



**THE COURT OF APPEAL**

Neutral Citation Number: [2020] IECA 247

**Record Number: 2019/220**

**Whelan J.  
Ní Raifeartaigh J.  
Power J.**

**BETWEEN/**

**FABRI-CLAD ENGINEERING LIMITED**

**RESPONDENT**

**- AND -**

**JEFFREY STUART T/A  
STUART STEEL FABRICATIONS**

**FIRST NAMED DEFENDANT**

**AND  
LESLIE STUART**

**APPELLANT**

**JUDGMENT delivered by Ms. Justice Máire Whelan on the 27th day of August 2020**

**Introduction**

1. This is an appeal against the judgment and order of Binchy J. made on 4 April 2019 exercising his discretion to refuse the appellant's application for an order pursuant to O. 13, r. 11 of the Rules of the Superior Courts ("RSC") to set aside judgment in the sum of €98,252 marked by the respondent in the Central Office of the High Court on 9 May 2017. The respondent cross-appeals on two alternative net issues.

**Background**

2. The appellant is the father of the first defendant, Jeffrey Stuart, who at all material times traded as Stuart Steel Fabrications. The respondent provided steel fabrication materials to the first defendant from 2009. On or about 22 January 2014 at the offices of his solicitor Cleary & Co., The Diamond, Raphoe, Co. Donegal, the appellant signed a guarantee for the indebtedness of his son on foot of which the within proceedings were subsequently brought.

**The Guarantee**

3. The guarantee dated 22 January 2014 was made between "Leslie Stuart of the one part and Long Roulston Ltd trading as WDL Engineering... of the other part." It recites as follows: -

- "1. It is hereby agreed and acknowledged by the parties hereto that Long Roulston Limited are owed a sum of €98,252.00 by Geoffrey (*sic*) Stuart trading as Stuart Steel. The said Geoffrey (*sic*) Stuart is the son of Leslie Stuart, the other party to this agreement.
2. It is hereby agreed by the parties hereto that the said Leslie Stuart is prepared to guarantee the debt owed by Geoffrey (*sic*) Stuart trading as Stuart Steel to Long Roulston Limited and it is agreed by the parties hereto that the sum owed is €98,252.00 for the avoidance of doubt.
3. Accordingly, Leslie Stuart hereby guarantees the debt of Geoffrey (*sic*) Stuart trading as Stuart Steel as owed to Long Roulston Limited and the said Leslie Stuart agrees to make two annual payments in the sum of €5,000 each. The first payment is to be made at the end of February of each year, and the second payment being made on or before the end of October of each year until such time as the debt has been redeemed in full. It is also hereby agreed that Long Roulston Ltd is entitled to interest. It has been agreed between the parties hereto that the initial interest rate shall be charged at 2.5% in respect of the first three years of this agreement. In respect of any balance due after three years, interest shall be charged at 5.5% until such time as the debt has been redeemed in full.
4. In the event of default and for the avoidance of doubt it is hereby agreed and acknowledged by the parties hereto that it shall be open to Long Roulston Ltd to bring whatever proceedings they may wish against Geoffrey (*sic*) Stuart trading as Stuart Steel and/or Leslie Stuart of Mondooey, Manorcunningham, Co. Donegal."

The instrument was executed by the appellant which execution was witnessed by his solicitor. The guarantee was signed on behalf of the company by Derek Long and Michael Roulston but not executed by it. The relevance, if any, of this fact will be considered, presently.

#### **The Summary Summons**

4. Over the two years thereafter no part of the said monies was discharged under the terms of the guarantee. On 22 March 2016 summary proceedings were instituted by the respondent company against the parties. Service was effected on the appellant on 14 April 2016. No appearance was entered by or on behalf of the appellant.
5. Over a year later on 9 May 2017 judgment in default of appearance in the sum of €98,252 was marked in the Central Office and on the said date a F.I.F.A. issued directing seizure of the goods of the appellant and his son to satisfy the judgments obtained against them.

**Letter of 6 November 2017**

6. On 6 November 2017, six months after judgment was obtained, the appellant's solicitor wrote to the respondent's solicitors, Lanigan Clarke of Letterkenny, in relation to the judgment. There is a dispute between the parties as to whether the said letter was written "without prejudice" and whether its acknowledgement of the liability is receivable in evidence which will be considered in due course. At all events it is clear evidence that the appellant knew of the judgment as of early November 2017.

**Motion to set aside judgment pursuant to O. 13, r. 11**

7. On or about 24 January 2018, over eight months subsequent to judgment being obtained, the appellant issued a notice of motion as a litigant in person seeking an order pursuant to O. 13, r. 11 setting aside the judgment marked by the respondent in the Central Office on 9 May 2017. The grounding affidavit of the appellant sworn on 24 January 2018 asserted that: -
  - (a) he was never properly served with the proceedings and "therefore ...did not enter and file an appearance within the time prescribed in the Rules";
  - (b) "...the plaintiff to these proceedings is not a party to the guarantee... and ...I am at a loss to understand how the plaintiff has issued these proceedings against me"; and,
  - (c) he had a "full defence and counterclaim to the claim of the plaintiff, in circumstances, where the defendants have carried out steel erection work for and on behalf of the directors of plaintiff... to a value of up to €100,000...".
8. In his first replying affidavit sworn on behalf of the respondent company on 14 February 2018, Michael Roulston, a director of the company, established that service had been validly effected upon the appellant and a copy of the affidavit of service of Brendan Joyce sworn on 20 April 2016 was exhibited. Thus, any contention that there was a frailty in the service of the summary proceedings on the appellant was baseless.
9. Michael Roulston explained in his said affidavit that the respondent company was incorporated on 24 July 2007 under the name Long Grier Ltd. Thereafter, by a resolution dated 15 October 2009, it resolved to change its name to Long Roulston Ltd. Subsequently by a further resolution dated 16 October 2015 it resolved to change its name to Fabri-clad Engineering Ltd., its current name. He demonstrated that the respondent company is one and the same as Long Roulston Ltd. for whose benefit the guarantee was provided by the appellant. This accords with the special indorsement of claim which pleaded "2. The Plaintiff was formerly known as Long Roulston Limited, which name was changed by the Registrar of Companies on the 20th of October 2015." The duplicate certificate of incorporation on change of name exhibited was certified on 30 October 2015.
10. To the appellant's contention that he had a full defence and counterclaim it is deposed: "While some work was carried out by the first named defendant, no work was carried out by the second named defendant for the plaintiff." He denied that there was either a valid

defence or a valid counterclaim to the judgment obtained by the respondent against the appellant on 9 May 2017. He asserted that the judgment had been obtained regularly in the Central Office of the High Court in default of appearance and had been accepted in open correspondence sent by the appellant's solicitors thereafter.

11. By an affidavit filed on or about 14 June 2018 the appellant posited that the respondent company was not the "entity with which the purported guarantee was entered into." He deposed that: -

"...if the name of the original entity that entered the purported guarantee was going to be changed then a new guarantee with that new entity should have been executed."

He also deposed that the: -

"...purported guarantee was not signed for or on behalf of Long Roulston Limited in my presence or in the presence of a solicitor. I say that when I signed I signed a blank document which did not incorporate the purported guarantee or the signing clause for Long Roulston Limited trading as WDL Engineering."

The appellant deposed that he was commissioned to undertake services at ten named locations: -

"...work valued at in excess of €110,000 plus VAT of 13.5%."

12. In an affidavit sworn on 19 July 2018, the respondent company's director, Michael Roulston, with regard to the execution of the guarantee deposed at para. 5: -

"...The guarantee was in fact offered by the second named defendant, was produced by Donogh Cleary, the former solicitor of the second named defendant and was... signed in his presence. Derek Long, the other director of the plaintiff, signed the guarantee in the presence of Mr. Cleary for the plaintiff. The guarantee was then brought to me by Mr. Cleary which I then signed on behalf of the plaintiff also."

It was contended that there was no requirement "that a guarantee be witnessed in the manner alleged by the second named defendant".

13. Regarding the appellant's contention that works had been performed by him for the benefit of the respondent company it was contended that the documents produced to support that claim: -

"...appear if anything to indicate that they were performed by the first named defendant and not the second named defendant."

It was contended that such documents failed to demonstrate any defence to the appellant's liability under the guarantee, but could instead give rise to a counterclaim: -

"The alleged facts which the second named defendant refers to arose subsequent to and independently of the liability created by the guarantee. Nothing more than bare assertions are offered by the second named defendant in this regard."

14. The affidavit deposed that no statement of accounts was produced by the appellant. With regard to the letters dated 15 January 2018, exhibited in support of a contention that monies are owed by the respondent company to the appellant, it provided at para. 10: -

"...I would have significant concerns about the reliability and credibility of those letters. I note that the letters are all in identical terms and are all dated the 15 January 2018. I further say and believe that the letters were produced at the request of the second named defendant after he informed them that they were needed in order for him to obtain a bank loan. In fact, I say and believe that a number of the works referred to were not completed satisfactorily. William Glynn refused to sign the letter that he was provided with. I also say and believe that Erick Steel, whose letter is unsigned, passed away in or around 24 January 2017, nearly a year earlier."

The deponent continued at para. 11: -

"...contrary to what the second named defendant says, the plaintiff has already credited three of the works undertaken by the first named defendant referred to by the second named defendant in his affidavit."

He further deposed: -

"These projects have already been taken account of in the overall balance owed by the first named defendant of €126,979.16 (which the second named defendant has guaranteed €98,252.00 of)."

The deponent continued at para. 12: -

"...In circumstances where the second named defendant has only guaranteed the liabilities of the first named defendant up to €98,252.00, it is quite clear... then that the purported set off or counterclaim referred to by the second named defendant can have no bearing whatsoever on his liability under the guarantee."

15. The third affidavit sworn by the appellant on 1 November 2018 substantially ignored the very clear assertions of Mr. Roulston which impugn the validity of the purported invoices and the contention that a claim to a good defence or counterclaim had been made out. Instead he contested his own execution of the guarantee, alleging at para. 4 that he was:-

"...presented with a blank document to sign and I was informed that the details would be added later, as the guarantee document had not been prepared as of the date of my visit."

The appellant contended that he was not offered independent legal advice prior to execution of the "blank document in [Donogh Cleary's] office". It was further asserted that: –

"...the directors of the company required a guarantee to be executed in circumstances where they had first contracted with the first named defendant when he was a minor."

Neither the date of birth of the first named defendant nor the relevance of this latter contention are otherwise elaborated upon thereafter.

### **The Judgment**

16. Judgment was delivered on 4 April 2019. The court noted that the motion to set aside had been issued more than eight months after judgment had been obtained. The court observed at para. 3 that, by a letter dated 6 November 2017, the appellant's solicitors made "an offer to make payments towards the judgment debt". It was noted that the guarantee provided by the appellant on 22 January 2014 was in respect of the liabilities of his son, the first named defendant. The guarantee was drafted by the appellant's solicitor and executed in his presence. The judgment noted at para. 4 that counsel for the respondent company had stated that, without the guarantee, the respondent was "unwilling to continue to provide goods to the first named defendant, and that on the strength of the guarantee, it agreed to and did in fact continue to provide goods to the first named defendant."
17. As to the guarantee's execution, the court noted at para. 6 that it had been signed "for and on behalf of" the respondent company (but not under its seal) and signed by the appellant (but not under his seal).
18. The court reviewed the affidavits of the appellant, noting at para. 7 that in his first affidavit he had contended that "he was never 'properly' served with the proceedings". The court noted that clearly he was served in accordance with the rules as was apparent, firstly, from an affidavit of service of Brendan Joyce dated 20 April 2016 and, secondly, from his own solicitor's letter written on the appellant's behalf on 9 May 2016 which had expressly referred to the summons.
19. The court concluded that a proposed defence based on the argument that the respondent company was not a party to the guarantee was entirely misconceived; it being clear that Fabri-Clad Engineering Ltd. was a party to the guarantee under its previous name, Long Roulston Ltd.
20. With regard to the contention that the appellant had a valid counterclaim the court considered that the affidavits and exhibits fell:-

"...far short of what would be required to demonstrate that the applicant has a valid counterclaim, or that if he does, it is a counterclaim sufficient in amount to warrant the setting aside of the judgment." (para. 7(3))

21. The judgment noted at paras. 9 and 10 that at the hearing a number of legal arguments were advanced arising from the guarantee itself and the manner of its execution including as follows: that since there was no consideration provided for in the guarantee, it was required to be executed under seal in order to be enforceable and that the guarantee was unenforceable by reason of past consideration.
22. The court noted counsel for the respondent's argument that there was no longer any requirement for a deed to be executed under seal in order to be valid and that reliance had been placed on s. 64 of the Land and Conveyancing Law Reform Act 2009.
23. The court determined at p. 6 as follows: –

"13. I am fully satisfied that the guarantee has been executed in accordance with s. 64(2) of the Act of 2009, so as to be recognised as a deed. However, there is, on the face of it, a reasonable argument that the consideration for the entry into the guarantee by the applicant was past consideration. The guarantee itself makes no reference to consideration at all. It contains an acknowledgment that there is owing by the first named defendant the sum of €98,252 to the plaintiff. It says that the first named defendant is the son of the applicant. It then goes on to provide, simply, that the applicant is prepared to guarantee the debt owed by the first named defendant in the sum of €98,252.

14. It is apparent that nowhere in the deed is consideration expressed at all for the provision of the guarantee. Nor does it even suggest what the consideration might be, such as for example the forbearance on the part of the plaintiff from the issue of proceedings against the first named defendant, or the continued supply of goods by the plaintiff to the first named defendant.

15. The rule against past consideration is well recognised in Irish law. It seems to me that the applicant would have a reasonable prospect of success in defending these proceedings on this basis, if the matter is permitted to proceed to a full trial."

Having considered the High Court decision in *O'Donovan Dairy Services Ltd. v. Cashin* [2016] IEHC 476, the court observed at para. 17: –

"...the applicant in my opinion has a reasonable prospect of succeeding with the defence on the basis that the consideration for the guarantee was past consideration. That being the case, the applicant should be entitled to have the judgment set aside and to have the matter progressed to a full trial, unless there is any other reason to refuse the relief sought."

24. The court then turned to consider the issue of delay, observing at para. 18:–

"...the plaintiff argued that the applicant delayed in bringing this application. It was only when the plaintiff sought to enforce the judgment obtained, that the applicant moved this application. Moreover, through the letter of his solicitors of 6th November, 2017, the applicant accepted the debt and made proposals for payment.

The remedy sought is a discretionary remedy, and having regard to those factors, the court should refuse the application, even if satisfied that the applicant may have reasonable grounds for a defence.”

The court went on to observe at para. 19 that: –

“The plaintiff did not argue for any specific prejudice on grounds of delay, and so therefore appears to rely on the more general prejudice that inevitably flows from the delay in not being able to benefit from a judgment already obtained, for the period between the date of that judgment and the date upon which such judgment may again be obtained following a full hearing.”

The court proceeded to carry out a balancing exercise between competing prejudices, observing: –

“...But weighing one prejudice against another, it seems to me that the risk of injustice in not permitting a matter proceed to trial is a far greater risk of injustice for a person who has a prospect of defending proceedings successfully, and thereby avoiding altogether the consequences of a judgment, than is the risk of injustice to a plaintiff who, if successful at trial, suffers only the cost of not having the amount to which he is entitled for a longer period.”

The court concluded with regard to delay: –

“...while delay is a factor in this application, it should not, in and of itself, be determinative of this application.”

25. In the exercise of his discretion the second question considered by the trial judge at para. 20 was whether:-

“...the open correspondence of the solicitors for the applicant of 6th November, 2017, making proposals for payment of the debt, should operate of itself or in conjunction with other factors so as to bar him from the relief sought by this application.”

The court noted that the letter was written with the benefit of legal advice and included the statement that the appellant was “cognisant of his responsibilities in this regard”, suggesting an acceptance by the applicant of the debt itself, as distinct from the judgment against him, or both. The judge concluded: –

“I consider this letter to be sufficient reason to dismiss this application, but if I am wrong about this, it must be at least a factor to be taken into account against the applicant.” (emphasis added)

26. The court then turned to a consideration of the applicable rules of the Superior Courts being O. 13, r. 11 and O. 27, r. 14(2), which was inserted into the Rules of the Superior



Courts by S.I. No. 63 of 2004. The court considered *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018) where the authors observe at para. 4-42: -

"...It is not clear whether this rule, which was introduced to confine the discretion of the court when dealing with an application to set aside a default judgment, applies to a judgment obtained in default of appearance so as to modify Order 13, rule 11. However, even if the requirements of Order 27, rule 14(2) are imported, it is doubtful that they would lead to any significant alteration of the principles that have been developed in relation to applications to set aside such default judgments."

The court went on to observe at para. 24 that: -

"...prior to the introduction of O. 27, r. 14(2) the Court was very much at large in the exercise of its discretion as to whether or not to set aside a judgment obtained by default. While that discretion remains in the context of applications where the Court is satisfied that there are special circumstances that caused the default giving rise to the judgment, O. 27, r. 14(2) makes it very clear that the Court must, before exercising that discretion, first be satisfied as to the existence of such special circumstances, and must identify those circumstances, before then going on to exercise its discretion on the merits of the application."

27. The court considered the decision of the Supreme Court in *McGuinn v. Commissioner of An Garda Síochána* [2011] IESC 33 where judgment had been set aside notwithstanding a delay in bringing the application of twenty-one months in circumstances where there had been a misunderstanding between the respective solicitors for the parties and the order made by the court was inconsistent with what the defendant's solicitor understood had been agreed between them.
28. The court placed reliance on the decision of this court in *McGrath v. Godfrey* [2016] IECA 178, a judgment which made no reference to O. 27, r. 14(2), but which had concluded at para. 44 (Irvine J. as she then was) that: -

"...where the judgment was obtained in a regular manner, the onus was on the defendant to demonstrate the existence of a defence which had a real prospect of success and thereafter to establish the existence of some special circumstances such that, having weighed the interests of both parties, would have warranted the trial judge setting aside the judgment. Integral to that issue was proof by the defendant that he would be in a position to pursue a defence which had a real chance of success if the order were to be set aside."

Analysing the said jurisprudence, the trial judge observed at para. 27: -

"This passage suggests that the first step in the consideration of an application such as this is to consider whether or not the applicant might have a defence to the proceedings, and if so, the strength of that defence. If the court is so satisfied, it goes on to consider whether or not there are special circumstances such as would

justify setting aside judgment. Whether or not this is the sequence in which the court must treat with the separate issues, the fact is that this makes it clear that the court must be satisfied that there are special circumstances to grant an application to set aside a judgment already obtained.”

The trial judge noted at para. 28: –

“The only reason given by the applicant to explain why judgment was obtained against him was an untrue reason- that he had not been served with the proceedings. The fact that he deposed to this on affidavit is probably sufficient reason to refuse this application. But, additionally, he has advanced no special circumstances for the purpose of O. 27, r. 14(2). That too is sufficient reason, without more, to refuse the application.”

29. The court went on to further observe that: –

“...Faced with the judgment, his response was to make proposals for payment in a manner that suggested he accepted the debt was due by him to the plaintiff. And finally, he delayed in bringing this application.”

The court thus concluded: –

“Even though I have been satisfied that the applicant would have a reasonable prospect of successfully defending these proceedings, that prospect is far outweighed by all of the foregoing and accordingly I refuse the application.”

### **Grounds of appeal**

30. The appellant’s notice of appeal, dated 13 May 2019, identifies twenty-eight separate grounds of appeal including that:

- the trial judge erred in not permitting the matter to proceed to a full trial, notwithstanding being satisfied that the appellant had a reasonable argument that the consideration for entry into the guarantee was past consideration (grounds 1, 2, 3 and 24);
- the trial judge erred in accepting the respondent’s oral contention that without the guarantee the respondent company “was unwilling to continue to provide goods to the first named defendant”, a matter not averred to in any affidavit sworn on behalf of the respondent (ground 4 - this ground of appeal wholly disregards the detailed pleas in the special indorsement of claim as considered below);
- the trial judge incorrectly applied the principles from various decisions including *McGuinn v. Commissioner of An Garda Síochána*, *McGrath v. Godfrey, O’Donovan Dairy Services Ltd. v. Cashin* and an extract from *Delany and McGrath on Civil Procedure* (4th ed., Round Hall, 2018), para. 4-42 (grounds 5, 14, 15 and 16);

- the trial judge erred in failing to set aside the judgment obtained in default of appearance by reason of delay on the part of the appellant in bringing the application (grounds 6, 7 and 21);
- a letter sent by the appellant's solicitor to the respondent's solicitor on 6 November 2017 ought to have been treated by the trial judge as being "without prejudice" and he erred in considering it to be open correspondence (grounds 8, 9, 10 and 11);
- the trial judge incorrectly applied the provisions of O. 27, r. 14(2) RSC, including in determining that the appellant had failed to advance special circumstances for the purposes of that rule (grounds 12 and 19);
- the trial judge incorrectly applied O. 13, r. 11 RSC (ground 13) and erred in holding that the only reason identified by the appellant initially for judgment being obtained in default of appearance was an "untrue reason" (grounds 17 and 18);
- the trial judge erred in finding that the appellant had in effect accepted or acknowledged the debt and/or his liability to the respondent on foot of the judgment (grounds 20 and 27);
- the trial judge erred in holding that the guarantee was not required to be executed under seal in circumstances where no consideration was provided for in the instrument (ground 22); and,
- the trial judge erred in concluding that the appellant did not have an arguable defence and/or a valid counterclaim against the respondent, and in finding that there were other reasons to refuse the appellant's application (grounds 23, 25 and 26).

### **Cross-Appeal**

31. The respondent opposes the appeal on all grounds asserting that the order of the High Court should be affirmed, particularly having regard to delay on the part of the appellant in bringing the application to set aside the judgment regularly obtained in default of appearance.
32. The cross-appeal raised two grounds; firstly, that the trial judge erred in holding that the appellant had a reasonable prospect of successfully defending the proceedings on the basis that the consideration for the guarantee was past consideration in circumstances where the judge had also held that the guarantee was a valid deed pursuant to s. 64(2) of the Land and Conveyancing Law Reform Act 2009. As such the guarantee had effect as if it were a document executed under seal for which no consideration is required. In such circumstances, the respondent contends that the appellant would not have any reasonable prospect of success in defending proceedings on the grounds that the consideration for the guarantee was past consideration. In the alternative, the respondent argues that the trial judge erred in holding that the consideration for the entry into the guarantee was past consideration: "There was consideration for the giving of the

guarantee in the continued supply of goods by the respondent to the first named defendant.”

**Submissions of the appellant**

33. Written submissions filed on behalf of the appellant asserted at para. 1 that counsel for the respondent: –

“...only informed the trial judge during the hearing that the respondent maintains that without the said guarantee, it was unwilling to continue to provide goods to the first named defendant, and that on the strength of the guarantee, it agreed to and did in fact continue to provide goods to the first named defendant.”

It was contended that this should have been deposed to on affidavit.

34. It was submitted that the only consideration shown was past consideration and “that is insufficient at law to make the guarantee valid”. It was argued that the finding by the trial judge that the guarantee was not executed under seal: –

“...did not obviate the need for consideration for the guarantee to be effective. Had the guarantee been executed under seal then it is submitted that no consideration was required. However, the guarantee was not then consideration was required.”

The submission took issue with the execution of the guarantee and in particular the failure of the respondent company as beneficiary of the guarantee to validly execute the guarantee under seal.

35. At the hearing of the appeal, counsel for the appellant denied that the guarantee could be deemed a deed under seal for the purposes of s. 64 of the Land and Conveyancing Law Reform Act 2009. At best it embodied a promise unsupported by consideration which is only enforceable by a deed under seal. It was argued that a plenary hearing is required to determine whether the document embodying the guarantee could be said to come within the definition of a deed to be found in s. 64(2)(a) of the 2009 Act, assuming that the Act had any application to the document in the first place. It was contended that there was no evidence that the parties to the instrument intended it to be a deed, neither is it expressed to be such or executed or delivered as such. What is at issue here is a guarantee for which there is no consideration which falls outside the provisions of s. 64 and which is not to be deemed a deed for the purposes of that statutory code, it was argued.
36. It was contended that the trial judge was in error in regarding correspondence from the appellant’s then solicitor, dated 6 November 2017, as constituting “open correspondence”: –

“It... appears to have been accepted by the trial judge that there was no consideration for the purported guarantee, it is perplexing as to how the then solicitor for the appellant who actually drafted the purported guarantee could then

appear to concede that the purported guarantee was somehow valid, in the absence of consideration.”

37. It was contended that the letter of 6 November 2017 ought not to have been relied upon by the trial judge as meaning that the appellant had “accepted the debt” when same was headed “Without Prejudice”. It was argued that the appellant had been “obviously given the wrong advice” in having the letter of 6 November 2017 written. At the hearing of the appeal, counsel for the appellant contended that it was harsh and unjust to have construed the letter as disentitling the appellant to succeed in the appeal in the manner found. It was argued that a court ought to be very slow to deny an appellant his right to defend the claim; the test was whether he had a reasonable prospect of defending the claim. Further the court should have regard to the risk of injustice were the appellant shut out from the possibility of defending the action.
38. It was contended that “proper vouching evidence supporting [the] counterclaim was before the trial judge but he chose to consider it as inadequate.” It was argued that the affidavits delivered on behalf of the respondent were not subjected to adequate critical analysis so as to determine if the contents “...did establish that the appellant had no stateable counterclaim against the respondent.” However, at the hearing of the appeal, counsel for the appellant ultimately conceded that the evidence of the counterclaim was “scrappy”.
39. The appellant placed significant reliance on the decision in *O’Donovan Dairy Services Ltd. v. Cashin* and in particular para. 21 which provided: -

“The core of the jurisprudence with regard to the exercise by the court of its jurisdiction to set aside a judgment obtained in default is that the defendant be permitted to defend the proceedings and the judgment be set aside if it can be shown that he has a real or reasonable prospect of success. The test is more than that which is required for a defendant to be permitted to defend proceedings brought by way of summary summons, which requires that a defendant show an arguable defence...”

It was contended that the delays in the said case were significantly greater than any in the instant case, and as such *O’Donovan Dairy Services* was distinguishable on its facts since “any delay in bringing this application was not significant.”

40. It was contended that the trial judge did not have sufficient regard to the breadth of his own discretion as set out in the decisions of this court in *McGrath v. Godfrey* and *Emo Oil Ltd. v. Willowrock Ltd.* [2016] IECA 200 and that the appellant had met the test in the jurisprudence of being in a position to demonstrate that he had a *bona fide* defence to the proceedings and that same had a “real prospect of success” on the issue as to whether the consideration was past consideration. It was argued that the approach to “special circumstances” by the trial judge ought to have followed the jurisprudence, particularly of Irvine J. (as she then was) in *McGrath v. Godfrey*. It was further contended that the trial judge had misapplied the test laid down by the Supreme Court in *McGuinn v.*

*Commissioner of An Garda Síochána* at para. 27 of his judgment. Further, it was emphasised that the delays disclosed in *McGuinn* of twenty-one months were appreciably longer than the delays in the instant case.

41. It was contended that the “special circumstances” advanced by the appellant, within the meaning of O. 27, r. 14(2), included but were: –

“...not limited to the counterclaims that he set out and supported with exhibits on affidavit and that were not explicitly denied by the affidavit of reply sworn on behalf of the respondent.”

At the hearing, counsel contended that the authorities being relied upon by the respondent were distinguishable and that the “special circumstances” principle ought not to be over rigorously applied or elevated into an extra burden but rather should be treated as incorporated within the “interests of justice” criterion of the primary test pursuant to O. 13, r. 11.

42. It was further argued regarding delay that the trial judge had failed to subject this delay:–

“...to critical evaluation so as to establish if the delay was unjustified in the circumstances so as to prejudice the rights of the plaintiff.”

It was argued that the delay in this case was not significant in circumstances where the appellant was a lay litigant when he issued the motion.

43. At the hearing of the appeal, counsel for the appellant contended, regarding the treatment by the High Court of the appellant’s first affidavit disputing valid service of the summary proceedings upon him, that whereas the assertion ought not to have been made, nevertheless the court was not exercising a penal jurisdiction and ought to have been slow to find the appellant disqualified from the right to defend the proceedings arising from the said erroneous averment. The appellant had not been legally advised at the time the said affidavit had been filed.

#### **Submissions of the respondent**

44. The respondent contended that there were five distinct issues to be determined in the appeal: –

- (1) whether the appellant had raised any arguable grounds of defence to the guarantee with a real or reasonable prospect of success;
- (2) whether the “interests of justice” favour the setting aside of the judgment;
- (3) whether there are any “special circumstances” which explain the failure to enter an appearance or otherwise justify setting aside the judgment;
- (4) whether the provisions of s. 64 of the Land and Conveyancing Law Reform Act 2009 apply to the guarantee; and,

(5) whether the letter of 6 November 2007 can attract “without prejudice” privilege.

45. The respondent contended that the judgment was regularly obtained, giving rise to an obligation on the part of the appellant to show both a good defence to the claim and also that the interests of justice require that he should be given the opportunity to defend it before the court could accede to his application. It was contended that any defence must be shown to be more than arguable and have a real prospect of success.
46. The respondent contended that O. 27, r. 14(2) gave rise to a requirement on the part of the appellant to demonstrate that special circumstances existed which would both explain and justify his failure to enter an appearance. It was argued that this requirement is:-

“...already incorporated within the tests laid down by the courts, and in particular the requirement that a court must be satisfied that the interests of justice favour the setting aside of the judgment.”

The decision of this court in *McGrath v. Godfrey* was offered as authority for this proposition. It was contended that at least some element of the test is discretionary.

47. The respondent contended that the trial judge erred in holding that the appellant had established a prospect, or a reasonable prospect, of raising a successful defence to the guarantee: -

“Even if the High Court was correct on that point, it was nevertheless justified in refusing to set aside the judgment obtained against the appellant. The second element of the test, the interests of justice, supports this.”

***Submissions in respect of the cross-appeal***

48. The respondent contended that the trial judge was incorrect in finding that the appellant had a reasonable prospect of succeeding at trial based on a defence that the guarantee was unenforceable on grounds of past consideration. Since the trial judge found that the guarantee was one to which the provisions of s. 64 of the Land and Conveyancing Law Reform Act 2009 applied and was satisfied that it was executed in accordance with s. 64(2), the guarantee should have had effect as if it were a document executed under seal *per* s. 64(3). The respondent contended then that the issue of consideration no longer arose. Accordingly, the sole ground on which the High Court had held the appellant to have established a defence with a reasonable prospect of success no longer had any force, it was argued.
49. Insofar as it was asserted that the guarantee satisfied the requirements of s. 64(2) of the 2009 Act, the arguments were based on the contention that it was clear that the document was intended to be a deed by containing a heading appropriate to the instrument in question. It was contended that the relevant execution requirements in s. 64(2)(b)(i) had been satisfied. The respondent took issue with the appellant’s submission that for the guarantee to be valid the company ought to have executed it under seal, contending that such a proposition was wrong and reliance was placed on the decision of the Supreme Court in *McGuinness v. Ulster Bank Ireland Ltd.* [2019] IESC 20. It was

argued that since the guarantee was created to bind the appellant, an individual, the only execution required was by him in accordance with s. 64(2)(b)(i). The provisions of s. 64(3) had not been brought to the attention of the trial judge at the hearing in the High Court, it was claimed.

50. In addressing the alternative ground advanced in the cross-appeal, that the High Court erred in holding that the consideration for the entry into the guarantee was past consideration, the respondent contended that valid consideration for the guarantee was expressly pleaded in the special indorsement of claim in the summary summons, being the continued provision of goods to the first named defendant and the additional indebtedness of the first named defendant of over €20,000 was referable to same. Reliance was placed on two decisions of this court in support of that contention; *ACC Loan Management Ltd. v. Connolly* [2017] IECA 119, [2017] 3 I.R. 629 and *McDonnell v. Ring* [2016] IECA 16, and the decision of the High Court in *Allied Irish Banks plc v. McKenna* [2014] IEHC 122.

51. It was contended that the appellant first raised the issue of want of consideration in oral arguments at the hearing in the High Court: -

“At no stage prior to the hearing of the application to set aside the judgment, was the validity or necessity of consideration raised by the appellant.”

It was asserted regarding valid consideration: -

“If the appellant is to satisfy the court of the potential merits of any defence relating to requirement of consideration for the guarantee, then the onus was on the appellant to put forward evidence on that point.

Evidence is available in respect of the supply of further goods to the first named defendant following the guarantee and the respondent submits that that evidence can be supplied if so desired. In any event, the appellant has not offered any affidavit evidence in relation to the absence of any consideration so that is submitted that there cannot be any possibility that he has satisfied the first limb of the test.”

***Submissions in respect of the appellant’s counterclaim***

52. It was asserted on behalf of the respondent that, whereas some work had been done by the first named defendant, no work was ever done by the appellant in the manner contended. It was emphasised that there had been a failure to furnish receipts to support the counterclaim. It was contended that there is no basis for the appellant’s contention that he has a good defence to the respondent’s claim on foot of the guarantee with any reasonable prospect of success:-

“...even if the sparse and barely credible evidence offered was to be taken at its height, it would in no way have any effect on the liability of the appellant under the guarantee.”



It was contended that even if the alleged works could be attributed to the appellant (which was denied), "that still cannot amount to a defence to the guarantee itself."

53. The respondent placed reliance on the decision of Clarke J. (as he then was) in *Moohan v. S. & R. Motors (Donegal) Ltd.* [2007] IEHC 435, [2008] 3 I.R. 650 which considered whether a counterclaim could amount to a defence by way of set-off to a claim for summary judgment. The court held that a defendant seeking a defence must himself do equity and further, if any counterclaim amounts to an independent claim, judgment will still be entered for a plaintiff. The respondent contended that the appellant's claim, if he has any, is an independent one which is not to be taken as a defence to a judgment already obtained but rather it ought to be pursued independently. The respondent contended that a counterclaim was offered by way of defence to a claim for summary judgment on foot of a guarantee in the decision of *Allied Irish Banks plc v. McKenna* and such argument failed to satisfy the lower summary judgment threshold.

***Submissions in response to other defences raised by the appellant***

54. The respondent then turned to a consideration of the other issues raised by the appellant in support of the first limb of the two-fold test applicable to the setting aside of a regularly obtained summary judgment as determined by this court in *McGrath v. Godfrey*. It was contended that the trial judge had correctly determined that the argument that the respondent company was not a party to the guarantee was "entirely misconceived". It was further contended that the argument advanced before the High Court that the appellant had not received independent legal advice in relation to the execution of the guarantee had been abandoned in this appeal. Likewise, it appeared that the appellant's contention on affidavit to have signed a blank document rather than the guarantee itself, which in substance amounted to a plea of *non est factum*, did not appear to be pursued. The respondent argued that a similar type of defence was rejected by Birmingham J. (as he then was) in the High Court in *Allied Irish Banks plc v. McKenna* at paras. 27 and 28 of that judgment.

***The interests of justice - The letter of 6 November 2017***

55. The respondent, in addressing the second limb of the test for the setting aside of a summary judgment regularly obtained, contended that the interests of justice were against the setting aside of the judgment and that no special circumstance was established. It was contended that the letter of 6 November 2017 from the appellant's then solicitor which acknowledged the fact that judgment had been obtained against him was open correspondence. It was contended that the letter was not capable of attracting privilege. The letter had been sent six months after judgment had been obtained and contained proposals for the payment of the debt. In all the circumstances, even if the letter bore the words "without prejudice" (which it did not), it simply could not attract "without prejudice" privilege as it discussed the payment of an admitted liability.
56. At the hearing of the appeal, counsel further addressed the law of "without prejudice", arguing that two crucial prerequisites for same were absent; firstly, the presence of a dispute and an attempt to settle or compromise same and secondly, some indication on the face of the correspondence that it was not to be disclosed. At no stage prior to the

hearing in the High Court nor at any stage prior to the appeal were the contents of the said letter put in issue. Accordingly, it was argued that the interests of justice did not favour the setting aside of the judgment and the second element of the test applicable pursuant to O. 13, r. 11 had not been satisfied by the appellant. Neither were there any "special circumstances" within the meaning of O. 27, r. 14(2) which justified the setting aside of the judgment. Reliance was placed on the conduct of the appellant and the delay on his part in bringing the application.

#### **Further affidavit and O. 27, r. 14(2)**

57. During the hearing of the appeal, it came to light that a further affidavit described as a "fourth affidavit of Leslie Stuart" had been sworn on 27 April 2020. No leave of the court had been sought in relation to the filing of same. The appellant had previously filed three affidavits on 24 January 2018, 14 June 2018 and 1 November 2018. The appellant contended that this further affidavit ought to be admitted and that it demonstrated that he met the requirement of "special circumstances" pursuant to O. 27, r. 14(2). The respondent argued that the court ought not to permit the late filing of the new affidavit. The admissibility and relevance of same is considered below.
58. In legal argument the appellant contended, having regard to the decision in *Fox v. Taher* (Unreported, High Court, Costello P., 24 January 1996), that an injustice would arise if the court allowed the judgment to stand. Counsel contended that it was not clear whether O. 27, r. 14(2) operates so as to modify O. 13, r. 11. Even if it did, it was contended it is doubtful whether the requirement of "special circumstances" would lead to any overzealous application of the rules. Counsel attached weight to the decision of *McGuinn v. Commissioner of An Garda Síochána*, and in particular the decision of Murray J. (as he then was), as demonstrating that the construction of O. 27, r. 14(2) leans in favour of setting aside such an order. Counsel contended that the fourth affidavit was necessitated to demonstrate that his client met the requirement of "special circumstances" insofar as O. 27, r. 14(2) was applicable.

#### **Discussion**

##### **The role of this court in interfering with exercise of discretion by a trial judge**

59. An appellate court will ordinarily be slow to interfere with the decision by a court of first instance in an application of this kind. An intervention can be made with regard to the exercise of discretion where the trial judge was incorrect in his findings of material facts or where he or she misunderstood or misapplied the law to the salient facts. The facts in this case were deposed to on affidavit and no oral evidence was adduced. In such circumstances it is for the appellant to establish an error in relation to the findings of fact that is "such as to render the decision untenable" *per* Charleton J. in *Ryanair Ltd. v. Billigfluege.de GmbH* [2015] IESC 11 at para. 5.

##### **Mutuality**

60. As to the appellant's contention that the guarantee is to be impugned as the company did not execute it in accordance with its own articles of association, that is misconceived. The enforceability of the guarantee was not contingent upon its execution by the company for whose benefit it was created. It is execution by the guarantor alone that is of relevance.

61. A unilateral contract is made mutual by the institution of proceedings seeking to enforce rights thereunder. A plaintiff who brings proceedings to enforce a guarantee signed only by the guarantor, as a party sought to be charged under its terms, is not to be put to proof that he accepted the agreement since the institution of the proceedings *prima facie* sufficiently shows acceptance. This is not a specific performance suit but rather an enforcement of rights under the guarantee in a court of law. For such purposes only the signature of the party to be charged is required to be affixed to the instrument. Where the contract is binding at law, any want of mutuality cannot be an objection in equity either.
62. There is a distinction to be drawn between want of mutuality as to remedy which arises solely from the failure of a plaintiff to sign a memorandum when it is a requirement of the Statute of Frauds 1695 or other legislation, on the one hand, and a non-mutuality inherent in the contract itself where one party binds himself and the other promises nothing. It is noteworthy that nowhere does the appellant dispute or engage with the specific pleas at paras. 11 and 12 of the special indorsement of claim which expressly contend for good consideration supporting the guarantee. The issue of consideration is considered in detail below.

**Order 13, r. 11**

63. It is common case that the judgment under consideration in this appeal was regularly obtained in default of appearance. As such, what is required to be determined was whether the appellant has demonstrated an arguable defence to the claim and whether the interests of justice require that he should be given an opportunity to defend the proceedings accordingly. As observed by Clarke J. (as he then was) in *O'Tuama v. Casey* [2008] IEHC 49 at para. 2.1, a regularly obtained judgment may only be set aside after the court has considered the possible merits of the defence which a defendant would wish to put forward. Such an approach has been followed in this court in *McGrath v. Godfrey* at para. 21 and *Emo Oil Ltd. v. Willowrock Ltd.* at para. 27; and by the Supreme Court in *Moore v. Dún Laoghaire-Rathdown County Council* [2016] IESC 70, [2017] 3 I.R. 42 at para. 41.
64. The authors of *Delany and McGrath on Civil Procedure* (4th edn., Round Hall, 2018) at para. 4-49 observe: -
- “The discretion of the court to set aside a regular judgment obtained in default of appearance is based on the principle identified by Lord Atkin in *Evans v. Bartlam*, that ‘unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure.’ It is, thus, open to a court to set aside a judgment and give a defendant the opportunity to defend proceedings where the interests of justice so require.”
65. A defendant who asserts that they have an arguable defence and asks the court to exercise its discretion in their favour must establish that they have a real or reasonable

prospect of success, as held in *Alpine Bulk Transport Company Inc. v. Saudi Eagle Shipping Company Ltd.* [1986] 2 Lloyds Rep. 221 (“*The Saudi Eagle*”). *The Saudi Eagle* was subsequently approved in this jurisdiction by Lynch J. in *O’Callaghan Ltd. v. O’Donovan* (Unreported, Supreme Court, 13 May 1997) and followed by this court in *Bank of Ireland v. O’Brien* [2020] IECA 29 and *McGrath. v. Godfrey*.

66. In the course of these proceedings, the appellant has contended for the following defences: -
- (i) that he has a good counterclaim against the respondent company;
  - (ii) that the guarantee is unenforceable in law for lack of valid consideration;
  - (iii) although not pursued at the hearing of this appeal, it was suggested before the High Court that additional grounds of defence available included that the respondent was not a party to the guarantee by reason of having failed to validly execute the guarantee, that the appellant had not received independent legal advice prior to the execution of the guarantee, that the first defendant was a minor at a time when goods were supplied to him, that there was delay on the part of the respondent and that the appellant signed a blank document at the time (in effect, a defence of *non est factum*).
67. As observed by Murray J. (as he then was) in *McGuinn v. Commissioner of an Garda Síochána* at pp. 9 to 10, mere delay will not disentitle a party to relief unless the interests of justice so require and each case falls to be determined on its own particular facts and circumstances in order to do justice to the parties.

**The Statute of Frauds 1695 and the Land and Conveyancing Law Reform Act 2009**

68. A ground of defence advanced on behalf of the appellant is that, in the absence of valid consideration, the guarantee was required to be executed as a deed under seal in order to be enforceable. In response, the respondent contends that the guarantee constitutes a deed executed in accordance with s. 64 of the Land and Conveyancing Law Reform Act 2009 and as such has effect as if it were a document executed under seal. Aside from the issue of whether the guarantee satisfies the attributes of a deed under s. 64 of the 2009 Act, the question arises as to whether the provisions of the 2009 Act apply to a document of the kind under consideration in these proceedings, namely, a guarantee which does not relate to land.
69. Section 2 of the Statute of Frauds 1695 requires a memorandum or note in writing for the purpose of taking action *inter alia* on foot of a guarantee. That note or memorandum must be signed by “the party to be charged therewith” and in this case the guarantee was signed by the appellant against whom in these proceedings the guarantee was sought to be enforced. That signature was witnessed by his solicitor.
70. Section 2 of the Statute of Frauds 1695, upon its enactment, provided as follows: -

"...no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person there-unto by him lawfully authorised."

By virtue of Schedule 2 of the Land and Conveyancing Law Reform Act 2009, the underlined words were repealed from s. 2 of the 1695 Statute. Otherwise the provisions of s. 2 remain in full force and effect.

71. It is to be recalled that the 2009 Act had its origins in the report of the Law Reform Commission on *Reform and Modernisation of Land Law and Conveyancing Law* (L.R.C. 74-2005) which had identified at para. 1.01 two primary objectives to be achieved by the Act: (i) the replacement of all pre-1922 legislation pertaining to land law and conveyancing; and (ii) the reform of the substantive law underpinning conveyancing practice in the State.

72. The 2009 Act is primarily concerned with documents relating to land transactions. The long title to the 2009 Act provides: -

"An act to provide for the reform and modernisation of land law and conveyancing, to repeal enactments that are obsolete, unnecessary or of no benefit in modern circumstances, to provide for the variation of trusts, to modernise the law relating to *lis pendens*, to amend the Registration of Deeds and Title Acts 1964 and 2006 and certain other enactments and for related matters."

73. Section 51 of the 2009 Act deals with the requirements that contracts be evidenced in writing and provides: -

"(1) Subject to subsection (2), no action shall be brought to enforce any contract for the sale or other disposition of land unless the agreement on which such action is brought, or some memorandum or note of it, is in writing and signed by the person against whom the action is brought or that person's authorised agent."

When considered against the operative text of s. 2 of the Statute of Frauds 1695 it is clear that it is the latter which governs contracts of guarantee and not s. 51 of the 2009 Act. The guarantee was concluded in January 2014. However, in no sense can it be characterised as a contract which involves the disposition of an interest in land. Therefore, it is a transaction which although concluded after the coming into operation of the 2009 Act, is not affected by its terms.

74. Part 9 of the 2009 Act is directed to contracts relating to land. Chapter 1 of Part 9 is entitled "Contracts relating to land". Neil Maddox in *Land and Conveyancing Law Reform Act 2009: A Commentary* (1st edn., Round Hall, 2009) observes at para. 9-01: -

"This part deals with conveyances and contracts relating to land... Chapter 1 governs contracts relating to land. It re-enacts the writing requirements previously contained in the Statute of Frauds 1695 for such contracts, and preserves the vendor and purchaser summons as a means of proceeding in disputes as to title."

The modification to s. 2 of the Statute of Frauds 1695 is effectively brought about by s. 51(1) of the 2009 Act which repeals and re-enacts s. 2 of the 1695 Statute but only so far as it relates to contracts for the sale of land. Maddox observes at para. 9-03 of his commentary: -

"It does not, it seems, effect a change in the law relating to the written requirements for a contract and the enforcement of a contract is still subject to equitable doctrines."

75. J.C.W. Wylie in *The Land and Conveyancing Law Reform Acts: Annotations and Commentary* (2nd Edn., Bloomsbury Professional, 2017) observes of s. 51: -

"Section 51 replaces s. 2 of the Statute of Frauds (Ir) 1695, but only so far as it relates to contracts relating to land (see Schedule 2). Section 2 remains in force in respect of, e.g., contracts of guarantee (see *Allied Irish Banks plc v. McKenna* [2014] IEHC 122; *ACC Loan Management Ltd v. Dolan* [2016] IEHC 69) and in consideration of marriage (see McDermott, *Contract Law* (Tottel Publishing, 2001), ch 4; Clarke, *Contract Law in Ireland* (8th edn., Round Hall, 2016), paras 4.05 - 4.12)."

It is clear therefore that s. 2 of the Statute of Frauds 1695 continues to be fully operational save and except to the extent that it has been modified in relation to contracts relating to the disposition of an interest in land. Section 2 of the Statute of Frauds 1695 continues to govern the requirements for the creation of a valid contract of guarantee. Can contracts falling outside the ambit of s. 51 of the 2009 Act (as this guarantee clearly does) invoke the benefit of s. 64 of the 2009 Act? Chapter 2 of Part 9 of the 2009 Act governs title and what constitutes a good root of title in contracts relating to land.

76. Chapter 3 of Part 9 of the 2009 Act is considered by Wylie where he notes: -

"To some extent the provisions... replace provisions in pre-1922 statutes governing deeds and their operation, such as the Statute of Uses (Ireland) 1634, Real Property Act 1845, Law of Property Amendment Act 1859 and Conveyancing Act 1881. However, it also contains substantial changes to the formalities for execution of deeds: see s. 64 (and the Notes to that section)."

77. Section 62(1) of the 2009 Act appears under the heading "Conveyances by deed only". It provides: -

"Subject to section 63, a legal estate or interest in land may only be created or conveyed by a deed."

Wylie notes regarding this provision: -

"What constitutes a deed since 1 December 2009 is set out in s. 64(2)..."

78. Section 63 identifies various kinds of land transactions where it is not necessary to use a deed to transfer legal title.

79. Section 64 operates in the context of a statute governing the creation and conveyance of interests in land and the formalities required in relation to same and as such is governed in its ambit by s. 62(1) which mandates that generally a legal estate or interest in land may only be created or conveyed by a deed. The question arises as to whether the modifications and changes to the formalities for deeds brought about by s. 64 are confined to deeds pertaining to conveyances which are governed by the provisions of the 2009 Act or can be invoked in respect of a document which is not a conveyance and does not concern land or a legal estate or interest in land such as the guarantee of 22 January 2014.

80. Section 64(1) provides: -

"Any rule of law which requires—

- (a) a seal for the valid execution of a deed by an individual, or
- (b) authority to deliver a deed to be given by deed,

is abolished."

As Maddox in his commentary notes: -

"Prior to the commencement of this section, deeds were required to be sealed, normally by the attachment of a red sticker to them or the insertion of the initials L.S. inside a circle at the foot of the deed. This section does not affect the fact that a promise, unsupported by consideration (i.e., incapable of forming an enforceable contract) is only enforceable if executed by deed under seal."

Wylie in his annotations and commentary observes of s. 64(1):-

"It is important to appreciate that, as with the English provisions, s. 64 is based on continuance in the law of the distinction between a deed, on the one hand, and a document which is not a deed on the other (see L.R.C. 56-1998, paras 2.72-2.73). Thus ss. 62 and 63 of the 2009 Act retain this distinction... so that it remains important to determine in many situations whether a deed was executed. If it was not, the document may not be effective to carry out the intended transaction."

81. Wylie in his annotations observes that s. 64:-

“...introduces one of the major changes recommended by the Commission, the removal of the need for an *individual*... to use a seal in order to make the document a deed. ...It is important to note that subsection (1) simply abolishes the ‘rule of law’ which prior to that date ‘require[d]’ use of a seal.” (emphasis in original)

82. Section 3 of the 2009 Act provides that “deed” has the meaning given to it by s. 64(2). The net effect of s. 64(2) is that if a document does not comply with s. 64(2) it does not constitute a deed for the purposes of a land or conveyancing transaction. The requirements of ss. 64(2)(a), (b) and (c) appear to be cumulative.

83. Section 64(2)(a) provides: -

“(2) An instrument executed after the commencement of this Chapter is a deed if it is—

(a) described at its head by words such as ‘Assignment’, ‘Conveyance’, ‘Charge’, ‘Deed’, ‘Indenture’, ‘Lease’, ‘Mortgage’, ‘Surrender’ or other heading appropriate to the deed in question, **or** it is otherwise made clear on its face that it is intended by the person making it, or the parties to it, to be a deed, by expressing it to be executed or signed as a deed...” (emphasis added)

84. Section 64(2)(a) of the 2009 Act requires to be considered in its historical context. Traditionally a deed intended to effect a disposition of unregistered land commenced with the words “This Indenture”. Section 5 of the Real Property Act 1845 provided that a deed executed after 1 October 1845 purporting to be an indenture “shall have the effect of an indenture, although not actually indented”. Section 64(2)(a) is characterised by Wylie and Woods in *Irish Conveyancing Law* (4th edn., Bloomsbury Professional, 2019) at para. 18-07 as providing: -

“...further incentive to use... the appropriate heading for the conveyance in question by providing that one of the criteria for a document to be regarded as a deed... is that the document is described at its head with a heading appropriate to a deed.”

Section 64(2)(a) facilitates the construction of any instrument giving effect to a transaction which falls within the 2009 Act so that the description of it at its heading will identify the nature of the conveyance intended to be effected by its terms. Maddox observes that s. 64(2)(a) is broadly drafted, allowing a court to find that an instrument is a deed if:-

“(1) It is headed by words which indicate it is a deed.

(2) It is made clear on its face that the instrument is intended to be a deed by it being expressed to be executed or signed as such. A document will not be found to be a deed simply from the fact that the transaction is one where a deed is required as such. A finding would effectively abolish the formalities altogether.”



85. It is clear therefore that sub-clause (a) of s. 64(2) calls for some wording or description within the document in question indicating an intention that it is a deed. Two alternatives are identified within the sub-clause to achieve this end, as Wylie in his annotations and commentary on the sub-section observes: -

"The first alternative specified by paragraph (a) is to use an 'appropriate' heading for the document. Note that several examples are given but any other heading will do provided it is appropriate to the transaction being effected by the document in question. ...If a conveyancer is in doubt, however, a 'neutral' heading should be used, like 'conveyance' or 'deed'."

As the language of the subsection demonstrates, it must be clear from the face of the document that it was intended by the person making it to be a deed.

86. Wylie observes, in considering the words "made clear on its face" in sub-clause (a), "[t]hat is in the document itself and the wording indicates that it should be done in the execution part...". He further observes: -

"It is not necessary that both parties execute a deed unless they are doing something under it, such as conveying the land (which is why the grantor must execute it but not necessarily the grantee...)..."

87. With regard to the minimum requirements for execution of an instrument to comply with s. 64(2)(a) so as to demonstrate an intention by the party making it that it be a deed "by expressing it to be executed or signed as a deed", Wylie observes: -

"The revised precedents in Division E recently issued for *Laffoy*... have opted for a heading and the execution clauses simply use the wording '**SIGNED**' and '**DELIVERED**' without the time-honoured introductory wording - **IN WITNESS** etc. This clearly complies with paragraph (a). The alternative would be to use wording such as '**SIGNED** and **DELIVERED** as a **DEED**' (with or without an '**IN WITNESS**' introductory clause)."

It will be recalled in the instant case that, insofar as the appellant is concerned, the document provides in the testimonium: -

"In Witness hereto the parties hereby agree on the...day of...2014."

As to its execution by the appellant it provides:-

"Signed by Leslie Stuart..."

It would appear that the signature of the appellant was attested by his then solicitor. Such attestation provides *prima facie* evidence that a document was duly signed by him. In any case, it is not in dispute that the appellant's signature is appended to the guarantee. There is no reference to the guarantee being delivered.

88. It is noteworthy that the document under consideration in its initial words is described as "A Guarantee made the...day of...2014...". As such it bears a description of a contractual agreement of suretyship and does not involve the creation or disposition of any interest in land.
89. It is clear therefore that the document embodying the guarantee fails to meet any of the essential prerequisites specified in s. 64(2)(a) of the 2009 Act, since nowhere does the instrument "make clear on its face" that it was intended by the appellant at the time of execution to be a deed. Furthermore, since the intention is clearly to be gleaned from the mode of execution it is clear in the signing of the guarantee the appellant never expressed it to be "executed and or signed as a deed". Therefore, the guarantee cannot be characterised as a deed within s. 64(2)(a).
90. Furthermore, it is doubtful that the guarantee was one ever capable of coming within the ambit of Chapter 3 of Part 9 of the 2009 Act which is concerned with contracts and conveyances in relation to land. Section 51 and s. 62 of the 2009 Act suggest that the statutory intent of the 2009 Act is circumscribed and concerns the creation or conveyance of a legal estate or interest in land, neither of which the guarantee purports to do.
91. Although it is unnecessary to consider the requirements of ss. 64(2)(b) and (c) in light of the above findings, for the sake of completeness those provisions will now be discussed.
92. Although there is a signature there is no express attestation to meet the requirement of Part I of s. 64(2)(b)(i) which requires it to be "signed by the individual in the presence of a witness who attests the signature". The alternative forms of execution at Part II, requiring "it is signed by a person at the individual's direction given in the presence of a witness who attests the signature", or Part III, requiring "the individual's signature is acknowledged by him or her in the presence of a witness who attests the signature", do not appear to apply or arise at all.
93. The appellant does not contest his signature. There is no attestation clause as such as would come within the ambit of s. 64(2)(b)(i)(I). None of the other subsections of s. 64(2)(b) are material since they pertain to bodies corporate and their execution of an instrument.
94. Section 64(3) provides that a document executed in accordance with the legal requirements of s. 64 "has effect as if it were a document executed under seal." The respondent sought to rely on the decision in *McGuinness v. Ulster Bank of Ireland Ltd.* [2014] IEHC 281. In that case, the High Court noted that the appointment of a receiver was not under seal. The deed of appointment was signed and delivered by a senior official of the bank "for and on behalf of and as the deed of Ulster Bank Ireland Ltd." on foot of a power of attorney. The court found that execution by the senior bank official of the deed of appointment of the receiver was done in compliance with s. 17 of the Powers of Attorney Act 1996.

95. A key issue in the case was whether the deed had been validly delivered in accordance with s. 64(2)(c) of the 2009 Act, namely “delivered as a deed by the person executing it or by a person authorised to do so on that person’s behalf.” The issue was appealed to the Supreme Court and judgment was delivered, [2019] IESC 20, holding that the deed of appointment was validly executed by virtue of s. 64(2)(b) of the 2009 Act. A fundamental distinction between *McGuinness* and the instant case is that the former case concerned the validity of the appointment of a receiver over property, the subject matter of security held by the bank, whereas the instant case is concerned with a guarantee in relation to a sum of €98,252.00 together with interest as therein specified and does not pertain to real property or a security in or over land.
96. To put matters simply, the contract under consideration pertains to an agreement which continues to be subject to the provisions of the un-repealed part of s. 2 of the Statute of Frauds 1695. By contrast, contracts in relation to land or real property have been carved out of s. 2 of the Statute of Frauds 1695 and are now governed in most material respects, including the formalities of deeds concerning them, by the provisions of the 2009 Act.
97. In conclusion, I am satisfied that the transaction intended by the guarantee document falls wholly outside the ambit of the 2009 Act and constitutes neither a contract nor a conveyance which could be said to relate to land or real property or any interest therein.
98. In any case, I am satisfied that the guarantee document failed to comply with s. 64(2)(a) of the 2009 Act. Neither did it comply with s. 64(2)(b) which is directed to the execution of the instrument. Further I am satisfied that the instrument was not delivered in accordance with s. 64(2)(c) which requires that it be delivered as a deed. It follows that the guarantee is not a deed executed under s. 64 such that it could have effect as if it were a document executed under seal. The guarantee satisfied all relevant requirements of the Statute of Frauds 1695. It did not require to be executed as a deed under seal, or to be deemed such, for its validity for the reasons stated below.

### **Counterclaim**

99. In *McGrath v. O’Driscoll* [2006] IEHC 195, [2007] 1 I.L.R.M. 203 Clarke J. (as he then was) had to consider whether the defendant had established an arguable defence/counterclaim such as would afford a defence to the plaintiff’s claim and the principles applicable to granting leave to defend the application for summary judgment in such circumstances. However, it should be noted that the test a defendant must satisfy to obtain leave to defend, which applied in *McGrath v. O’Driscoll*, is substantially different to that which a defendant must satisfy in order to persuade the court to set aside a regularly obtained judgment in default of appearance, as at issue in the instant case.
100. Although the appellant contends that he has a “full defence and counterclaim” to the claim of the respondent, this is very much in contention. There is a specific averment that the appellant carried out works for at least ten individual contractors to a value of up to €100,000 in para. 5 of his affidavit filed 24 January 2018. It will be recalled that that averment embodies a bare assertion and nothing further. The replying affidavit of Michael

Roulston of 14 February 2018 not alone disputes but fundamentally contradicts this assertion at para. 11: -

“...While some work was carried out by the first named defendant, no work was carried out by the second named defendant for the plaintiff.”

The second affidavit of the appellant filed on 14 June 2018 at para. 7 deposes that he was “commissioned to undertake the following services...”. He proceeds to identify ten separate entities, and it is further contended that the work done was “valued at in excess of €110,000 plus VAT of 13.5%.” Documents are referred to which are characterised by him as “a statement of accounts”.

101. The said documents fall far short of establishing the basis of a valid counterclaim. A curious feature is that, far from having served demands for payment on the respondent, the appellant in the first instance failed to exhibit these statements of accounts or to furnish them to the respondent. The statements were only provided to the respondent after a direction of the High Court compelling their production. The said documents were never exhibited in any affidavit of the appellant but rather in an affidavit on behalf of the respondent of 19 July 2018. Eight documents are exhibited, substantially identical in content. Each states “Stuart Steel” on behalf of WDL Engineering (the name under which the respondent formerly traded) of Mondooy, Co. Donegal, “Put together and set upright a structure on our premises”. There is no express reference in any such statement to the appellant. There is no evidence that the appellant has any legal or beneficial ownership in or over Stuart Steel or that he ever directly invoiced the respondent in regard to any services allegedly rendered. There is no evidence exhibited to demonstrate a nexus between the appellant and Stuart Steel such as would render the appellant beneficially entitled to debts due and owing to Stuart Steel. Several of the “statements of account” relied upon to support an alleged counterclaim are unsigned. In one case, it was averred on behalf of the respondent that an individual whose letter is unsigned died almost a year prior to the date appearing on the document in question. This averment was not contradicted by the appellant. In addition, none of the documents on their face identify the value of the works referred to nor any sum in respect of which the respondent company is liable directly to the appellant in respect of same. There is no evidence that the appellant submitted invoices directly to the respondent company.
102. In a later affidavit sworn on 19 July 2018 the company director, Michael Roulston, deposed, regarding the various sums claimed by the appellant, that the respondent company had made allowances in respect of same or otherwise they had been paid and discharged and that no sums thereunder were due and owing to the appellant. The affidavit of debt filed in support of judgment deposed that the appellant’s son had since the service of the summary summons carried out work in lieu for the respondent in the sum of €2,404.24 and accordingly the sum of €98,252 was jointly and severally due and owing by the first named defendant and the appellant and the additional sum of €19,658 was due and owing by the first defendant. Crucially, the appellant neither disputed or contradicted any of those averments.

103. Whether the counterclaim contended for could amount to a defence by way of set-off was considered by Clarke J. in *Moohan v. S. & R. Motors (Donegal) Ltd.* at para. 9. He observed that the court had a "wider discretion" depending on whether or not the counterclaim arises from an independent set of circumstances. As was observed by Clarke J., when the nature of a defence put forward amounts to a form of cross-claim on the part of the defendant against the plaintiff "then the first question which needs to be determined is as to whether that cross-claim would give rise to a defence in equity to the proceedings." The answer to that question derives from the decision of Kingsmill Moore J. in *Prendergast v. Biddle* (Unreported, Supreme Court, 31 July 1957), as Clarke J. noted: -

"...the test as to whether a cross-claim gives rise to a defence in equity depends on whether the cross-claim stems from the same set of facts (such as the same contract) as gives rise to the primary claim. If it does, then an equitable set off is available so that the debt arising on the claim will be disallowed to the extent that the cross-claim may be made out."

As Clarke J. continues at para. 10:-

"On the other hand if the cross-claim arises from some independent set of circumstances then the claim (unless it can be defended on separate grounds) will have to be allowed, but the defendant may be able to establish a counter claim in due course, which may in whole or in part be set against the claim."

104. In the instant case, we are faced with a contractual arrangement entered into by the appellant as guarantor of the debts of a third party, namely his son, the first named defendant in these proceedings. The counterclaim he contends for ultimately amounts to an unproven assertion that €110,000, or more, plus VAT is due and owing to him personally in respect of services rendered by him personally and not by his son or any other entity.

105. It is significant that the various works the subject of the "statements of account" dated 15 January 2018 were apparently carried out after the guarantee was entered into, after the institution of the proceedings and after judgment was obtained by the respondent.

106. In the circumstances arising therefore, the cross-claim contended for arises from a wholly independent set of circumstances. It is not amenable to, nor could it appropriately be the subject of, a cross-claim to the within proceedings. Accordingly, the contentions with regard to a counterclaim such as they are, do not give rise to a good defence such as would meet the first limb of the two-fold test pursuant to O. 13, r. 11 RSC.

#### **Past consideration**

107. A further ground of defence advanced on behalf of the appellant is that the guarantee is unenforceable in law for want of consideration. Had the respondent been in a position to demonstrate that the guarantee document embodied a transaction which fell within the 2009 Act and complied with the key formalities specified in ss. 64(1) and 64(2) of the 2009 Act and executed as such, it would have been entitled to invoke the benefit of s.

64(3) of the said Act so that the guarantee would be effective "as if it were a document executed under seal", in which case the issue of consideration would not be relevant. However, as discussed above, this is not the position in this case.

108. At issue in this case, is a contract of suretyship. A detailed overview of such contracts is provided by John Breslin in chapter 14 of *Banking Law* (3rd edn., Round Hall, 2013). As like any other contract, contracts of suretyship must be supported by consideration in order to be enforceable if they are not executed under seal. It is common case that the guarantee in this case was never under seal.
109. It is well-settled that past consideration is no consideration. Irish authorities for the proposition that a guarantee given for past consideration, which is not under seal, is void include *Fitzgerald v. Portarlinton* (Irish Exchequer) (1835) 1 Jon 838; *Aldritt v. Maconchy* [1906] 1 I.R. 416, 432 to 433; *Grimshaw v. Woolsey* [1848] 12 I.L.R. 147; and, *ACC Bank plc v. Dillon* [2012] IEHC 474 at paras. 4.3 to 4.4 per Charleton J.
110. Breslin in his text offers examples of how the rule against past consideration has operated in the context of contracts of suretyship at para. 14-32: -

"In *Astley Industrial Trust Limited v. Grimston Electric Drills*, [1965] 1 09 S.J. 149 a surety guaranteed payments under a hire purchase agreement which had been entered into four days previously and it was held that the guarantee was given for past consideration and was void. However, it was pointed out by Treitel that 'If the consideration and the promise are substantially one transaction, the exact order in which these events occur is not decisive.' This is supported by the decision in *Bradford v. Roulston* [1858] 8 I.C.L.R. 468. In that case a guarantee given after the creditor had (at the guarantor's request) afforded credit to the principal debtor was held to be supported by a good consideration. Both Pigot C.B. (who conducted a thorough review of the authorities at the time) and Richards B. held that the promise to give the guarantee unites with the earlier request for credit; and the promise was enforceable even though resting on past or executed consideration."

111. As succinctly put by Charleton J. in *ACC Bank v. Dillon* at para. 4.4:-

"In an analysis of whether consideration is past or current, the strict order of events is not necessarily decisive."

112. A contract of guarantee is by its nature ancillary and subsidiary to some other contract or liability on which it is founded. In the instant case that liability is disclosed at clause 2 of the agreement which states: -

"...that the said Leslie Stuart is prepared to guarantee the debt owed by Geoffrey (*sic*) Stuart trading as Stuart Steel to Long Roulston Limited and it is agreed by the parties hereto that the sum owed is €98,252.00 for the avoidance of doubt."

113. As a matter of law, the mere existence of the debt owed by the appellant's son and his firm and the son's default is not sufficient in and of itself to support the appellant's

promise to the respondent creditor. It has been well settled at least since the decision of *Forth v. Stanton* (1667) 1 Wms. Saund. 210 at 211a, 211b, that such a guarantee must in all cases be founded upon a new consideration and where there is total failure of such consideration, the guarantor or surety is entitled to have his guarantee delivered up and cancelled.

114. In the context of a valid guarantee not under seal, the consideration for the guarantor's promise does not move from the principal debtor (in the instant case his son, Jeffrey Stuart), but rather from the creditor being the respondent company. *Halsbury's Laws of England*, 4th Edn. at p. 58, para. 115 observes: -

"It need not directly benefit the surety, although it may do so, and it may consist wholly of some advantage given to or conferred on the principal debtor by the creditor at the surety's request. Thus, the surety's promise often stipulates for a supply of goods or an advance of money to the principal debtor, or that the principal debtor should be taken into the creditor's service or employment."

115. Whereas the guarantee does not constitute a deed, it is an instrument subject to the provisions of s. 2 of the Statute of Frauds 1695. May on *The Law of Fraudulent and Voluntary Conveyances* (3rd edn., Stevens and Haynes, 1908) states at p. 211: -

"It is a well settled principle that, in questions on the statutes of Elizabeth, considerations not mentioned in a deed may be resorted to, both at law and in equity, to support it, provided they be not inconsistent with what appears on the face of the deed."

At pp. 212 and 213 the author states: -

"It is not in contradiction of the expressed consideration to prove a larger consideration than that mentioned..."

The question whether the consideration is valuable, or not, is to be decided by the circumstances at the time the deed which is impeached was executed; and not by the light of subsequent events. If, then, the consideration be something future or contingent, and, after the execution of the deed, it fails, the deed is not thereby avoided."

It is clear that in regard to consideration the court looks at all the circumstances of the case.

116. At p. 213 the author states: -

"In determining whether or not a deed is voluntary, the court will take into consideration all the circumstances under which it was executed and the relative positions of the parties; ...and will take into consideration any evidence which tends to throw light on the reasons and considerations for the settlement. Although there may be no proof, either by extrinsic evidence or by anything appearing on the face of the deeds, of any stipulations or agreement which would be sufficient

consideration to support the deed, yet several transactions may be viewed together, and the parties to them must be considered to have stipulated according to the rights which they had; and any consideration which is found to exist will either support the whole of the transaction, or none at all."

117. Elsewhere at p. 156 the author states: –

"...a deed, apparently voluntary, may be supported by proof of consideration, or by considerations which arise subsequently to the deed."

The decision in *Clarke v. Willott* (1872) L.R. 7 Ex. 313 is cited as authority for this proposition.

118. The decision of this court in *ACC Loan Management Ltd. v. Connolly* is relied on in the cross-appeal. In that case, a question was raised in relation to the execution of a guarantee purported to have been "signed, sealed and delivered" but there was no evidence that a seal had been affixed and it had only been signed by the guarantor. The High Court judge had rejected any arguable defence based on the absence of the seal on the basis that in his view the obligation to have a guarantee by an individual executed under seal had been abolished by s. 64 of the 2009 Act. However, the guarantees in question had been executed before the coming into operation of the 2009 Act and so, in that respect, it is clearly distinguishable from the present case. At pp. 647 and 648, Finlay Geoghegan J. observed: –

"53. The bank does not dispute that the trial judge incorrectly decided this issue by reference to s. 64 of the 2009 Act. However, it submits that even prior to the 2009 Act there was no requirement that a guarantee be executed under seal to be valid. It refers to *Allied Irish Banks plc v. McKenna* [2014] IEHC 122... in which Birmingham J. found that the guarantee in question was not executed under seal, but held that there was no such requirement where the bank had provided consideration for the guarantee by way of loan and overdraft facilities to the principal debtor. It submits that there was on the facts herein consideration for the guarantee in the form of the loan facility advanced to the son.

54. Reliance was also placed upon the judgment of this court in *McDonnell v. Ring* [2016] IECA 16... where Mahon J. giving the judgment of the court stated at p. 14:–

'30. Even if there had been an absence of consideration, the guarantee was "signed, sealed and delivered" by the appellant. Where a contract is executed "under seal" it is not necessary to establish the existence of consideration. In this case, although the guarantee is said to be "under seal" there is no evidence that the document was in fact sealed. However, the absence of a seal is not necessarily fatal to the respondent's claim. In vol. 32 of *Halsbury's Laws of England* (5th ed., 2012) the following is stated at p. 143: –

"Where a person executes a deed by stating it has been 'signed, sealed and delivered' but without in fact sealing it, and another person relies



on the deed to his detriment, the person executing the deed is estopped from denying that it was sealed.””

The court concluded that whereas the trial judge had rejected an arguable defence by reason of the absence of a seal for an incorrect reason, the decision reached was correct for the reasons advanced on behalf of the bank. The appeal was dismissed. The guarantee under consideration in this appeal is not expressed to be “under seal” or “signed, sealed and delivered” as to its execution by the guarantor.

119. The face of the guarantee agreement makes reference only to the antecedent debt of the appellant’s son’s firm to the respondent as of 22 January 2014. However, that is not the end of the matter. This regularly obtained judgment was obtained on foot of a summary summons served on this appellant on 14 April 2016. Para. 9 of the special indorsement of claim pleads:-

“9. In October 2013 the first named defendant was indebted to the plaintiff in the sum of €98,252. The plaintiff, its servants or agents, informed the first named defendant that **in consideration for the continued provision of goods to the first named defendant**, it required... a personal guarantee from the second named defendant, guaranteeing the indebtedness of the first named defendant to the plaintiff.” (emphasis added)

120. At para. 11 it is stated that on foot of the provision of the guarantee the respondent **“agreed to and did in fact continue to provide goods to the first named Defendant.”** That statement of fact was never disputed by the appellant. By way of further independent demonstration that the respondent did continue to provide goods to the appellant guarantor’s son after the execution of the guarantee, para. 12 of the indorsement states that as of 5 October 2015, one year and nine months post the date of the guarantee, the son’s indebtedness to the respondent had increased from €98,252.00 to €120,314.24. That uncontested fact is consistent only with the respondent’s position that the consideration for the guarantee included that the respondent would continue to provide goods to the first named defendant. It is inconsistent with the appellant’s claim that the guarantee is bad for want of consideration.

121. It is noteworthy that in his affidavits the appellant has not disputed these key assertions including the specific claim in the special indorsement of claim that “in October 2013 the company had indicated it required a personal guarantee from the appellant for the continued provision of goods to his son, the first named defendant.” The issue of past consideration was never raised by the appellant until oral submissions at the hearing of the motion despite the fact that three affidavits were sworn by him prior to that date.

122. In a later affidavit sworn on 19 July 2018 Michael Roulston on behalf of the respondent company deposes at para. 5: -

"...The guarantee was in fact offered by the second named defendant, was produced by Donogh Cleary, the former solicitor of the second named defendant and was his (*sic*) signed in his presence."

123. I am satisfied that the affidavit evidence of the appellant falls short of establishing a good defence or counterclaim to these contentions. The written submissions of the respondent's counsel (para. 35) stated: -

"Evidence is available in respect of the supply of further goods to the first named defendant following the guarantee and the respondent submits that that evidence can be supplied if so desired. In any event, the appellant has not offered any affidavit evidence in relation to the absence of any consideration so that (*sic*) is submitted that there cannot be any possibility that he has satisfied the first limb of the test."

124. In substance, what the respondent is contending is that, although not expressly specified within the guarantee agreement itself, the respondent company in consideration for the guarantor's promise continued to supply goods on credit to the respondent's son after 22 January 2014 and up until the institution of the proceedings in 2016.

125. The appellant nowhere in four affidavits filed in support of his application has denied the clear statements in the summary summons of an agreement on 22 January 2014 that on the basis of the appellant entering into the guarantee, the company would continue to provide goods to the first defendant, Jeffrey Stuart trading as Stuart Steel Fabrications. That in and of itself supplies a complete answer to the claim of lack of valid consideration, it not being under seal and not constituting a deed. The issue as to whether consideration is past or merely executed is essentially one of fact.

126. The issue as to want of consideration was first raised at the hearing of the motion in the High Court. The appellant characterises the position adopted by the respondent as follows: -

"Counsel for the respondent only informed the trial judge during the hearing that the respondent maintains that without the said guarantee, it was unwilling to continue to provide goods to the first named defendant, and that on the strength of the guarantee, it agreed to and did in fact continue to provide goods to the first named defendant. It is submitted that if this was such a motivating factor then it should have been deposed to on an affidavit."

127. Such submission was fundamentally incorrect, when considered in the light of paras. 9, 11 and 12 of the special indorsement of claim in the summary summons which do not appear to have been opened to that court. The decision of the Privy Council in *Pao On v. Lau Yiu Long* [1980] A.C. 614 is authority for the proposition that extrinsic evidence is admissible to show that the consideration for a guarantee agreement was greater and additional to that specifically stated in the document itself.

128. Accordingly, I am satisfied that the appellant's above submissions and the arguments in pursuance of a defence do not in their totality demonstrate the existence of a defence which on balance has a real prospect of success were the judgment to be set aside and the matter remitted to trial. I am not satisfied that the appellant has shown in the context of O. 13, r. 11 a defence on the merits that has a reasonable prospect of success at a plenary hearing.

### **The Interests of Justice**

129. That finding should dispose of the appeal but for completeness it is appropriate to consider also the second limb of the O. 13, r. 11 test which requires the court to consider the interests of justice.

130. The High Court judge quite properly declined to disregard open correspondence consisting of a letter of 6 November 2017 (six months after judgment was obtained) written by the appellant's own solicitor which freely admitted his obligations on foot of the guarantee. The import of the language is inescapable: -

"It is the case that he is cognisant of his responsibilities in this regard and we understand that he [has] recently spoken to Mr. Roulston of your client company and he has instructed us to formally make the above offer."

131. Arguments that the said correspondence was inadmissible as being subject to privilege were, prudently, not pursued in this court nor could they have been. At the time of the writing of the said letter and having due regard to its contents, there was no dispute in being between the parties. The letter did not bear any suggestion that it was "without prejudice" nor could it have, in the circumstances obtaining at that time. The company had obtained a judgment in respect of a sum which in its totality the letter freely acknowledged, was properly obtained and the appellant did not seek to impugn any part of the judgment. The legal proceedings had concluded in effect, save and except for the execution of the judgment by the respondent. I am satisfied that the letter in its totality significantly tips the balance in favour of the respondent and predisposes towards refusing the appellant's application. The trial judge correctly had regard to it.

132. Order 27, r. 14(2) is also relevant. As the respondent correctly argued, O. 27, r. 14(2) provides that any judgment by default, whether under O. 27 or any other of the rules, may be set aside by the court upon such terms as to costs or otherwise as the court may think fit, if the court is satisfied that at the time of the default, special circumstances (to be recited in the order) existed which explain and justify the failure. This provision was introduced into the rules by S.I. No. 63 of 2004.

133. In the High Court, the trial judge referred to para. 4-42 of *Delany and McGrath on Civil Procedure*, which is set out in full at para. 26 of this judgment, in which the authors express doubt over whether O. 27, r. 14(2) modifies O. 13, r. 11. I share the authors' doubt and there is certainly ambiguity as to whether the provision is applicable in circumstances where a judgment has been obtained in default of appearance such as would result in a material modification of O. 13, r. 11.

134. The final affidavit of the appellant was submitted in support of his contention that “special circumstances” did obtain. To that end I am satisfied in all the circumstances that it is in the interests of justice that it be received by this court since it is directed towards a specific issue potentially central to the exercise by this court of its discretion. The key issues raised are that once the proceedings were served on the appellant he placed them in the hands of his solicitor and instructed the solicitor to do “whatever was necessary to defend those proceedings on my behalf”. He refers to a without prejudice letter in support of that contention. The appellant further deposes that he gave the letter to a solicitor “with the intention that he would do whatever was necessary to defend the proceedings. This was not done and this is the circumstance which gave rise to the marking of judgment in default on the 9th May, 2017.”

135. In *McGuinn v. Commissioner of an Garda Síochána* Murray J. analysed O. 27, r. 14(2) in the course of his judgment observing at p. 6: –

“The amendment to the longstanding Order 27 Rule 4 is specific and narrowly focused. For an applicant to succeed under the terms of the rule he must first of all demonstrate that there were ‘special circumstances’ explaining and justifying the failure at the time when the judgment was obtained.” (emphasis in original)

The *McGuinn* decision is distinguishable in a number of material respects including, that the solicitor on the other side mistakenly had informed the appellant’s solicitor in that case that a motion had been struck out. Undoubtedly in the instant case the impasse appears to have evolved between the appellant and his own solicitor as distinct from emanating from the other party. Whilst of course the jurisprudence relied upon by Murray J. is important, including *Croke v. Waterford Crystal Ltd.* [2004] IESC 97, [2005] 2 I.R. 383, in the instant case it is not that mistakes were made on the part of the appellant but rather nothing at all occurred, and no step was taken of any kind from 22 March 2016 upon the institution of the proceedings, or more particularly from 14 April 2016 when they were served upon the appellant, until after judgment in default of appearance was marked. In addition, there was no letter of admission in *McGuinn* akin to the open letter of 6 November 2017 in the instant case.

136. In the instant case there is no irregularity whatsoever in the manner in which judgment was obtained. As Irvine J. observed in this court in *McGrath v. Godfrey* at para. 44: –

“In circumstances where the judgment was obtained in a regular manner, the onus was on the defendant to demonstrate the existence of a defence which had a real prospect of success and thereafter to establish the existence of some special circumstances such that, having weighed the interests of both parties, would have warranted the trial judge setting aside the judgment. Integral to that issue was proof by the defendant that he would be in a position to pursue a defence which had a real chance of success if the order were to be set aside.”

137. In my view that approach to the test applicable when considering a motion brought pursuant to O. 13, r. 11 encompasses within it the considerations to be found in O. 27, r.

14(2). Applying that test to the instant case I am satisfied that no “special circumstances” have been identified, although clearly there seems to have been some apparent disconnect between the appellant and his own solicitor that, in my view, on the facts of this case, does not amount to a special circumstance such as would support the setting aside of the judgment. It is a matter furthermore in respect of which the respondent is wholly blameless.

### **Conclusions**

138. In respect of the appeal I would dismiss the appellant’s appeal on all grounds. With regard to the cross-appeal the respondent has not established that the guarantee had effect as if it were a document executed under seal for which no consideration was required within the meaning of s. 64(3) of the 2009 Act.
139. However, the trial judge did err in concluding that the consideration for the entry into the guarantee was past consideration. That issue was never raised in any affidavit filed in support of the application. The appellant failed to dispute, still less contradict, in any of the four affidavits sworn by him the clear statement to the contrary and asserting valid consideration set forth in paras. 9, 11 and 12 of the special indorsement of claim. It was not in the interests of justice to permit the launch of such a contention at the hearing of the application. In the circumstances I would allow that alternative ground in the cross-appeal.
140. On the issue of costs, it is appropriate that the respondent be granted its costs in opposing the appeal in this court and of the motion in the court below. In circumstances where the respondent has succeeded on only one of the two alternative grounds of the cross-appeal, there should be no order as to costs in relation to the cross-appeal. It is the intention of the court to so order fourteen days from the date of this judgment unless either party applies within that time requesting that the court should otherwise order. If so applying, the relevant party must first notify the Office of the Court of Appeal in writing of its intention to object within the fourteen-day period and should file short written submissions, and at all events no longer than 2,000 words, within one week of it so notifying the court, sending same to the other party at the time of filing. The other party will then have a further week to file submissions, which are to be no longer than 2,000 words.
141. Ní Raifeartaigh and Power JJ. have confirmed that they are in agreement with the above judgment.