# THE HIGH COURT

[2024] IEHC 257

**[2023 No. 3154 P]**

**BETWEEN**

**KC CAPITAL PROPERTY GROUP LIMITED**

**PLAINTIFF**

**– AND –**

**KEEGAN QUARRIES LIMITED**

**DEFENDANT**

**JUDGMENT of Mr Justice Max Barrett delivered on 26th April 2024.**

SUMMARY

*In this judgment I explain why I* will *accede to an application for security for costs.*

**1.** By notice of motion of 20th November 2023, Keegan Quarries Ltd (KQL) has come seeking: (1) an order pursuant to O.29, r.1 RSC and/or s.52 of the Companies Act 2014 to furnish security for the costs to be incurred by KQL in defending the within proceedings; (ii) an order fixing the amount of security for costs to be incurred by KQL in defending the within proceedings together with an order directing the manner in which that security shall be given;

(iii) an order pursuant to.s.52 of the Act of 2014 placing a stay upon the within proceedings as against KQL until any of the directions referred to at (ii) have been complied with in full, (iv) all necessary accounts and inquiries to determine the appropriate level of security for costs to be incurred by KQL in defending the within proceedings, (v) such further order/s as seem appropriate.

**2.** KQL is in the business of, among other matters, quarrying and the supply of sand, gravel, ready-mix concrete and pre-cast concrete. KC Capital (KC) is the owner of a site at 45-47 Cuffe Street, Dublin 2, on which it intends to erect a nine-storey commercial office building to be known as the Greenside Building. It has engaged a design team that includes Mahoney Architecture (the Architect) and GK Consulting Engineers (the Engineer).

**3.** Initially KC contracted with Grant Fit Out Ltd as its contractor to construct the Greenside Building. Grant Fit Out contracted in turn with KQL to supply ready-mix concrete as a part of the construction of the Greenside. There is, it seems, no contractual relationship between KC and KQL. Instead, KC claims that KQL owed it a duty of care in the supply of ready-made concrete.

**4.** KC claims that the Engineer initially specified the compressive strength of the concrete to be used in the construction of the Greenside as C35/45N for structural concrete and C40/50N for structural columns. KC claims that KQL issued a design mix (T/B 1034) to the Engineer for the C35/45N concrete and the design mix (T/B 1034) was approved by the Engineer. KC claims that in May 2022 the Engineer increased the specified compressive strength for concrete to be used in the basement walls of the Greenside to C40/50N. In this regard, KC claims that KQL issued a new design mix (T/B 1036) to the Engineer and which was approved by the Engineer.

**5.** In June 2022, KC claims that the concrete for the basement walls, ground floor columns and ground floor slab was delivered by KQL and poured. KC claims that the concrete delivered by KQL did not achieve the requisite compressive strengths as specified by the Engineer for the ground floor slab (C35/45N) or for the basement walls and columns (C40/50N). KC therefore claims that the concrete was understrength and, as a result, was not fit for purpose and was defective.

**6.** In October 2022, the Architect issued a formal notice to Grant Fit Out requiring it to remove the allegedly under-strength concrete, and issued a further formal notice requiring Grant Fit-Out to provide an improved programme for the works. KC claims that Grant Fit Out did not comply with these requirements and, as a consequence, the Architect issued a notice of default and KC terminated its contract with Grant Fit Out. KQL engaged with Grant Fit Out in September 2022 in respect of concrete cube test results and so was generally aware of the issue. However, it appears that KC did not notify KQL of any asserted claims against KQL until March 2023.

**7.** In April 2023, KC entered into a contractual relationship with a new contractor, Townlink Construction Ltd to carry out the works and Townlink took occupation of the Site thereafter. Upon the issuing of the within proceedings Townlink was in the process of demolishing and removing the subject-matter of the within proceedings.

**8.** As a result of the foregoing, KC claims to have suffered loss and damage by reason of the delay in the completion of the Greenside and additional costs in so doing. KC claims that its total loss and damage is estimated at in excess of €13m. It has also reserved its position as to any loss in value in the Greenside.

**9.** KQL has delivered a full defence to KC's claim.

**10.** As part of this application for security for costs it is necessary for KQL to demonstrate that it has a *prima facie* defence to KC's claim. KQL maintains that it has not only a defence but a strong defence. In summary, the defence of KQL is grounded on the following (obviously I make no prediction and have no view as to who will succeed at the substantive trial of these proceedings):

(1) KQL has no relationship in law with KC, the Architect or the Engineer. KQL engaged only with Grant Fit Out. Accordingly KQL was not party to any agreement with the Engineer to supply concrete only in accordance with specifications specified by the Engineer.

(2) All concrete supplied by KQL to the Site was in accordance with that which was ordered by Grant Fit Out. At the request

of Grant Fit Out, KQL prepared and submitted to Grant Fit Out three different design mixes (T/B 1034, T/B 1035, and T/B 1036). However, Grant Fit Out did not always order concrete in accordance with those submitted and approved design mixes and, it now appears, Grant Fit Out did not order concrete from KQL in accordance with the specifications which the Engineer instructed Grant Fit Out to follow. As the supplier of the concrete, KQL maintains that it is not the role or function of KQL to advise on the adequacy of concrete being ordered by reference to its intended purpose. That, it claims, is a matter entirely for the person ordering the concrete.

(3) It was Grant Fit Out that specified the mix, including compressive strength, for each batch of concrete ordered. Each batch of concrete dispatched by KQL to the Site was in accordance with the mix, including the compressive strength, as ordered by Grant Fit Out. KQL tested sample batches of concrete dispatched from its plant for supply to Grant Fit Out. Those tests were in accordance with industry standards and demonstrate that the concrete produced by KQL and dispatched to Grant Fit Out was in accordance with industry standards and was in accordance with that which was ordered by Grant Fit Out, including the requisite compressive strength. KQL takes issue with the procedures and testing methodology deployed in connection with the cube test results.

(4) The concrete supplied by KQL met the durability requirements for each design mix that was actually ordered for delivery by Grant Fit Out.

(5) Any diminution in quality or strength of the concrete supplied is as a consequence of acts or omissions of others after the delivery of the concrete to the Site and for which KQL is not responsible.

(6) The real cause for the requirement to demolish the basement and ground floor slab is by reason of a defective design and /or workmanship in the construction of the basement and ground floor slab and for which KQL bears no responsibility.

(7) Further it appears to KQL that the building is being rebuilt in a manner different to the original design.

**11.** I should perhaps note in passing that since the commencement of these proceedings KQL has actively sought inspection of the Site and the concrete the subject-matter of the within proceedings. KQL maintains that KC has frustrated and impeded KQL and its expert witnesses in inspecting the concrete the subject-matter of these proceedings. This issue has perhaps some relevance in that while KQL considers itself to have demonstrated a prima facie defence to the claim (it has), there is still further evidence that KQL wishes to procure that, it maintains, will demonstrate further the strength of its defence to these proceedings.

**12.** KQL's cost accountants estimate that its cost of defending these proceedings will be €771,410 (exclusive of VAT).

**13.** A defendant is entitled to seek security for costs against a corporate plaintiff pursuant to s.52 of the Companies Act 2014. In deciding whether or not to grant security for costs, the applicable caselaw suggests a three-part test to arise. Thus the onus rests on a defendant to establish (i) that it has a prima facie defence to the plaintiff's clam, and (ii) that there is reason to believe that the plaintiff will not be able to pay the defendant's costs if so ordered. Then (iii) if the defendant succeeds in satisfying requirements (i) and (ii), security for costs may be ordered unless the plaintiff can establish special circumstances to the contrary. The Supreme Court recently endorsed this three-part test in *Quinn Insurance Ltd v. PWC* [2021] IESC 15 and *Protégé International Group (Cyprus) Ltd v. Irish Distillers Ltd* [2021] IESC 16.

**14.** In bringing this three-part test to bear, I am tasked with finding the least risk of doing an injustice between the parties in a context which, if I might respectfully observe, was well captured by O'Donnell J in *Quinn*, at §12:

"*It adds insult to injury...if the defendant who...should not have been sued is not able to recover the costs of establishing that the plaintiff's claim was without foundation. A defendant considering the risk of litigation must factor into its calculations the fact that it may have to expend considerable sums in defending a claim which will not be recoverable. This can significantly alter the calculation that a defendant must make and increase the incentive to compromise a claim event if it is considered to be one without merit. A defendant forced into such a compromise is entitled to feel aggrieved. Sometimes, this may be an unavoidable consequence.... However, it reaches a different level again if the plaintiff is a limited liability company, without significant assets, but perhaps having wealthy shareholders or corporate backers who will benefit if the claim is successful and who may be able to provide a fully resourced legal team to prosecute the claim. In such a case, a defendant is entitled to feel that the pressure to compromise because of the risk of expenditure of costs which will be irrecoverable is something less than the administration of justice*".

**15.** This risk of injustice seems almost as old as civil litigation. Writing of litigation practice in the Roman Empire, Gibbon observes, in *The History of the Decline and Fall of the Roman Empire* (1776-1789) that even in the Byzantine era "*The expense of the pursuit sometimes exceeded the value of the prize, and the fairest rights were abandoned by the poverty or prudence of the claimants*".[1] Substitute 'defence' for "*pursuit*" and 'defendants' for "*claimants*" and the picture presenting is much the same as that described by O'Donnell J. in *Quinn*.

**16.** In terms of where the risk of injustice is generally (though not inevitably) likely to lie in an application for security for costs, I note the observations of Clarke CJ in *Quinn* that "*It is easy to see how, ordinarily, the balance of justice...might be said to favour the grant of security*" (§7.9) and that the "*default position*" remains that security for costs ought to be granted where a court is not satisfied that a corporate plaintiff has resources available to it to discharge a defendant's costs (§7.21).

[1] Vol IV, ch.44. Available online at *www.ccel.org/g/gibbon/decline/volume2/chap44.htm* (accessed: 23rd April 2024).

**17.** By way of preliminary observation, it seems to me that KQL has established a *prima facie* defence to this claim, notwithstanding that KC has allegedly impeded KQL and its experts from inspecting the demolished concrete to the extent required. In particular, I note the following in this regard:

(a) KQL has denied every aspect of the claim (which it is for KC to establish);

(b) KC has failed to deliver any evidence to suggest that KQL delivered to the Site anything other than the concrete ordered by Grant Fit Out;

(c) KC has advanced the claim as to a duty of care in the baldest of terms, essentially ignoring the prevailing contractual arrangements that were in place.

(d) KC does not deny that Grant Fit Out and KQL entered into a contract for the supply of concrete.

(e) KC has not tendered any evidence to demonstrate that KQL delivered concrete other than as ordered by Grant Fit Out.

(f) KC does not assert that anyone other than Grant Fit Out was responsible for the ordering of the concrete.

(g) KC will need to establish that KQL, in complying with its contractual obligations to Grant Fit Out, was somehow in breach of a duty of care to the owner of the Site;

(h) KQL maintains that it was Grant Fit Out that specified the compressive strength of each batch of concrete and that in compliance with that contractual obligation KQL (it claims) cannot be said to have breached any duty of care to KC;

(i) KQL maintains that if the incorrect contract was ordered the liability for that lies with Grant Fit Out;

(j) KQL maintains that there is no duty on a supplier of concrete to ensure that the concrete ordered meets the requirements of the owner of a property.

(k) KQL maintains that the fact that it provided Grant Fit Out with three specific design mixes is irrelevant in circumstances where Grant Fit Out chose not to order two of them;

(l) KQL claims that it was not party to any agreement with the Engineer only to supply concrete in accordance with stipulations specified by the Engineer;

(m) KQL contends that it had no role on the Site and that it did not know the specific location where each batch of concrete was intended to be poured;

(n) KQL maintains that it was for Grant Fit Out to determine the concrete it required on any given day and to order it;

(o) KQL maintains that Grant Fit Out knew that if it wanted a particular design mix that needed expressly to be ordered; otherwise it would be supplied with KQL's standard design mix;

(p) KQL maintains that it was for Grant Fit Out to decide where the concrete was to be poured;

(q) KQL maintains that the fact that the Engineer may have approved the three relevant design mixes is irrelevant where that was a matter between the Engineer and the Original Contractor;

(r) KQL notes that KC has failed to produce evidence as to where each load of concrete was poured, this being evidence KC would be expected to have;

(s) KQL notes that KC has failed to demonstrate that KQL did not deliver concrete in accordance with that ordered by Grant Fit Out;

(t) KQL denies that it had any direct commercial relationship with KC;

(u) KQL maintains that the concrete delivered by it was not under-strength but corresponded with the compressive strength ordered by Grant Fit Out;

(v) KQL denies that the concrete ordering process between it and KC was contrary to standard practice;

(w) KQL maintains that even if the concrete ordering process was contrary to standard practice that cannot ground a claim between KC and it;

(x) KQL notes that in accordance with standard industry practice it tested a sample of concrete batches dispatched to the Site and that they accorded with the mix requested by Grant Fit Out;

(y) KQL notes that KC does not contest the testing methodology of KQL but merely as to whether it was done often enough;

(z) KQL notes that no evidence has been tendered by KC to refute the notion that it was Grant Fit Out that failed to order a sufficient volume of concrete during the relevant period that met the compressive strength requirements allegedly specified by the Engineer;

(aa) KQL maintains that any diminution in the compressive strength of the concrete supplied by KQL was caused by the acts or omissions of others for whom KQL bears no responsibility.

(bb) KQL maintains that the said acts or omissions constitute *novus actus interveniens*;

(cc) KQL maintains that KC has failed to engage properly with the evidence tendered on behalf of KQL and that it has ignored all other possible causes for the presence of understrength concrete, instead surmising that KQL must have used a lower-strength concrete;

(dd) KQL denies that the computer-generated batch records are wrong and misleading and maintains that it has refuted this in detail;

(ee) KQL notes that the claim as to the absence of GGBS in the concrete it supplied is a 'red herring' as it uses Portland Cement, which yields stronger concrete than concrete containing GGBS;

(ff) KQL disputes the necessity to remove all the concrete from the Site;

(gg) KQL contends that KC failed adequately to mitigate its loss;

(hh) KQL maintains that the monies sought of it include a claim for betterment which KC is not entitled to maintain against KQL;

(ii) KQL maintains that KC was contributorily negligent in permitting Grant Fit Out to pour concrete on the Site subsequent to the Engineer and Architect having warned Grant Fit Out that it did so at its own risk.

**18.** Respectfully, I cannot see in light of the foregoing that I could properly conclude that KQL has failed to establish a *prima facie* defence, albeit that I do not know whether its defence will eventually succeed at the trial of the action. I note in passing that KC's position was that I should not determine this application on the basis that KQL has failed to demonstrate the existence of a prima facie defence.

**19.** I note that in reaching my conclusion as to the existence of a *prima facie* defence I am actively cautioned – in cases such as *Greenclean Waste Management Ltd v. Leahy* [2015] 1 IR 106 and *Bionomica Ltd (in vol. liq.) v. Response Engineering Ltd* [2020] IEHC 340 – against engaging in an adjudicative analysis of KQL's defence and am required to limit myself solely to the issue as to whether or not a prima facie defence has been made out. I have heeded that caution.

**20.** For the reasons that I now outline, I am of the view that there is reason to believe that KC, on the balance of probabilities, will be unable to pay the costs of KQL should KQL eventually be successful in the substantive proceedings. I note in this regard that KQL in this application does not need to establish that KC is or will be insolvent. Nor does it need to establish that KC will be unable to pay the costs of KQL. It need merely establish that there is reason to believe that KC will not be able to pay the costs of KQL. I admit to some uncertainty as to the logic in *IEGP Management Co v. Cosgrave* [2022] IEHC 175 that the level of evidence required to establish a reason to believe will necessarily be less than that required to refute a reason to believe. (Surely the level of evidence in any one instance will be dictated ultimately by what is required to discharge the requisite burden of proof in any one case?) That said, I do not see that anything turns on the point in this case.

**21.** Before proceeding to matters financial, I ought perhaps to mention a matter of corporate structure. Thus, I note that KC is an SPV that was established to acquire and develop the Greenside at a time when the market for office property is in a state of flux. With the exception of an initial €100 (one hundred euro) investment it has been funded solely by loan finance. A

practical consequence of the manner in which it has been set up would be to shelter it from any (if any) order for costs that might issue in favour of KQL. I note also that KC features as part of a complex corporate structure that concerns at least one other property.

**22.** In *IBB Internet Services v. Motorola Ltd* [2013] IESC 53 among the points made by Clarke J. (at §6.8) was the point that even the prospect of liquidation were it to present would not be sufficient to satisfy the inability to repay if there was sufficient equity in the company (of which security for costs was sought) to allow for payment of costs. Of note in this regard, it seems to me, are the JLL Report, and the two Harding Reports. The JLL Report seems to be something of an outlier in the valuation it gives to the Greenside. More persuasive for the reasons, I will describe hereafter are the BNP Paribas Report, the Knight Frank Letter and the Colliers Report. They contain detailed 'red book' valuations. However, what makes them especially notable is that they were prepared for Fairfield (a lender). The notion that valuers acting on behalf of a lender would have any incentive to inflate artificially the value of an asset is contrary to logic and experience. That would require the valuers to do a professional disservice to their client. As of May 2022 the BNP Report gives the Greenside a valuation of €51m. As of August 2023, the Colliers Report gives a valuation of €43¾m. Both the Harding Reports turn on the JLL Report. So, if the JLL Report is deficient, so are they. In this regard, not only does the close on €31m valuation in the JLL Report appear to be an outlier, but KC has also drawn the following weaknesses in the JLL Report to my attention: (i) the JLL Report does not acknowledge the existence of the BNP report (and hence does not explain the disparities between the two), (ii) the comparator building at George's Quay is a 23-year old building which does not have the intended green credentials of the Greenside and no attempt is made to explain this disparity (and/or why the comparator remains a good comparator), and (iii) the JLL Report applies a higher capitalisation to the Greenside than that applied to 5, Harcourt Road, without offering explanation. Respectfully, I just do not see that the JLL Report is of the same calibre as the BNP Paribas Report, Knight Frank Letter, and Colliers Report.

**23.** All that said, even if I prefer the last three documents (and I do) all that shows is that KC at this time owns (in the Greenside) a valuable property, with the accounts that have been placed before me not suggesting (in truth far from suggesting) that it is otherwise rich in assets or cash So, in effect, what KCL would be asked to do were I *not* to order security for costs would be to proceed on the assumption that (i) the property market will not turn against KC during however long it takes to bring these proceedings to conclusion (with the inevitable application

for a stay on costs in the event of appeal to the Court of Appeal and possibly beyond) and (ii) that KC will throughout the applicable time be in a position, even should it lose these proceedings, (a) to liquidate whatever assets it owns at that time or to raise financing on the strength of same (assuming it retained ownership of the Greenside at that time or continued to hold some of the profits from any sale or transfer of same), and/or (b) otherwise to procure monies sufficient to meet any costs order. Respectfully, I do not see how asking KQL to shoulder the burden that some or all of the foregoing might not hold true throughout the course of these proceedings can seriously be contended to involve a situation that involves the least risk of doing injustice between the parties.

**24.** I am buttressed in the views that I have expressed when I have regard to the annual accounts that have been placed before me. KC's profitability rests essentially on a single asset (the Greenside) and, as recently as its 2020 accounts, concerns were being expressed as to KC's ability to continue as a going concern. Obviously there are good years and bad years in business and matters may have improved to now but it has to be of concern in an application for security for costs that such concerns were being expressed in the relatively recent past. Respectfully, I do not see how asking KQL to shoulder the burden that any (if any) costs order will fall due to be paid in a good financial year for KC can seriously be contended to involve a situation that involves the least risk of doing injustice between the parties.

**25.** I note that KC enjoys the continued support of its lender; indeed I have uncontroverted evidence before me that the lender (Fairfield) is entirely aware of the defective concrete, supports KC's prosecution of these proceedings, and supports the resumption of the Works. However, there is no guarantee that such support will continue into the future no matter what circumstances may present, and I do not see that Fairfield has undertaken contractually to assist in meeting the amount of any (if any) costs order that might issue against KC. Moreover, what in any event does the uncontroverted evidence mean? Unless Fairfield were to act contrary to its own best interests as lender then of course it would be supportive of proceedings in which (if KC were successful) a prospective loss would be avoided, and of course it would be supportive of the resumption of works on a project to which it has acted as lender. Fairfield is simply, and perfectly legitimately, acting in accordance with where it sees its own best interests to lie at this time; that offers no assurance as to its future actions (which will doubtless be informed by the same legitimate commercial determinant – its self-interest – in light of whatever market/financial circumstances present at any one point in time in the future).

**26.** I refer to the observations above regarding KC being an SPV, how the manner in which it has been set up yields the practical consequence that it would be sheltered from any (if any) costs order that might issue in favour of KQL and how it is part of a complex corporate structure that concerns at least one other property. Those are all factors of relevance in deciding a security for costs application, and factors which favour the issuance of an order for security for costs. To them, I would add (and respectfully adopt) the following submissions contained in the written submissions of counsel for KQL:

> "[T]*he ability of KC...to pay the costs of KQL is premised upon variables outside the control of KC...and the vagaries of the commercial property market. The ability of KC...to pay the costs of KQL* [if so ordered] *is, at best...speculative and does not afford the requisite assurance to demonstrate* [that] *there is no reason to believe that it will not do so. KC...is unable to point, with the requisite degree of certainty, to a means of paying the costs of KQL. Thus, the least risk of injustice in this case requires KC...to provide security for the costs of KQL*".

**27.** The foregoing being so, and it is, it is necessary for me to consider (consistent with *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd* [2009] IEHC 7) whether there are any special circumstances that would justify my refusing to order security for costs in line. Respectfully I do not see that there are. It suffices to make the following three points in this regard.

**28.** First, as regards the proposition that the inability to pay is a consequence of the alleged wrongdoing of KQL, the evidence furnished in this regard by Ms Gillespie is expressly premised on assumptions (that in fact appear to be her instructions), none of which have been averred to, and is, as a consequence, rather speculative evidence, certainly not that sufficiently clear evidence which would enable me to analyse this contention in the thorough fashion contemplated by Clark CJ in *Protégé International Group (Cyprus) Ltd v. Irish Distillers Ltd* [2021] IESC 16.

**29.** Second, even if Ms Gillespie's evidence were otherwise, the 'elephant in the room' when it comes to contending that the inability to pay is a consequence of the alleged wrongdoing of KQL is KC's status as an SPV incorporated solely for the purpose of acquiring the site on

which the Greenside stands and developing the Greenside itself. Save for an initial €100 (one hundred euro) investment all of KC's activities to date have been financed exclusively from borrowings. It is, in this regard, a typical nominal value SPV that could never have afforded to meet a costs order.

**30.** Third, an analysis of the counterfactual scenarios posited by Ms Gillespie shows that they do not entirely withstand scrutiny. In Scenario 1 the scale of impecuniosity exceeds the presently estimated valued of KC's claims against KQL so, mathematically, it just could not be that the loss in issue would suffice to make the difference between KC being in a position (or not in a position) to meet the costs of KQL if ordered. In Scenario 2, KC ostensibly stands on firmer ground in terms of showing that if KC succeeds in every single respect of its claim then its inability to pay any (if any) costs order had matters gone otherwise would be attributable to KQL's alleged wrongdoing. But experience teaches that that level of recovery by KC tends not always to happen, especially where, as here, there is a claim as to non-mitigation of loss. And I am in any event being asked by KC to proceed in this regard blinkered as to the potential liability of KC under a guarantee by it connected with a loan provided to it by Pointsight Ltd (and the implications of same for the Scenario 2 analysis).

**31.** It follows from all of the foregoing that I will accede to the application for security for costs. As explained by Clarke CJ in *Quinn* (at §7.21), the default position in cases such as this continues 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 to do so in order to minimise the risk of injustice across the board. In fact, it seems to me, having regard to all that I have stated thus far that it would *increase* the risk of injustice to KQL if I were to depart from the default position. I will therefore make an order for security for costs in favour of KQL in the amount of €771,410 (exclusive of VAT). I will also order a stay on these proceedings pending provision of that security within three months of the date of this judgment.