THE HIGH COURT

2016 No. 514S

BETWEEN

FABRI-CLAD ENGINEERING LIMITED

PLAINTIFF

AND

JEFFREY STUART TRADING AS STUART STEELE FABRICATIONS

FIRST NAMED DEFENDANT

AND

LESLIE STUART

SECOND NAMED DEFENDANT

JUDGMENT of Mr. Justice Binchy delivered on the 4th day of April, 2019

1. This is a judgment on an application brought by the second named defendant, the applicant, to set aside the judgment obtained against him, and also against the first named defendant, by the plaintiff, on 9th May, 2017 in the sum of €98,252. That judgment was obtained in default of appearance by the plaintiff. On the same date, a F.I.F.A. issued directing a seizure of the goods of the defendants to satisfy the judgments obtained against each defendant.

2. This motion, although undated, appears from the stamps impressed thereon and from the grounding affidavit upon which it is based, to have issued on 24th January, 2018, more than eight months after the judgment issued. Although the second named defendant is now legally represented, it appears as though he was not represented at the time that he caused this motion to issue, and swore his grounding affidavit.

3. Before considering his grounding affidavit, it is appropriate to mention that on 6th November, 2017, solicitors acting on behalf of the applicant, wrote a letter to the solicitors acting on behalf of the plaintiff making an offer to make payments towards the judgment debt. This letter refers to a quarry owned by the applicant in respect of which he was hoping to gain some income from a third party. In it, his solicitors stated:-

> "It is estimated that at the moment… therefore would be €1,600 [per month] available which Mr. Stuart would be happy to apply towards the debt. It is the case that he is cognisant of his responsibilities in this regard and we understand that he is (sic) recently spoken to Mr. Roulston of your client company and he has instructed us to formally make the above offer. Perhaps when your client had a chance to consider the same, you might revert with your instructions."

4. The background to the proceedings, and the basis upon which judgment was obtained, is that the second named defendant provided the plaintiff with a guarantee in respect of the liabilities of his son, the first named defendant, to the plaintiff, on 22nd January, 2014. This guarantee was drafted by the applicant's own solicitor, and executed in his presence. Although it is not averred to on behalf of the plaintiff on affidavit, counsel for the plaintiff informed the Court that the plaintiff claims that without that 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. The guarantee provided was for the amount then due by the first named defendant to the plaintiff in the sum of €98,252. The summary summons states that as of 5th October, 2015, the first named defendant was indebted to the plaintiff in the sum of €120,314.24. The plaintiff claims that by letter 28th October, 2015, it demanded that sum from the first named defendant, and that as a consequence of the failure of the first named defendant to pay the amount due, the plaintiff called in the amount due by the second named defendant pursuant to the guarantee.

5. The form of guarantee acknowledges the debt due by the first named defendant to the plaintiff, and the operative part thereof provides as follows:-

> "accordingly, Leslie Stuart hereby guarantees the debt of Jeffrey Stuart trading as Stuart Steel as owed to Long Roulston Ltd [which subsequently changed its name to Fabri-Clad Engineering Ltd] 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."

6. The guarantee goes on to make provision for payment of interest and to state that in default of payment the plaintiff may bring whatever proceedings it may wish to do against both defendants. It is then signed "*for and on behalf of*" the plaintiff (but not under seal of the plaintiff) and signed by the second named defendant (but not under the seal of the second named defendant). According to the plaintiff, this guarantee was prepared by the solicitors for the second named defendant, and the solicitor witnessed the signature of the second named defendant thereon.

7. In his grounding affidavit (prepared without legal advice) the applicant claims:-

> (1) That he was never "properly" served with the proceedings herein and for that reason he did not enter and file an appearance. While it is unclear what the applicant means by "properly" served, it is clear that he was served in accordance with the rules. That this is so is apparent from an affidavit of service dated 20th April, 2016 in which a Brendan Joyce, Summons Server, deposes on affidavit that he served a true copy of the summons herein personally upon the applicant on 14th April, 2016. Not only that, solicitors acting on his behalf wrote, on 9th May 2016, to the solicitors for the plaintiff in connection with the proceedings, and referred in their letter to the summons. Moreover, no such complaint is made in the letter of the applicant's solicitors of 6th November, 2017 referred to above, and instead, the applicant, through his solicitors, makes proposals for payment in that letter. In any case the applicant did not pursue this argument at the hearing of this motion, and wisely so.
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> (2) The applicant says that the plaintiff is not a party to the guarantee. However, this point is entirely misconceived. It is clear that the plaintiff was a party to the guarantee, under its previous name, Long Roulston Ltd.

> (3) The applicant claims to have a full defence and counterclaim to the proceedings in circumstances where the applicant claims that the defendants have carried out steel erection work for and on behalf of the directors of the plaintiff for at least ten individual contractors to a value of up to €100,000. While this point is developed in two further affidavits of the applicant, each dated 14th June, 2018 and documentation subsequently delivered, I am of the view that the latter affidavit and the documentation subsequently delivered fall 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.

8. Affidavits were delivered by Mr. Michael Roulston of the plaintiff dated 14th February, 2018 and again on 19th July, 2018, dealing with the various arguments made by the applicant on affidavit. An appearance to the summary summons was entered on behalf of the applicant on 2nd July, 2018. This was entered by a different firm of solicitors to the solicitors who wrote on behalf of the applicant to the solicitors for the plaintiff, on 6th November, 2017.

9. At the hearing of this application, in addition to the arguments made by the applicant on affidavit, counsel for the applicant advanced a number of legal arguments arising from the guarantee itself, and the manner as to its execution.

10. Firstly, he argued that since there was no consideration provided for the guarantee by the applicant, it requires to be executed under seal in order to be enforceable. Secondly, he argued that the applicant has a good defence to these proceedings on the grounds that the consideration for the provision of the guarantee was past consideration.

11. In response to this, counsel for the plaintiff argued that there is no longer any requirement for a deed to be executed under seal in order to be a valid deed. He referred to s. 64 of the Conveyancing and Law Reform Act 2009, subs. 1 of which expressly abolishes the requirement for a deed to be executed under seal, and subs. 2 of which provides that an instrument is recognised as a deed if it meets a number of requirements. For present purposes, the relevant requirement is that the deed should be signed by an individual in the presence of a witness who attests his signature and that that requirement has clearly been met in this case because the signature of the applicant has been witnessed by a solicitor, namely Mr. Donough Cleary who was advising the applicant at the time of the guarantee.

12. As to the second limb of this argument, it is argued on behalf of the plaintiff that there was consideration for the giving of the guarantee, namely the continued supply of goods by the plaintiff to the first named defendant.

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.

16. As to the test to be applied on applications such as these, I was referred to a number of authorities, but I need look no further than the decision of Baker J. in the decision of *O'Donovan Dairy Services Ltd v. Cashin* [2016] IEHC 476, in which she summarised the applicable authorities and at para. 21 thereof she stated:-

> "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 …"

17. As I have said above, 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.

18. In this regard, 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 plaintiff refers to para. 30 of the judgment of Baker J. in *O'Donovan Dairy Services Ltd v. Cashin* in which she said:-

> "I consider in this case that in the exercise of my discretion I cannot ignore a number of factors. The delay of the defendant in bringing this motion has been significant, and while the authorities do not bear out a view that the delay of itself will prevent the exercise of discretion, a delay which is prejudicial to the interests of the other party will always impact upon the exercise of its discretion by a court."

19. 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. 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. In the circumstances therefore, while delay is a factor in this application, it should not, in and of itself, be determinative of this application.

20. I turn now to consider the question as to whether or not 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. In considering this issue, I think it must be borne in mind that the applicant at this time had the benefit of legal advice. In the letter, it is stated that the applicant is "cognisant of his responsibilities in this regard". This suggests an acceptance by the applicant of the debt itself, as distinct from the judgment against him, or both. Moreover, no objection is taken in this letter as to the service of the proceedings or the fact that judgment was obtained or the manner in which it was obtained. 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.

Applicable Rules of the Superior Courts

21. Order 13, rule 11 of the Rules of the Superior Courts provides:-

> "Where final judgement is entered pursuant to any of the preceding rules of this Order, it shall be lawful for the Court to set aside or vary such judgement upon such terms as may be just."

22. Order 27, rule 14(2) of the Rules of the Superior Courts (as inserted by S.I. No. 63 of 2004) provides:-

> "Any judgment by default, whether under this Order or any other of these 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, and where an action has been set down under rule 8, such setting down may be dealt with by the Court in the same way as if a judgment by default had been signed when the case was set down."

23. There appears to have been very few cases in which O. 27, r.14(2) of the Rules of the Superior Courts has featured or been considered. In Biehler, McGrath and Egan McGrath, *Delaney and McGrath on Civil Procedure*, (4th Ed., Round Hall, 2018) at para. 4-42, the authors discuss the matter as follows:-

> "It is not clear whether this rule, which was introduced to confine the discretion of the court when dealing with an application 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."

24. Whether or not that last observation is correct, 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.

25. In *McGuinn v. Commissioner of An Garda Síochána & Ors* [2011] IESC 33 the Supreme Court specifically considered the question as to whether or not there were special circumstances giving rise to the judgment, and by majority judgment concluded that there were. The Court then went on to consider whether or not the interests of justice required that judgment should be set aside and concluded that it did, notwithstanding that there had been a very long delay in bringing the application to set aside judgment, a period of 21 months, which is considerably longer than in this case. The special circumstances of that case were that there had been a misunderstanding as between the solicitors acting on behalf of the parties as to what happened on the occasion of a first motion for judgment in default of defence, and the order that had been made by the court was inconsistent with what had been agreed between the parties.

26. The Court of Appeal considered an application to set aside an order of the Master of the High Court dated 14th February, 2014, in the case of *McGrath v. Godfrey* [2016] IECA 178. While there was no express reference in that judgment to O. 27, r. 14(2) of the Rules of the Superior Courts, Irvine J, in para. 44 of her judgment, states:-

> "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. For my part, I am satisfied that he did not discharge that onus in the materials which he put before the High Court. That being so there was no need to consider further whether any issues which Mr. Godfrey has raised concerning his knowledge of the proceedings might have given the Court good reason to set aside the judgment."

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 if 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.

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 0.27, r. 14(2). That too is sufficient reason, without more, to refuse the application. But there is more. 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. 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.