was an assessment of whether those assets could, in reality, be converted into cash so as to meet a costs order. The court, he said, was concerned with liquidity and realisability, not with accounting value.

25. On the facts, he contended that Ison's financial position was straightforward. Its accounts demonstrated that it had negligible cash, no income stream, and no ability to generate independent funds. Its only asset of substance was its minority shareholding in HGHL. That shareholding, he submitted, was the sole basis upon which Ison resisted the application, both in asserting that it was not impecunious and in contending that any insufficiency was attributable to the respondents' alleged wrongdoing.

26. Mr. Steen SC's central submission was that this reliance was fundamentally misplaced. Even accepting, for the sake of argument, that the shares had a positive value, he submitted that they were not an asset which could meet a costs order in any practical

sense. He emphasised a number of features. First, the shareholding was a minority interest in a private company, for which there was no ready market. Secondly, the shares were subject to significant contractual restrictions under the shareholders' agreement, including prohibitions on transfer or encumbrance without a 70% majority, and requirements that any transferee enter into a deed of adherence. Thirdly, the value of the shares was itself contingent and speculative, being dependent on the future development and realisation of the Berwick Pines site.

27. He further submitted that there was no realistic prospect of extracting value from the shares in the relevant timeframe. Dividends were unlikely, given the group's indebtedness and the need to deploy capital into development. A sale of the shares would be inherently difficult, both because of their minority nature and because of the ongoing dispute between the parties. Nor could the shares be effectively used as security, as their value was uncertain and their enforcement would be complex and delayed. In that regard he relied on authorities such as *Fides Capital v Alchemy Projects Ltd.* [2017] IEHC 266 and *3V Benelux BV v Safecharge Card Services Ltd* [2020] IEHC 139 emphasising that security ordinarily takes the form of cash or a readily realisable equivalent, and that speculative or illiquid assets do not suffice.

28. He submitted by reference to *Flannery v Walters* in particular that where a plaintiff company relies on assets rather than cash, it must explain how those assets can be realised to meet a costs order. In this case, he submitted, there was an absence of any concrete evidence as to how the shares could be monetised, whether by sale, charge, or otherwise. The court, he contended, should not fill in those evidential gaps in favour of the applicant.

29. In reply to Ison's argument that the shares might ultimately have a value exceeding the estimated costs, Mr. Steen, SC stressed that this was beside the point. Even if the shares were worth more in an accounting sense, that would not address the immediate and practical requirement to meet a costs order in cash. He adopted the position, reflected in the evidence of Mr. Collins, that even on the applicant's own counterfactual case (namely, that the impugned transactions had not occurred) this would not generate liquid funds available to discharge costs. He also referenced the oral submission of counsel for Ison that, had one of the property assets (Watson Place) been transferred for its correct value, then Ison would have had cash. He replied by submitting that this

ignored the basis of the deal with the lender which involved them taking a massive reduction in their debt of €40m down to €12.5 on the basis that they would sweep up the cash generated by these asset sales.

30. He also addressed Ison's alternative reliance on alleged wrongdoing as constituting "special circumstances". His submission was that the applicant had failed to establish, even on a *prima facie* basis, any causal connection between the impugned transactions and its alleged inability to pay. In particular, he criticised as speculative the counterfactual analysis advanced, noting that the asset disposals were carried out under lender pressure and that the Signal loan transaction was necessary to avert receivership. He submitted that the lender was going to "sweep up" whatever cash was generated by the particular asset sales in question. In any event, he maintained that the special circumstances exception could not displace the requirement for security in the absence of clear and credible evidence.

31. Finally, he resisted any suggestion that the court should engage with the merits of the underlying oppression claim, relying on *3V Benelux* and *Quinn Insurance* to submit that the inquiry must remain confined and should not become a "mini-trial". To the extent that the applicant sought to rely on the alleged strength of its case, he submitted that such considerations were irrelevant once a *prima facie* defence was established.

32. Accordingly, Mr. Steen, SC's case, taken as a whole, was that the applicant was plainly impecunious in the relevant sense; that its sole asset consisted of an illiquid, restricted and speculative minority shareholding; that there was no evidence as to how that asset could be realised so as to meet a costs order; and that, in those circumstances, there was a clear basis for the court to conclude that the statutory test was satisfied and that security should be ordered in the ordinary way.

(ii) Summary of the submissions of Ison

33. Mr. Brian Conroy, SC (with Ms. Lydia Bunni, BL) made very helpful oral and written submissions on behalf of Ison.

34. Mr. Conroy, SC accepted that the respondents had established a *prima facie* defence for the purposes of this security for costs application. Secondly, he confirmed that Ison was no longer seeking to resist the application based on the "stifling" argument. Next, he did not dispute the contention of Mr. Steen, SC that the likely inference of this

situation (where Ison had no income or cash of substance) was that Mr. Crossan was funding the litigation.

35. Mr. Conroy, SC had two main points. Firstly, that the respondents had not established that Ison had insufficient assets to meet any award of costs; and secondly, that if this was established, then any insufficiency was due to the alleged wrongdoing of the respondents. Finally, he submitted that if the court decided in principle that Ison should be directed to make security for costs, then the court should arrange a further hearing to facilitate arguments about directing security on a phased basis.

36. Mr. Conroy, SC carefully outlined Ison's case in the section 212 proceedings. Notwithstanding that the court does not have to analyse the merits of the dispute to establish whether the respondents' have established a *prima facie* defence, I propose to set out a brief summary of this element of Mr. Conroy, SC's submissions to give context to the issues that remain. Firstly, the value of Ison's only asset of any substance is intertwined somewhat with this narrative. Secondly, this context is also relevant to Mr. Conroy, SC's ancillary submission that, if Ison's only asset is in some way insufficient to meet the costs, then this is *prima facie* due to the alleged wrongdoing of the respondents.

37. Mr. Conroy, SC explained that, taken as a whole, Ison's case in oppression is grounded in an alleged course of conduct by the majority shareholder which had the effect, he claimed, of excluding the minority from meaningful participation in the value of the company. He contended that the central asset remaining within the group was the Berwick Pines site, described by Mr. Crossan as the "jewel in the crown", and that, on any view of the contemporaneous figures, there was substantial underlying value in that asset notwithstanding any indebtedness. In that context, he emphasised that the value attributed to the site in late 2023 in the appraisals would, if realised against the ultimately reduced debt, produce very significant equity for the shareholders.

38. He submitted that, notwithstanding this position, the minority shareholder was effectively excluded from the negotiations with the lender and denied any real insight into the restructuring of the group's indebtedness. He contended that Mr. Crossan had no direct engagement with the lender and was not furnished with documentation at the relevant time, which would have enabled him to understand the evolving position.

39. Mr. Conroy, SC then placed particular emphasis on the sequence of proposals advanced in early 2024, whereby Mr. Crossan was invited either to contribute substantial further equity or to accept severe dilution. He argued that these proposals were framed in circumstances of acute pressure, including assertions that the company faced insolvency and receivership if funding was not provided. Mr. Conroy, SC characterised these communications as placing Mr. Crossan in an invidious position, effectively compelling him to consider disadvantageous outcomes on the basis of incomplete or misleading information.

40. Mr. Conroy, SC submitted that Mr. Crossan was led to believe that a substantial equity contribution by the majority was required, but that the ultimate transaction was largely funded by borrowings secured on the company's own assets. In addition, he submitted that the debt was then acquired by an entity wholly owned by Mr. Collins rather than by the company itself, thereby diverting to that entity the benefit of the write-down which would otherwise have accrued to the group.

41. In that regard, he contended that the practical effect of the transaction was to interpose a large intra-group debt in favour of the majority, with the consequence that future development proceeds would be upstreamed to the majority's vehicle rather than to the company for distribution among shareholders. Mr. Conroy, SC submitted that, absent the write-down, which he said Mr. Collins only acknowledged in his second replying affidavit, that the structure of the arrangement had the capacity to strip *all* value from the company. He further pointed to the then contemporaneous accounts as reinforcing the perception that the full face value of the debt was to remain payable, thereby contradicting any suggestion that a write-down had always been intended.

42. His submissions also relied on the course of negotiations during this period, in which he said that increasingly onerous exit terms were proposed, including relinquishment of the shareholding of Mr. Crossan for nominal consideration and a reduced carried interest in a future dividend. Mr. Conroy, SC contends that these proposals can only be understood against the backdrop of the undisclosed transaction, and that they were designed to procure Mr. Crossan's exit at a substantial undervalue. The timing of the continued pursuit of these proposals, even after the Signal transaction had been concluded, is relied upon as corroborative of that contention.

43. A further strand of the submissions concerned the later offer made in early 2025 to resolve the dispute, which involved a contribution by Mr. Crossan and a transfer of the Signal debt back to the company. Mr. Conroy, SC submitted that this proposal was made after the alleged wrongdoing had already occurred and after trust between the parties had irretrievably broken down. He contended that it did not address earlier transactions, including the asset transfers, and could not reasonably be accepted in circumstances where Mr. Crossan had formed the view that he had been deliberately misled.

44. Mr. Conroy, SC submitted that the conduct relied upon plainly falls within the scope of section 212 of the Companies Act 2014, rejecting as artificial any distinction based on the use of subsidiary entities. He argues that a director cannot avoid fiduciary obligations by acting through related companies where the effect is to divert value from the company to entities under his control. On that basis, he contended that the transactions, taken together, disclose a *prima facie* case of oppressive conduct.

45. Finally, in addressing the application for security for costs, Mr. Conroy, SC relied on the decision of the Supreme Court in *IBB Internet Services v Motorola* [2013] IESC 53 for the proposition that the applicable test requires "reason to believe" that the plaintiff will be unable to meet an adverse costs order. He further referred to *Jirehouse Capital v Beller* [2009] EWHC 110 (Ch), as cited in that judgment, and to *Irish Press plc v Warburg Pincus,* unreported McGuiness J.,12 March 1997, in support of the contention that the existence of valuable underlying assets may suffice (these consisted of various interests including investments in listed shares held by subsidiaries). Applying those principles, he submitted that if the Berwick Pines asset is properly valued and the debt position correctly understood there is no sufficient basis to conclude that the applicant will be unable to meet any costs order.

IV. DISCUSSION

Consideration of relevant legal principles

46. There was broad agreement as to the general legal principles applicable to this application.

47. Section 52 of the Companies Act, 2014 provides as follows:-

> "*Where a company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his or her defence, require security to be given for those costs and may stay all proceedings until the security is given."*

The parties agreed that this provision applied to applicants in section 212 proceedings referring to the decision of Sanfey J. in *Re PASRM Ltd.* [2023] IEHC 149.

48. This provision entitles the court to direct that security for costs be provided by a plaintiff in any legal proceedings where "*it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant"* if the defendant is successful.

49. This provision, in general, brings a focus onto three elements: namely, the requirement for "*credible testimony*"; which in turn needs to be sufficient to meet the substantive threshold set by the statutory phrase "*reason to believe*"; and then, the question of whether the two foregoing elements combine to demonstrate that the plaintiff company "*will be unable to pay the costs"* of a successful defendant, and what that means.

50. In addition, the case law establishes that the moving party must establish a *prima facie* defence to the claim; see *Usk and District Residents Associations Ltd v The Environmental Protection Agency* [2006] IESC 1 ("*Usk*").

51. These overarching and established principles are helpfully summarised by Clarke CJ. in *Quinn Insurance v PwC* [2021] 2 IR 70 at para. 7.1 as follows:-

> *"The defendant must first establish a bona fide defence and also demonstrate that the plaintiff would be unable to pay the costs of the proceedings should the claim fail and costs be awarded against the plaintiff concerned. Thereafter, security should be ordered unless special circumstances can be established."*

52. While the onus is on the moving party to establish that it has a *prima facie* defence and that there is credible testimony which establishes that there is "reason to believe" that the plaintiff will be unable to pay the costs if it loses, the onus is on the party resisting security for costs to establish special circumstances; see *Usk* para. 6.2. where Clarke J. for the Supreme Court approves of the summary of the law set out by Morris P. in

Interfinance Group Ltd. v KPMG, High Court, unreported, 29 June 1998 who stated as follows:-

> *1. In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:-*
>
> > *(a) that he has a prima facie defence to the plaintiff's claim, and*
> >
> > *(b) that the plaintiff will not be able to pay the moving party's costs if the moving party be successful;*
>
> *2.In the event that the above two facts are established then security ought to be required unless it can be shown that there are specific circumstances in the case which ought to cause the court to exercise its discretion not to make the order sought. In this regard the onus vests upon the party resisting the order.*
>
> *The most common examples of such special circumstances include cases where a plaintiff's inability to discharge the defendants costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought.*
>
> *The list of special circumstances referred to is not, of course, exhaustive."*
>
> *(underlined for emphasis).*

53. In this case, Ison accepts that the respondents have established a *prima facie* defence. Secondly, Ison withdrew its argument that an order for security for costs would "stifle" its claim. Consequently, two main issues remain to be decided, along with one subsidiary issue. These are:-

(i) whether the respondents have by credible testimony established that there is "reason to believe" that Ison will be unable to pay costs;

(ii) if this is established, then whether Ison can establish that any such inability to pay costs arises as a result of the alleged wrongdoing of the respondents; and

(iii) if a decision is made in principle to direct security, whether the court should direct the full amount or, in the alternative, direct the making of security in phased payments.

The legal principles in relation to these specific issues will now be considered.

(i) Legal principles relevant to whether the respondents have by credible testimony established that there is "reason to believe" that Ison will be unable to pay costs

54. In relation to this first issue, the authorities indicate a number of well-established principles.

55. Firstly, being unable to pay the costs does not require the moving party to establish insolvency; see *Quinn Insurance*, Clarke C.J. at para 7.10.

56. Secondly, the test required by the statutory wording "reason to believe" does not require an applicant to establish the impecuniosity "on the balance of probabilities" and the test should not be elevated to that standard. The event in question is a future one and what the court is required to do is to evaluate the risk or danger of that event occurring; see Clarke J. in *IBB Internet Services Ltd. & Others v Motorola Ltd.* [2013] IESC 53 at para.s 5.5 to 5.16 where Clarke J. approves of the reasoning of Arden L.J. of the Court of Appeal for England and Wales in *Jirehouse v Beller* [2009] 1 WLR 751 on that point.

57. In addition, "reason to believe" requires more than a "*mere risk*" that the plaintiff will be unable to pay the costs. The test, Clarke J. concludes in *Motorola* at para. 5.16 ultimately requires the court:

> *"to consider all material evidence and reach an assessment of the range of likely eventualities and thereby determine whether there truly is "reason to believe" that the company "will" be unable to pay costs should it lose. That requires that the evidence satisfy the court that there is something significantly greater than a mere risk of such an eventuality occurring".*

58. In considering the evidence on this issue, the authorities establish that it is an error to consider only the net asset position of the corporate plaintiff based on, for example, its accounts or financial statements; see *Flannery v Walters* [2015] IECA 147. In other words, a more thorough, meaningful examination is required to consider whether the corporate plaintiff will have the ability to pay the costs. This in turn requires a consideration of the *nature* of the assets likely to be available to pay the costs. So for example in Flannery, the financial statements when closely examined indicated no income or operating activities and the only asset of substance was an investment in a

subsidiary about which there was no information; see *Flannery* at para.s 23 to 30. Consequently, Finlay Geoghegan J. concluded at para. 31 as follows:

> *"The financial statements for the first six months in 2014 continue to show a similar picture and repeat the same statements at Note 10. They also disclose that no income or cash was generated from operations. There was no evidence before the court of the ability of Lexington to generate profits and having regard to the statement at Note 10 and the nature of the assets it appears to me that, in the absence of explanations from Lexington the financial statements produced by Lexington can only be considered as indicating a significant risk that it would be unable to pay the costs of the defendants if successful."*

59. This in turn, draws attention to a further issue of principle. When the moving party draws attention to an issue of concern based on the plaintiff's financial statements (such as no income stream or apparently illiquid assets) the court should lean against filling in any unexplained matters in a manner favourable to the party that could have explained the matter if it did not do so. This principle is set out by Clarke J. in the High Court in *James Elliott Construction Ltd. v Irish Asphalt ltd.* [2010] IEHC 234 at para. 5.2 where he states:-

> *"Where there are circumstances that require explanation and where a company does not put before the court evidence sufficient to give such an explanation, the court should lean against filling in such unexplained gaps in a manner favourable to the party who could have provided the relevant explanation."*

60. That principle was relied upon by Finlay Geoghegan J. in *Flannery* in awarding security for costs in circumstances where the corporate plaintiff had not explained how it could readily monetise assets identified in its financial statements in the event that it had to pay the defendant's costs; see para.s 24 to 25 and 35 in particular.

(ii) Legal principles relevant to whether Ison can establish that any such inability to pay costs arises as a result of the alleged wrongdoing of the respondents

61. In relation to the second issue, the onus rests on the corporate plaintiff in relation to this issue: see *Usk*, para. 6.2 (cited above).

62. Secondly, the threshold or standard for establishing the special circumstances (in this case, that the alleged wrongdoing has caused an impecuniosity) is whether Ison has

established this on a *prima facie* basis; see Clarke C.J. in *Quinn Insurance* who states at para. 7.26:-

> *"so also is it appropriate for the Court to carefully scrutinise the proposition put forward on behalf of a plaintiff to the effect that there is a good prima facie basis for suggesting that, but for the alleged wrongdoing, the plaintiff concerned would be in a position to meet an adverse costs order. It seems to me to be again appropriate to comment that it is for the plaintiff to put up whatever evidence it wishes in that regard. It is not for a defendant to "raise particulars" about the evidence but it is open to a defendant to seek to persuade the Court that the evidence is inadequate. Mere assertion is certainly impermissible. Whether some level of even limited expert evidence may be required is a matter which will depend on the circumstances of the individual case."*

(iii) guidance in the jurisprudence as to the form of the order

63. As to the third subsidiary issue, firstly, the authorities indicate in a case involving a corporate plaintiff that the usual approach is to direct that the security for the full costs be made; see Clarke C.J. in *Quinn Insurance* at para. 97 where he states:

> *"... it should also be recognised that failing to provide full security does expose a defendant to the almost certain consequence that a successful defence of the proceedings will nonetheless leave that defendant with irrecoverable costs and thus a significant detriment. I would consider, therefore, that the default position should continue to be that full security in monetary form should be provided but that the court may depart from that position if it considers it necessary and appropriate so to do to minimise the risk of injustice across the board."*

64. Secondly, while there may be circumstances where the justice of the situation might merit departing from the "default position" in respect of the amount to be directed, it should not be, in general, the subject of a fresh or a second debate about the merits of the case; see Allen J. in *3V Benelux BV v Safecharge Card Services Ltd.* [2020] IEHC 139 at para. 32 in particular, where he states:

"In support of his argument that the court should consider ordering security for a percentage of the estimated costs, Mr. McGrath urges the court to take into account the fact that the defendant did not, at the substantive hearing, establish that it had a prima facie defence on the ground that the contract was frustrated. If that is so, it is said, all that is left in the case is whether the plaintiff suffered loss and, so the argument goes, it is inherently unlikely that the plaintiff did not suffer some loss. It seems to me that this submission effectively asks the court to go behind the finding already made that the defendant has established that it has a prima facie defence and to make a tentative assessment of the merits of the claim in deciding the level of security that is to be provided. I decline to do so. If the court, in deciding in principle whether there should be security for costs is precluded from attempting to assess the weight of the claim or defence, it seems to me that the same must apply when the court comes to decide the level of security. Otherwise, a consideration of the case by reference to the probability of success or failure would be introduced by the back door."

65. Rather, it can be appropriate to consider directing that the security be provided on a phased basis in a protracted or expensive case or directing that an indemnity be provided by the person who stands to benefit from litigation brought by a corporate defendant; see Clarke C.J. in *Quinn Insurance* at para. 7.21 who stresses that these matters should be considered in the context of endeavouring to minimise the risk of injustice:

"*In an appropriate case it may, for example, be sensible for the Court, where the proceedings are likely to be very expensive and protracted, to direct security on a phased basis so that the matter can be reviewed from time to time in light of developments in the case. Likewise, there may be circumstances where ordering security in the form of an indemnity from those who can be shown to be likely to benefit should the proceedings be successful may be an appropriate form of security even where those persons might not necessarily be a mark for all of the costs which might be awarded."*

Summary of relevant legal principles

66. Based on the foregoing, the key legal principles in a security for costs application involving a corporate plaintiff can be summarised as follows:-

(i) section 52 of the Companies Act 2014 confers on the court a discretionary jurisdiction to order security for costs where, on the basis of credible testimony, there is reason to believe that a corporate plaintiff will be unable to discharge an adverse costs order, a jurisdiction equally applicable in s. 212 proceedings;

(ii) the threshold inquiry is twofold, requiring the moving party to establish both a *prima facie* defence and evidence meeting the statutory standard of "credible testimony" giving rise to a "reason to believe" in such inability to pay costs;

(iii) the statutory standard does not demand proof of insolvency nor that the impecuniosity be established on the balance of probabilities, but equally it exceeds a bare or speculative risk, calling instead for a careful evaluation of the range of likely contingencies so as to determine whether there is a materially significant likelihood of non-payment;

(iv) in undertaking that assessment, the Court is not confined to a superficial reading of accounts or net asset position but must examine the quality, liquidity and realisable value of the plaintiff's assets and its capacity to generate funds, and where explanatory gaps arise in the evidence, the court should not resolve them in favour of the party best placed to explain them;

(v) once those elements are established, the onus shifts to the plaintiff to demonstrate special circumstances sufficient to displace the *prima facie* entitlement to security, commonly (though not exhaustively) including a causal link between the alleged wrongdoing and the plaintiff's impecuniosity, which must itself be demonstrated on a *prima facie* evidential basis and not by mere assertion; and

(vi) as to the form of order, once the court has determined that in principle security for costs should be directed, then the default approach involving a corporate plaintiff is to require security for the full costs without discount for any estimation of the merits of the plaintiff's case, albeit that the court retains flexibility, in the interests of justice, to tailor the order, for example by directing a phased provision of security (particularly in the conduct of complex or protracted litigation) or by directing the furnishing of an indemnity from those standing to benefit, so as to mitigate the risk of injustice.

V. DECISION

(i) Have the respondents established by credible testimony that there is "reason to believe" that Ison will be unable to pay costs if it loses

67. Applying those principles, that inquiry requires the Court to move beyond a purely formal assessment of solvency and to examine, in practical terms, the nature and realisability of the assets said to be available to meet an adverse costs order. It also requires the Court, where appropriate, to consider whether any gaps in the evidence have been addressed by the party best positioned to do so.

68. In that regard, certain aspects of the evidence are not in dispute. Ison does not trade, has no material income, no cash reserves of substance, and no identifiable source from which funds might be generated independently. Its financial position is entirely dependent upon a single asset, namely its minority shareholding in HGHL.

69. The character of that asset is of central importance. It is a minority shareholding in a private company, held subject to a shareholders' agreement which imposes restrictions on transfer and control. The only asset of substance within the underlying group is an ongoing residential development at Berwick Pines.

70. The evidence establishes that the development remains incomplete and is subject to continuing uncertainty, including the existence of legal challenges. It is also common case that the group carries indebtedness of approximately €12.5 million. On any sensible view of the evidence, that indebtedness must be discharged before any distribution could arise for the benefit of shareholders. Accordingly, even though Mr. Conroy, SC could point to appraisals used to raise money, one of which appraisal from December 2024 indicated a potential return before interest and tax of over €16million, given that the debt owed by HGHL appears to have been in excess €12million it is not clear therefore, given the uncertainties about what the Berwick Pines project might generate, what dividend would be available, if any to Ison after tax and the repayment of the debt.

71. In those circumstances, while the shareholding may have an accounting value, its capacity to generate cash in the timeframe relevant to a costs order is inherently uncertain. There was no evidence to indicate that dividends are likely to arise in the

near term, or at all, in a manner that would assist in meeting an adverse costs order, not least, bearing in mind that there is a level of indebtedness of over €12m.

72. Mr. Crossan in his affidavit accepted that Ison does not presently have the resources to meet an order for security for costs save by reference to the potential realisation of this shareholding. That concession reflects the practical reality disclosed by the evidence.

73. First, the Court must consider whether there is any evidential basis upon which it can conclude that this asset could be realistically realised or monetised so as to meet a costs order.

74. Ison did not adduce evidence addressing that question in a concrete or practical manner. In particular, there was no evidence as to how the shareholding might be sold, the likely timeframe for any such sale, the extent of any discount which might be applied, or the willingness of any party to acquire such an asset in the circumstances here.

75. Secondly, a number of possibilities were advanced in submissions on behalf of Ison as potential routes to realisation. It was suggested that a receiver might be appointed by way of equitable execution, who could seek either to sell the shares or to await the generation of dividends. However, that suggestion was not supported by evidence as to its practical feasibility. The appointment of such a receiver would itself require further proceedings, involve additional cost, and introduce a further layer of uncertainty. There was no evidence to suggest that a receiver would be likely to achieve a prompt realisation of value. In addition, it was not disputed, based on the principle identified in *Farrar v Farrars Ltd.* [1888] Ch Div Vol XL 395, that such a receiver could not sell to the respondents.

76. For similar reasons, I am not satisfied that the provision of security by way of a charge over the shares would meet the respondents' legitimate concern, given the uncertainty and complexity surrounding their enforcement.

77. Fourthly, it was suggested that the respondents, as majority shareholders, might cooperate in facilitating a sale of the entire business. This submission lacks evidential support and, more fundamentally, would require the successful party to undertake a commercial transaction involving the sale of the entire business. While that process itself is of an uncertain nature, it is not persuasive to contend that, in order to recover its costs, the owner of a business should have to sell the entire business. That is not, in

my view, a satisfactory answer to the difficulty identified. It would mean that the price of winning the case is that the business then has to be sold.

78. Each of these considerations directly undermine the submissions made on behalf of Ison that the shareholding could realistically be monetised so as to meet an adverse costs order. Consequently, in circumstances where the respondents have identified a clear and credible concern as to the realisability of Ison's sole asset, and where Ison has not provided a cogent explanation as to how that concern is addressed, the Court must approach the evidential position in accordance with the principles set out at para. 66(iv) above. It is not appropriate to resolve those gaps in a manner favourable to Ison.

79. Accordingly, having regard to the entirety of the evidence, I am satisfied that the respondents have demonstrated something materially more than a speculative risk. Rather, the evidence establishes a sufficiently substantial likelihood that Ison would be unable to meet an adverse costs order. The statutory threshold of "reason to believe" is therefore met.

80. That conclusion gives rise, in accordance with the established structure of the jurisdiction, to a *prima facie* entitlement to an order for security for costs, given the acknowledgement that the respondents have raised a *prima facie* defence.

(ii) Can Ison establish special circumstances, specifically that the inability to pay costs arises as a result of the alleged wrongdoing of the respondents

81. Turning then to the question of whether Ison has established special circumstances sufficient to displace that entitlement, and in particular whether any inability to meet a costs order arises from the alleged wrongdoing of the respondents.

82. Firstly, I am satisfied that the expert evidence relied upon by Ison is sufficient to establish, at a *prima facie* level, that the transactions in question have likely adversely affected the value of its shareholding to a sufficient extent. The threshold at this stage is not a high one, and the evidence (principally the reports of Mr. Kirby) meets it. While Mr. Steen, SC made compelling observations as to why Mr. Kirby's conclusions were not correct, the *prima facie* threshold does not require the court at this juncture to adjudicate on those issues.

83. However, I do not think there is a *prima facie* case made out that, but for the Watson Place transaction occurring in the manner which it did, that Ison would have actually

received cash. This submission ignores the basis of the deal with the lender which involved them taking a massive reduction in their debt of €40m down to €12.5 on the basis that they would sweep up the cash generated by these asset sales.

84. However, consistent with the principles set out at para. 66(v), that is not sufficient to displace the respondents' entitlement to security. The special circumstance relied upon must address the inability to pay in a meaningful way. In this case, the difficulty lies in the realisability of the asset rather than solely in its valuation.

85. Even if it is assumed, in Ison's favour, that the value of its shareholding has been diminished by the transactions complained of, that does not address the question of whether the asset can be realised so as to meet a costs order. The causal link required by the authorities is not established merely by demonstrating that the asset might have been worth more in a counterfactual scenario.

86. I am therefore not satisfied that Ison has established special circumstances sufficient to justify a refusal of security.

87. Finally, the overall context does not suggest any injustice by the making of a security for costs order. The undisputed inference is that Mr. Crossan (who describes himself as a "high net worth individual") is funding this litigation. He also says he is the beneficial owner of the minority stake in the company the subject of the section 212 proceedings. Accordingly, he is the person who will benefit from the litigation succeeding. As O'Donnell J. (as he then was) states at para. 156 of *Quinn Insurance*:

> ***"****I agree that a motion for security for costs should not ignore the fact that it is the limited company which is the plaintiff. The separation between the company and its shareholders must be recognised. However, it is not impermissible in my view — indeed it is only common sense — to have regard to the fact that if a company is impecunious, the proceedings must normally be being pursued for some reason and that someone is supporting them and likely to benefit from them if successful."*

88. It is no longer claimed that an order for security for costs will "stifle" the proceedings. In those circumstances, because Mr. Crossan's shares in HGHL (which he says he beneficially owns) are legally held by Ison, he has no exposure to costs if the litigation is unsuccessful and Ison itself will have no ready way to pay the costs should it lose.

The respondents on the other hand have to fund their side of the litigation and are exposed to paying costs. These observations are not linked to any sense of where the merits of the dispute might lie, rather they are a practical reflection of the underlying realities of who is funding the litigation and who stands to gain or lose by it. Consequently, this scenario is particularly apposite in the context of the purposes of the discretion provided by section 52.

VI. CONCLUSION & FORM OF ORDER

89. It follows that for the foregoing reasons the appropriate course is to direct that security for costs be provided.

90. As to the form of the order, the general approach, reflected in the authorities referred to above, is that security should be provided in the full amount of the estimated costs, absent some compelling reason to depart from that position. No issue was taken with the estimate advanced by the respondents.

91. Subject to what is said below about phasing, I propose to make an order pursuant to section 52 of the Companies Act, 2014 directing Ison to provide the respondents with security for costs in the amount of €474,622 (the undisputed estimate of the costs provided in evidence).

92. However, it was indicated on behalf of Mr. Conroy, SC that he expected he could make submissions as to whether security should be provided on a phased basis after the point of principle was decided. Having regard to the flexibility inherent in the jurisdiction, and to the desirability of minimising the risk of injustice, I am satisfied that it is appropriate to afford the parties an opportunity to address that issue. While Mr. Steen, SC made a robust argument that any points on phasing could have been made in the context of the security for costs application itself, any prejudice that arises from a short additional hearing, can be addressed by an appropriate costs order.

93. In those circumstances, I will list the matter for a short further hearing to address the form of the order, including the question of phasing, and the costs of this application.