THE HIGH COURT

COMMERCIAL

[2020] IEHC 549
[2018 No. 1057 S.]

BETWEEN

MICROSOFT IRELAND OPERATIONS LIMITED

PLAINTIFF

AND

ARABIC COMPUTER SYSTEMS AND NATIONAL TECHNOLOGY GROUP

DEFENDANTS

JUDGMENT of Mr. Justice David Barniville delivered on the 30th day of October, 2020

Introduction

1. This is my judgment on an application by the defendants for orders under O. 12, r. 26 RSC setting aside service of the proceedings on the defendants in the Kingdom of Saudi Arabia or, alternatively, discharging the order of the High Court (McDonald J.) of 21st August, 2018, permitting service of the proceedings on them.

2. The plaintiff, Microsoft Ireland Operations Limited ("Microsoft Ireland"), is an Irish company. The first defendant, Arabic Computer Systems ("ACS"), and the second defendant, National Technology Group ("NTG"), are both companies incorporated in Saudi Arabia. NTG is the parent of ACS. For convenience, I will refer to the defendant companies collectively as the "defendants" and, where applicable, seperately as ACS and NTG.

3. Microsoft Ireland has brought these summary proceedings in Ireland on foot of leave granted to it to issue and serve notice of the proceedings outside the jurisdiction on ACS and NTG in Saudi Arabia. An order giving that leave to Microsoft Ireland was made

by the High Court (McDonald J.) on 21st August, 2018. The order was made under O. 11, r. 1(e)(iii) RSC.

4. Microsoft Ireland seeks summary judgment against ACS in the sum of US$31,539,677.95 (or the euro equivalent of that sum) on foot of two written contracts which it claims were entered into between Microsoft Ireland and ACS on 1st September, 2014 and on 1st September, 2016. Microsoft Ireland seeks summary judgment against NTG on foot of a guarantee in writing dated 19th December, 2011, under which it is alleged that NTG agreed to guarantee certain debts allegedly due by ACS to Microsoft Ireland.

5. The defendants have brought this application to set aside service of the proceedings on them in Saudi Arabia and, alternatively, to discharge the order made by the High Court on 21st August, 2018. They contend that the persons who signed the contracts between Microsoft Ireland and ACS on behalf of ACS were not authorised to do so and that, as a consequence, those contracts are null and void. They further contend that ACS did not contract with Microsoft Ireland but maintain rather that its contractual arrangements were with Microsoft Arabia, a Microsoft subsidiary registered under the laws of Saudi Arabia. The defendants rely on the law of Saudi Arabia in support of their principal contention that the persons who signed the contracts on behalf of ACS were not actually authorised to do so and also that they did not have implied, apparent or ostensible authority to sign the contracts. They contend that as the contracts between Microsoft Ireland and ACS relied upon by Microsoft Ireland in the proceedings are null and void for that reason, NTG can have no liability under the alleged guarantee. They also contend that the person who signed the alleged guarantee was similarly not authorised to do so on behalf of NTG.

6. Microsoft Ireland disputes these contentions. It asserts that the persons who signed the relevant agreements on behalf of ACS were authorised to do so, at least in the sense that those persons had apparent or ostensible authority and further that ACS ratified the agreements and is otherwise estopped from denying the existence and enforceability of

them. It disputes the contention that the law of Saudi Arabia is relevant and argues that, as a matter of Irish law, it was entitled to proceed on the basis that the persons who signed the contracts on behalf of ACS were authorised to do so. It further disputes the contention that the relevant contractual relationship was between ACS and Microsoft Arabia. Not surprisingly, it relies in support of its case on the written agreements entered into between Microsoft Ireland and ACS. It further disputes the contention that the person who signed the guarantee on behalf of NTG was not authorised to do so and maintains that he too had apparent or ostensible authority.

7. The defendants have, in addition to relying on the alleged non-application of O. 11, r. 1(e)(iii) RSC, also contended that Saudi Arabia and not Ireland is the natural and appropriate forum to determine the dispute between Microsoft Ireland and those companies on *forum non conveniens* grounds. It was, however, confirmed in the course of the hearing that the defendants were only seeking to rely on the *forum non conveniens* grounds in respect of the claim by Microsoft Ireland against NTG, in the event that the court were to find that the Irish courts did not have jurisdiction in respect of Microsoft Ireland's claim against ACS under Order 11, rule 1(e)(iii). For that reason, the doctrine of *forum non conveniens* did not play a significant part in the evidence and submissions before the court.

8. As will be seen later in this judgment, both parties relied on evidence from Saudi Arabian qualified lawyers. Those lawyers provided written reports which were exhibited to the affidavits sworn on behalf of the parties. Somewhat unusually, Microsoft Ireland requested that the two Saudi Arabian lawyers whose reports had been provided on behalf of the defendants be produced for cross-examination on the issues of Saudi Arabian law raised in their reports. That request was accepted by the defendants. It was, therefore, necessary for the court to hear evidence by video link from three Saudi Arabian lawyers (two on behalf of the defendants and one on behalf of Microsoft Ireland). The evidence was complicated and confusing in many respects. While ultimately I have concluded that

the disputed issues concerning apparent and ostensible authority and ratification have to be decided (to the appropriate standard) in accordance with Irish law, rather than the law of Saudi Arabia, insofar as it has been necessary for me to express a view on disputed issues of Saudi Arabian law relevant to jurisdiction, I have preferred the evidence of Microsoft Ireland's Saudi Arabian lawyer over the two Saudi Arabian lawyers called on behalf of the defendants. In my view, insofar as it has been necessary for me to consider it on this application, his evidence was more persuasive and compelling.

9. This judgment considers a number of interesting legal issues raised by the parties, many of which have not previously been considered by the Irish courts. It also considers and analyzes some of the leading Court of Appeal and Supreme Court judgments, as well as the leading judgments of the courts of England and Wales, on jurisdiction under O. 11, r. 1 RSC and its counterpart in the neighbouring jurisdiction.

Summary of Decision

10. I have concluded, for the reasons set out in this judgment, that Microsoft Ireland has established to the required standard that the order made by the High Court on 21st August, 2018 was properly made and that it was an appropriate exercise of the discretion of the Court to grant leave to Microsoft Ireland to serve notice of the proceedings on the defendants in Saudi Arabia under the provisions of Order 11, rule 1(e)(iii) RSC. I have concluded that Microsoft Ireland has demonstrated to the required standard that, insofar as each of the three contracts the subject of the proceedings is concerned, the action brought by Microsoft Ireland is one brought to enforce or otherwise affect a contract or for other relief in respect of an alleged breach of a contract by ACS and/or NTG and that, in respect of each such contract, the contract is by its terms governed by Irish law. I have also concluded that, on the evidence, Microsoft Ireland has satisfied the requirements of O. 11, r. 2 RSC and O. 11, r. 5 RSC and it has persuaded me that this case is a proper one for service out of the jurisdiction under Order 11. In those circumstances, I have concluded

that the application by the defendants to set aside service of the proceedings on them in Saudi Arabia or, alternatively, to discharge the order made by the High Court on 21st August, 2018, should be refused.

Structure of Judgment

11. I will first describe the proceedings and set out the procedural background which has led to this application by the defendants. I will then outline the stated basis for that application. I will note the relevant provisions of the Rules of the Superior Courts (RSC). I will then identify the relevant contractual provisions on which Microsoft Ireland relied in order to obtain leave to serve outside of the jurisdiction. Thereafter, I will identify and consider the various issues which require to be determined on this application. Finally, I will set out my conclusions.

The Proceedings and Relevant Procedural Background

12. Microsoft Ireland commenced the proceedings by a summary summons which was issued in August, 2018. The claim in the proceedings is for judgment against both of the defendants in the sum of US$31,539,677.95 (or the euro equivalent of that sum). Microsoft Ireland claims that it is entitled to judgment against ACS in that amount on foot of two written contracts, called Microsoft Channel Partner Agreements, entered into between it and ACS on 1st September, 2014 (as amended and extended) (the "First Microsoft Channel Partner Agreement") and on 1st September, 2016 (the "Second Microsoft Channel Partner Agreement"), under which it claims ACS was entitled to purchase selected licensed offerings for resale to its customers in the Kingdom of Saudi Arabia. It claims that invoices were issued on foot of those agreements between 31st December, 2015 and 22nd August, 2017 in respect of these licensed offerings provided to its customers and that invoices in the total sum claimed have not been paid by ACS. Judgment is sought against NTG, the parent company of ACS, on foot of a contract in writing dated 19th December, 2011 (the "Guarantee"), allegedly entered into between Microsoft Ireland and NTG, under which it is

alleged that NTG agreed to guarantee and indemnify Microsoft Ireland in respect of the payment of certain debts due by ACS to Microsoft Ireland.

13. As noted earlier, Microsoft Ireland is a company registered in Ireland. Both of the defendants are companies registered in Saudi Arabia. It was, therefore, necessary for Microsoft Ireland to seek leave of the court to issue and serve notice of the summary summons on both companies out of the jurisdiction. An application for such leave was made by Microsoft Ireland to the High Court (McDonald J.) on 21st August, 2018. That application was made on foot of an *ex parte* docket dated 20th August, 2018 and was grounded on an affidavit sworn by Jesus Del Pozo Moran, sworn on 17th August, 2018. The *ex parte* docket sought leave under O. 11, r. 1(e) RSC, but did not specify the particular subparagraph of that provision on which reliance was being placed. At para. 19 of his affidavit Mr. Moran asserted that the contracts relied on were governed by Irish law and that, in those circumstances, leave to issue and serve notice of the proceedings outside the jurisdiction was being sought under Order 11, rule 1(e)(iii). Mr. Moran also stated (in that same paragraph) that each of the Microsoft Channel Partner Agreements and the Guarantee contained a jurisdiction clause providing for the jurisdiction of the Irish courts, although no express reliance was placed on O. 11, r. 3 RSC in the application for leave to issue and serve out of the jurisdiction.

14. The order made by the High Court (McDonald J.) giving Microsoft Ireland liberty to issue and serve notice of the proceedings outside the jurisdiction on the defendants referred to O. 11, r. 1(e) but, like the *ex parte* docket, did not specify the particular subparagraph of that provision on foot of which the leave was being granted. It was agreed by the parties that the leave was sought and granted under O. 11, r. 1(e)(iii) RSC, as the action was one brought in respect of a contract *"by its terms or by implication to be governed by Irish law"*.

15. Microsoft Ireland relied on express choice of law provisions contained in each of the two Microsoft Channel Partner Agreements and in the Guarantee. Clause 21 of the terms and conditions forming part of the First Microsoft Channel Partner Agreement stated that:-

> *"This agreement is governed by and interpreted in accordance with the laws of Ireland."*

An identical clause was contained in the unnumbered clause under the heading *"Applicable Law: Attorneys' Fees"* on p. 2 of the Second Microsoft Channel Partner Agreement. Clause 8.6 of the Guarantee expressly stated that the Guarantee *"shall be governed by and construed and enforced in accordance with the laws of Ireland"*. It was on foot of these provisions that Microsoft Ireland contended that the High Court should grant leave to serve notice of the proceedings on the defendants outside the jurisdiction under Order 11, rule (e)(iii) RSC.

16. Microsoft Ireland's solicitors served notice of the proceedings on the defendants in Saudi Arabia on 30th August, 2018 by post and by email, as provided for in the order of the High Court of 21st August, 2018. A conditional appearance was entered on behalf of both defendants on 12th October, 2018 for the purpose of contesting the jurisdiction of the Irish Courts to hear and determine the proceedings. In a letter of the same date, Hayes, the solicitors acting on behalf of the defendants, wrote to Matheson, Microsoft Ireland's solicitors, asserting that the agreements on which Microsoft Ireland was relying in support of its claim against ACS were not binding on ACS on the ground that the *"General Managers who signed these agreements were not authorised to do so, in accordance with the Articles of Association* [of ACS] *and they were not aware as to the meaning of same and they did so solely at the request of* [Microsoft Ireland]*"*. It was further asserted in that letter that Microsoft Ireland *"was made aware of the limited authority of ACS to enter into such agreements"*. No reference was made in that letter to any alleged infirmity in the

execution of the agreement between Microsoft Ireland and NTG. The letter went on to state that the defendants did not accept that Microsoft Ireland was entitled to rely upon the agreements with ACS and that any claims which it wished to make against the defendants ought to be made in Saudi Arabia. The letter further noted that the defendants would be disputing the jurisdiction.

17. Matheson replied on 30th November, 2018 rejecting the contention that the agreements relied on were not enforceable against the defendants and noting that:-

> "*your clients entered into signed, written agreements with our client in 2014 and performed in line with those agreements without objection prior to the current issue arising between our respective clients with regard to non-payment in the sum of US$31,539,677.95"*

Matheson further asserted that the:-

> *"behaviour of your clients and their agents was at all times consistent with an acceptance on their part that they were bound by the agreements in question, including multiple occasions where representatives of your clients, including Messrs Al-Ballaa, accepted the existence of the debts in question and provided assurances that those debts would be discharged"*.

It was then contended that, as a matter of Irish law, the defendants would be considered to have legally bound themselves to the terms of the relevant agreements.

18. The proceedings were entered in the Commercial List on the application of Microsoft Ireland in December, 2018. The defendants then issued their application challenging jurisdiction on 11th January, 2019.

19. In their motion, the defendants sought orders pursuant to O. 12, r. 26 RSC setting aside service of the notice of the proceedings on each of the defendants or, alternatively, discharging the order of the High Court of 21st August, 2018, permitting such service on the grounds that each of the defendants was not party to any agreement with Microsoft

Ireland conferring jurisdiction in relation to the proceedings on the Irish Courts. In the alternative, the defendants sought an order setting aside service of notice of the proceedings, discharging the order of 21st August, 2018 and staying the proceedings as against the defendants on the basis that Saudi Arabia, and not Ireland, is the natural or appropriate forum to determine the dispute (i.e. on *forum non conveniens* grounds). The defendants' application was grounded on an affidavit affirmed by Rashid Bin Mohammed Al-Ballaa ("Mr. Al-Ballaa") on 13th January, 2019. In that affidavit, Mr. Al-Ballaa described himself as *"one of the two appointed managers"* of ACS and the *"Managing Director"* of NTG. A replying affidavit was sworn by Mr. Moran on behalf of Microsoft Ireland on 1st February, 2019. Thereafter, several further affidavits were sworn by Mr. Al-Ballaa and Mr. Moran.

Summary of the Defendants' Position on the Application

20. In summary, the position of the defendants as set out in Mr. Al-Ballaa's affidavits was as follows. First, ACS dealt with Microsoft Arabia, a Microsoft subsidiary in Saudi Arabia and not with any Microsoft entity in Ireland, in providing marketing and reselling services to Microsoft since around 2000. Mr. Al-Ballaa described that relationship as involving ACS selling Microsoft products and services to business and governmental organisations in Saudi Arabia, where orders were placed by ACS with Microsoft Arabia and the customer paid the price for the products and services directly to ACS, with the bulk of the price received by ACS from the customer being remitted to Microsoft with ACS retaining its margin. The defendants' evidence was, therefore, that ACS contracted with Microsoft Saudi Arabia and not with Microsoft Ireland. The defendants' position was that the role of Microsoft Ireland was limited to providing some fairly insignificant back office support to Microsoft Arabia, principally treasury and credit control. The defendants contended, therefore, that its contractual dealings were with Microsoft Arabia and not with Microsoft Ireland. They claimed, therefore, that, as a consequence, ACS had a full

substantive answer to the case being made by Microsoft Ireland against ACS and also, for the purposes of the present application, that Microsoft Ireland could not invoke the jurisdiction of the Irish courts as the relevant purchase contracts were entered into in Saudi Arabia with Microsoft Arabia and were to be performed in Saudi Arabia.

21. Second, Mr. Al-Ballaa asserted that the individuals who purported to sign the Microsoft Channel Partner Agreements were not authorised to do so under the amended memorandum of association of ACS (I think he meant to refer to the amended articles of association) and were not authorised by Mr. Al-Ballaa or by any of the other directors or by the board of ACS to execute either of the Channel Partner Agreements. The defendants relied on an opinion obtained from a Saudi Arabian lawyer, Mohammed bin Abdullah Al Shuaibi ("Mr. Al Shuaibi") in support of its contention that, as a matter of the law of Saudi Arabia, Microsoft Ireland would be deemed to have had knowledge of the relevant amended articles of association and that the Microsoft Channel Partner Agreements did not bind ACS as a matter of Saudi law. It was further asserted that Microsoft Ireland was actually aware of the requirement that any agreement be concluded or executed by or under the authority of the board of directors of ACS, although Mr. Al-Ballaa did not elaborate on how that was so.

22. With regard to the Guarantee, the defendants' evidence was that, since ACS was not bound by either of the Microsoft Channel Partner Agreements relied on by Microsoft Ireland, NTG could have no liability under the alleged Guarantee to Microsoft Ireland. It was further asserted that the individual who signed the Guarantee on behalf of NTG was not authorised to do so under the amended memorandum of association (again, I believe Mr. Al-Ballaa was intending to refer to the amended articles of association of NTG) and was not authorised by the board of NTG or by any of its directors to execute the Guarantee. On that basis, it was contended that the Guarantee did not bind NTG. The defendants relied on the opinion of Mr. Al Shuaibi in support of their contention that Microsoft Ireland was

deemed to have knowledge of the amended articles of association of NTG and that, as a matter of Saudi law, the Guarantee did not bind NTG.

23. While the defendants also advanced *forum non conveniens* grounds in support of their application, it was confirmed by the defendants' counsel that the *forum non conveniens* grounds would only be relevant if the court were to conclude that the Irish courts had no jurisdiction in relation to Microsoft Ireland's claim against ACS but would otherwise have jurisdiction in relation to its claim against NTG. If the court were to reach those conclusions, the defendants argued that the court should refuse jurisdiction over Microsoft Ireland's claim against NTG on *forum non conveniens* grounds.

24. In addition to obtaining two opinions from Mr. Al Shuaibi, the defendants also obtained a report from another Saudi Arabian lawyer, Firas I. Trabulsi ("Mr. Trabulsi"), which supported Mr. Al Shuaibi's opinion and dealt with an additional issue not dealt with by Mr. Al Shuaibi, arising from the electronic signatures on certain of the agreements in light of the Saudi Electronics Transaction Law of 2007.

Summary of Microsoft Ireland's Position on the Application

25. The position of Microsoft Ireland as set out in Mr. Moran's affidavits can be briefly summarised as follows. On the first point advanced by the defendants, namely, that ACS's contractual counterparty was Microsoft Arabia and not Microsoft Ireland, Mr. Moran explained that the corporate structure operated by Microsoft Corporation throughout the region of the Middle East and Africa ("MEA") is such that the relevant contracting party (on the Microsoft side) in respect of all Microsoft channel partner agreements is Microsoft Ireland and that it enters into all of its commercial contractual arrangements for the distribution of Microsoft software products and online services within the MEA region under the laws of Ireland and subject to the jurisdiction of the Irish courts. According to Mr. Moran, Microsoft Arabia is a local subsidiary in Saudi Arabia. Its purpose is to provide logistical support to Microsoft Ireland's local channel partners and customers.

However, like all Microsoft subsidiaries throughout the MEA region, Microsoft Arabia is not authorised to and does not in fact sell or license Microsoft products. Mr. Moran asserted, therefore, that the relevant contractual counterparty for ACS in Saudi Arabia was Microsoft Ireland and not Microsoft Arabia.

26. Mr. Moran explained that since ACS commenced operations as a Microsoft reseller in or about 2000, ACS contracted with Microsoft Ireland and purchased licensed offerings from Microsoft Ireland only (save in certain exceptional circumstances). Mr. Moran exhibited copies of Microsoft channel partner agreements entered into between ACS and Microsoft Ireland in respect of the period from October, 2007 to August, 2014, prior to the First Microsoft Channel Partner Agreement, which, he maintained demonstrated that all of the Microsoft channel partner agreements during that period to which ACS were a party were with Microsoft Ireland and not Microsoft Arabia. Included within the exhibit containing those contracts (at Tab 2 of Exhibit JDPM1) was a letter from Microsoft Ireland to ACS dated 23rd March, 2010, in which Microsoft Ireland confirmed that ACS had entered into two Microsoft Channel Partner Agreements (for resellers and for large account resellers) in respect of the period from 1st September, 2009 to 31st August, 2010. Mr. Moran further stated that all of the Microsoft Channel Partner Agreements between Microsoft Ireland and ACS in the periods from 1st September, 2010 contained a clause providing that the relevant agreement was governed by and to be interpreted in accordance with the laws of Ireland and that the parties consented to the exclusive jurisdiction of the Irish courts.

27. Mr. Moran also explained the procedure by which orders were made by ACS in respect of licensed offerings from Microsoft Ireland. He asserted that each of the invoices making up the total claimed debt of US$31,539,677.95 corresponded to an order submitted by ACS to Microsoft Ireland. Mr. Moran exhibited sample copy invoices showing that the invoices were issued by Microsoft Ireland to ACS and required payment by ACS to

Microsoft Ireland's bank account with Citibank in London. Mr. Moran also stated that, in the period from 2007, Microsoft Ireland issued 4,671 invoices to ACS with a combined value of those invoices being approximately US$696.2 million. Microsoft Ireland disputed the defendants' contention that ACS operated on an *ad hoc* contract by contract basis with Microsoft Arabia and pointed to the absence of any documentation supporting any such alleged arrangement. Mr. Moran also referred to documentary evidence which he alleged demonstrated that Mr. Al-Ballaa was aware that Microsoft Ireland was the contractual counterparty of ACS (for example, Mr. Al-Ballaa's email dated 12th June, 2017 in response to the notice of termination of the Second Microsoft Channel Partner Agreement sent on 21st May, 2017, which I consider later in this judgment). Mr. Moran also referred to a visit which Mr. Al-Ballaa made to meet Microsoft Ireland executives in Dublin in November, 2015 (the relevance of which was disputed by Mr. Al-Ballaa).

28. Microsoft Ireland further disputed the contention that the two Microsoft Channel Partner Agreements relied on by Microsoft Ireland in respect of its claims in the proceedings were null and void or unenforceable on the ground that they were not signed by an individual who was authorised to sign on behalf of ACS. Mr. Moran noted that the First Microsoft Channel Partner Agreement was executed on behalf of ACS by Syed Abdulaleem ("Mr. Abdulaleem"), whose printed title on the copy of the agreement was stated to be "*General Manager*" (although it appears that Mr. Abdulaleem was not the general manager of ACS but, rather, of one of its divisions, Arabsoft). Mr. Moran stated that Mr. Abdulaleem was the person put forward by ACS to execute the First Microsoft Channel Partner Agreement (the extension to that agreement was confirmed in a letter from Microsoft Ireland to ACS which was addressed to Mr. Abdulaleem and the amendment to the agreement was signed on behalf of ACS on 21st January, 2016 by Muhammed Mounir ("Mr. Mounir") whose printed title was "*General Manager, Arabsoft*"). The Second Microsoft Channel Partner Agreement, which applied with effect

from 1st September, 2016, was again signed by Mr. Mounir as "*General Manager, Arabsoft*" on 1st November, 2016. Mr. Moran stated that Mr. Mounir was proffered to Microsoft Ireland and held out as having the necessary authority to execute that contract on behalf of ACS. He also relied on various documents, including an email sent by ACS to Mr. Molins Vizcaino of Microsoft Ireland on 4th January, 2016 introducing Mr. Mounir as the new general manager of ACS-Arabsoft and requesting that all emails to Mr. Abdulaleem be diverted to Mr. Mounir, as well as a further email exchange between Microsoft Ireland and ACS in January, 2016, in which the amendment to the First Microsoft Channel Agreement was sent by Microsoft Ireland to ACS to be executed.

29. Microsoft Ireland contended that the evidence established that Mr. Abdulaleem and Mr. Mounir were held out as having authority and that they had apparent or ostensible authority to execute the agreements on behalf of ACS. It further contended that, by its subsequent actions, ACS acknowledged, adopted and ratified the effectiveness of those contracts by acting in accordance with them and by acknowledging the debt due by ACS to Microsoft Ireland.

30. With regard to the Guarantee, Microsoft Ireland contended that not only did the fact that NTG was prepared to enter into the Guarantee with Microsoft Ireland undermine the defendants' contention that ACS operated on the basis of an *ad hoc* contract by contract arrangement with Microsoft Arabia as otherwise it would not have agreed to guarantee the debts of ACS to Microsoft Ireland, but also that the Guarantee was sealed with an NTG seal and was signed on its behalf by Ibrahim Al Zeer ("Mr. Al Zeer") whose title was described on the agreement as "*Managing Director*". Microsoft Ireland contended that the fact that the Guarantee was executed under seal added to its binding and enforceable character.

31. To the extent that issues of Saudi Arabian law were relevant, Microsoft Ireland relied on two legal opinions provided by Fahad Al Dehais Al Malki ("Mr. Al Dehais") to

dispute a number of the contentions advanced by Mr. Al Shuaibi and Mr. Trabulsi on behalf of the defendants. As noted earlier, all three of the Saudi Arabian lawyers gave oral evidence before me. To the extent that it is necessary to do so, I will refer to their evidence later in this judgment.

Relevant Provisions of the RSC

32. The basis on which Microsoft Ireland obtained leave to serve notice of the proceedings on the defendants in Saudi Arabia was O. 11, r. 1(e)(iii) RSC. That is the provision under which the court may permit service of proceedings or notice of proceedings outside the jurisdiction where the action:-

> *"is one brought to enforce, rescind, dissolve, annul, or otherwise affect a contract, or to recover damages or other relief for or in respect of the breach of a contract –*
>
> *(iii) by its terms or by implication to be governed by Irish law,…"*

33. Under O. 11, r. 2 RSC, where a court is asked to grant leave to serve proceedings or notice of proceedings under r. 1:-

> *"…the court to whom such application shall be made shall have regard to the amount or value of the claim or property affected and to the comparative cost and convenience of proceedings in Ireland, or in the place of the defendant's residence…"*

34. Order 11, r. 3 RSC provides (*inter alia*) that parties to a contract may agree that the Irish courts have jurisdiction in proceedings in respect of such a contract and that if the contract does not specify or indicate a place or mode or person to be served, service out of the jurisdiction may be ordered. While, as we will see, each of the Microsoft Channel Partner Agreements and the Guarantee relied upon by Microsoft Ireland contains a clause providing that the Irish courts have exclusive jurisdiction in respect of disputes connected with the relevant agreement, Microsoft Ireland did not rely on those provisions of the agreements in its application for leave to serve out of the jurisdiction and, in particular, did

not rely on Order 11, r. 3. However, the parties were agreed at the hearing that that was immaterial in circumstances where, if the defendants were correct in their contention that the agreements relied on by Microsoft Ireland were invalid or null and void in some respect, the jurisdiction clauses would fall with the rest of the agreements.

35. Under O. 11, r. 5 RSC, a party who seeks leave to serve proceedings or notice of proceedings on a defendant outside the jurisdiction is required to provide an affidavit or other evidence *"stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a citizen of Ireland or not"*. Where leave is sought under O. 11, r. 1, the affidavit or other evidence relied on must state the *"particulars necessary for enabling the court to exercise a due discretion"* in the manner provided for under Order 11, rule 2. Order 11, r 5 further provides that:-

> *"no leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this order."*

36. The defendants' application to set aside service of the notice of the proceedings or, alternatively, to discharge the order of the High Court of 21st August, 2018 is brought under O. 12, r. 26 RSC which states:-

> *"A defendant before appearing shall be at liberty to service notice of motion to set aside the service upon him of the summons or of notice of the summons, or to discharge the order authorising such service."*

The appearance entered on behalf of the defendants was an unconditional appearance for the purpose of disputing a jurisdiction of the Irish courts to hear and determine Microsoft Ireland's claims in the proceedings.

<u>The Contractual Provisions relied upon by Microsoft Ireland</u>

37. In support of its contention that leave to serve notice of the proceedings outside the jurisdiction on the defendants was properly granted under O. 11, r. 1(e)(iii) RSC, Microsoft Ireland relied on the clause 21 of the first Microsoft Channel Partner Agreement which, under the heading *"Applicable Law: Attorneys' Fees"* stated:-

> *"This Agreement is governed by and interpreted in accordance with the laws of Ireland…"*

Clause 21 went on to state that:-

> *"The parties consent to the exclusive jurisdiction of and venue in the Irish courts for all disputes connected to this Agreement. This choice of jurisdiction and venue does not prevent either party from seeking injunctive relief for: (i) violation of intellectual property rights; (ii) breach of confidentiality obligations; or (iii) enforcement or recognition of any award or order in any appropriate jurisdiction…"*

As noted earlier, Microsoft Ireland's case is that the First Microsoft Channel Partner Agreement was amended and extended to 31st August, 2016.

38. Microsoft Ireland also relied on a clause in similar terms in The Second Microsoft Channel Partner Agreement. That clause was contained in p. 2 of 3 of the agreement relied on (and not in clause 21 of the terms and conditions attached to that agreement as was the case in respect of the First Microsoft Channel Partner Agreement). However, the clause was in identical terms to that contained in the First Microsoft Channel Partner Agreement. Under the same heading *"Applicable Law: Attorneys' Fees"*, the clause relied upon by Microsoft Ireland stated that:-

> *"This Agreement is governed by and interpreted in accordance with the laws of Ireland."*

The balance of the clause referred to the parties consenting to the exclusive jurisdiction of and venue in the Irish courts in respect of disputes connected to the agreement and was in identical terms to clause 21 of the First Microsoft Channel Partner Agreement.

39. These then are the clauses of the two Microsoft Channel Partner Agreements relied on by Microsoft Ireland, which it contended brings its claim under those agreements within O. 11, r. 1(e)(iii) RSC. It asserted that the action brought by it is to enforce or to recover damages or other relief for, or in respect of, the breach of a contract *"by its terms or by implication to be governed by Irish law"*.

40. As regards the Guarantee, Microsoft Ireland relied on clause 8.6 of that agreement which stated:-

> *"This Guarantee shall be governed by and construed and enforced in accordance with the laws of Ireland."*

41. That agreement also contained a jurisdiction clause (at clause 7). However, as with the Microsoft Channel Partner Agreements, Microsoft Ireland did not expressly rely on the provisions of O. 11, r. 3 RSC when seeking leave to serve notice of the proceedings outside the jurisdiction on the defendants. Microsoft Ireland relied on clause 8.6 of the Guarantee in support of its application. It contended that the Guarantee, which it is seeking to enforce or in respect of which it is seeking damages or relief is, *"by its terms or by implication to be governed by Irish law"*, thereby enabling the court to grant leave to issue and serve notice of the proceedings outside the jurisdiction on NTG.

The Issues

42. In determining the defendants' application, the following issues must be addressed:-

(1) The party on whom the burden of proof lies where an application is made by a party who has been served with proceedings (or notice of proceedings) outside the jurisdiction on foot of an order made under

O. 11 and who seeks to set aside such service or to discharge the order giving leave.

(2) The standard of proof which a party must meet in persuading a court to grant leave to issue and serve proceedings (or notice of proceedings) on another party outside the jurisdiction under O. 11 or in demonstrating that such an order was properly made.

(3) The issues or questions to which Irish law applies and the issues to which the law of the Kingdom of Saudi Arabia applies. For example, whether Irish law or the law of Saudi Arabia applies to the question of the express authority of the defendants' representatives to sign the relevant agreements and whether the same law, or a different law, applies to the question of the apparent or ostensible authority of those persons and to the issues of estoppel and ratification.

(4) To the extent that Irish law applies to the issues or questions such as those referred to at (3) above, my conclusions on those issues as a matter of Irish law.

(5) To the extent that the law of the Kingdom of Saudi Arabia applies to those issues or questions, my conclusions on the application of that law to those issues.

(6) The defendants' contention that its agreements were with Microsoft Arabia and not with Microsoft Ireland.

(7) Whether Microsoft Ireland has demonstrated to the required standard that it has a good cause of action against the defendants.

43. I will now consider each of those issues in turn.

(1) The Burden of Proof

44. The defendants maintained that, notwithstanding that the application was brought by them to set aside service or to discharge the order permitting such service, the burden of proof was on Microsoft Ireland to establish that this was a proper case for granting leave to serve out of the jurisdiction. In other words, it was the defendants' contention that the grant of leave on an *ex parte* basis did not shift the burden of proof to the defendants to establish that it was not a proper case for the grant of such leave. They relied in that regard on the judgment of Hogan J. in the High Court in *Cornec v. Morrice* [2012] 1 IR 804 ("*Cornec*") and on the judgment of Hogan J. for the Court of Appeal in *Albaniabeg Ambient Sh.p.k. v. Enel S.p.A.* [2018] IECA 46 ("*Albaniabeg*"). The defendants submitted, therefore, that the legal burden of demonstrating that leave was properly granted by the High Court (McDonald J.) under O. 11, r. 1(e)(iii) RSC remained on Microsoft Ireland, although they accepted that the evidential burden in respect of some of the issues might shift to the defendants.

45. Microsoft Ireland accepted that it had to bear the burden of proof of demonstrating that the order granting leave was properly made, although it submitted that, to the extent that the law Saudi Arabia may be relevant, the burden of proof rested on the defendants as to what that law was and as to how it provided a defence to Microsoft Ireland's claims. Microsoft Ireland relied on the judgment of Walsh J. in the Supreme Court in *Kutchera v. Buckingham International Holdings Limited* [1988] 1 IR 61 ("*Kutchera*") in support of that contention.

46. On the basis that Microsoft Ireland did not dispute that the burden of proof rested upon it to demonstrate that the order granting leave to issue and serve notice of the proceedings on the defendants out of the jurisdiction was properly granted, I will proceed on that basis. That is the approach which was adopted by Hogan J. in the High Court in *Cornec* and by the Court of Appeal in *Albaniabeg* on the basis that *"…the courts cannot constitutionally make an order ex parte finally affecting the rights of the parties"* (per

Hogan J. at para. 18 of *Albaniabeg*, quoting from his judgment in *Cornec*). Therefore, the Court of Appeal in that case held that a party who had obtained an *ex parte* order for service out of the jurisdiction under O. 11, had the burden of demonstrating that the order in question had been properly granted (see para. 19 of the judgment in *Albaniabeg*). Both sides had accepted that that was the position in that case as they do in the present case.

47. I do note, however, that the Court of Appeal appears to have taken a different view in a judgment which predated *Albaniabeg*, namely, *O'Flynn & ors v. Carbon Finance Limited & ors* [2015] IECA 93 ("*O'Flynn*"). One of the appeals dealt with by the Court of Appeal in that judgment was an appeal from an order of the High Court refusing an application by one of the defendants under O. 12, r. 26 to set aside an *ex parte* order made by the High Court giving liberty to issue and serve notice of the proceedings on that defendant outside the jurisdiction under Order 11, rule 1. The Court of Appeal considered the nature of an application under O. 12, r. 26 and the onus on the moving party on such an application. The Court referred to the consideration given to those issues by Finlay Geoghegan J. in the High Court in *Chambers v. Kenefick* [2007] 3 IR 526 ("*Chambers*"), a case involving an application under O. 8, r. 2 RSC to set aside an order made *ex parte* renewing a plenary summons. The Court of Appeal in *O'Flynn* stated that there was no reason why the conclusions of Finlay Geoghegan J. in *Chambers* should not equally apply to an application under Order 12, rule 26. Finlay Geoghegan J. noted that Morris J. in *Behan v. Bank of Ireland* (unreported, High Court, 14th December, 1995), had described the onus on a defendant who sought to set aside an order renewing a summons made *ex parte* as follows:-

> *"In my view in moving an application of this nature the Defendant takes upon itself the onus of satisfying the Court that there are facts or circumstances in the case which if the Court which made the Order in the first instance, ex parte, had been aware it would not have made the Order. It is clear in my view beyond dispute, that*

this application is not to be dealt with on the basis that it is an appeal from the original Order and accordingly it is incumbent upon the moving party to demonstrate that facts exist which significantly alter the nature of the Plaintiff's application to the extent of satisfying the Court that, had these facts been known at the original hearing, the Order would not have been made."

48. In *Chambers*, Finlay Geoghegan J. was of the view that the approach of Morris J. did not *"set out the full circumstances in which the Court may consider an application under Order 8 rule 2"*. She continued:-

"It appears to me that, in addition to the approach set out by Morris J., it is open to a defendant, by submission, to seek to demonstrate to the Court that, even on the facts before the Judge hearing the ex parte application, upon a proper application of the relevant legal principles the order for renewal should not be made. This appears to be necessary having regard to the purpose of an application under Order 8, r. 2. It only relates to orders which have been made ex parte. On any ex parte application by a plaintiff, a defendant has not had an opportunity of making submissions to the Court as to why the Court should not exercise its discretion under O. 8, r. 1 to renew a summons. It appears to me that the purpose of including O. 8, r. 2 is to accord to a defendant fair procedures in the High Court, and to permit a defendant where he considers it necessary to make submissions to a Judge even on what might be described as an agreed set of facts that the Court should not exercise its discretion to renew a summons, and therefore I propose considering this application from the defendant on that basis."

49. The Court of Appeal in *O'Flynn* considered that to be the correct approach to be taken on an application to discharge an *ex parte* order permitting service of proceedings out of the jurisdiction (para. 102 of the judgment in *O'Flynn*).

50. The Court of Appeal in *Albaniabeg* did not refer in its judgment to the earlier judgment in *O'Flynn* and reached a different decision on the burden of proof on an application under O. 12, r. 26 RSC to set aside service of proceedings outside the jurisdiction or to discharge an order made permitting such service.

51. In light of the agreement between the parties that the burden of proof remained on Microsoft Ireland to establish, to the appropriate standard of proof, that the order permitting service out of the jurisdiction was properly granted, it is unnecessary for me in this judgment to express a view on which of the two judgments of the Court of Appeal is correct. That issue may arise for consideration in another case, but not in this one. I have proceeded, therefore, on the basis that, notwithstanding that this application has been brought by the defendants, the burden of proof remained on Microsoft Ireland to establish that the order made *ex parte* by the High Court on 21st August, 2018 was properly granted under Order 11, rule 1(e)(iii).

52. It seems to me that that conclusion is not affected by the fact that, as part of their defence, the defendants have sought to rely on the law of Saudi Arabia. It was argued on behalf of Microsoft Ireland that, insofar as the defendants sought to rely on the law of that country to stand up their defence to the claim, the burden of proof was on them so far as that law was concerned. That submission was based on certain *dicta* of Walsh J. in the Supreme Court in *Kutchera*. The defendants' position was that, while an evidential burden in respect of some of the issues might shift to the defendants, the ultimate legal burden of demonstrating that the order made by the High Court granting leave to issue and serve notice of the proceedings outside of the jurisdiction was properly granted under Order 11, rule 1(e)(iii) remained with Microsoft Ireland. In other words, the defendants' contention was that that legal burden never shifted to them.

53. I accept the defendants' contention that the legal burden has remained at all times on Microsoft Ireland to demonstrate that the order was properly made by the High Court

under Order 11, rule 1. However, I also accept that, where a party bases a claim or defence on foreign law, that party must provide expert evidence to prove that foreign law. That follows from the *dicta* of Walsh J. in *Kutchera* on which the defendants relied.

54. In *Kutchera*, the High Court had granted leave to issue and serve notice of proceedings on the defendant in Canada under Order 11, rule 1(e)(iii). The agreement at issue in the case had a choice of law clause providing for Irish law and a jurisdiction clause providing for the jurisdiction of the Irish courts. The defendant sought to rely on aspects of the law of Alberta in Canada to impugn the contract. In considering how foreign law had to be proved in an Irish Court, Walsh J. (with whom Hederman J. agreed) (McCarthy J. delivered a separate judgment with which Finlay C.J. agreed) (Henchy J. dissented), Walsh J. stated:-

> *"If an Irish Court is called upon to apply any part of a foreign law the procedures for doing so are already well settled. See the decisions of the former Supreme Court of Justice in O'Callaghan v. O'Sullivan [1925] 1 IR 90 and MacNamara v. Owners of the Steamship "Hatteras" [1933] IR 675. These cases quite clearly establish that in Irish law foreign law must generally be proved by expert evidence. The burden of proving foreign law lies upon the party who bases a claim or a defence upon the foreign law, and if that party produces no evidence, or only insufficient evidence of the foreign law, the Court applies Irish law. These cases also establish that if there is any conflicting evidence as to what is the foreign law, or what is the correct interpretation of the foreign law, then it is a matter for the Irish Court to decide as between the conflicting expert testimonies…"* (per Walsh J. at p. 68)

55. Expert evidence of aspects of the law of Saudi Arabia was proffered by the defendants in the form of the legal opinions of Mr. Al Shuaibi and Mr. Trabulsi. They gave oral evidence and were cross-examined on their evidence on behalf of Microsoft Ireland. In

response, Microsoft Ireland proffered expert evidence from Mr. Al Dehais. He gave evidence and was cross-examined on behalf of the defendants.

56. In circumstances where the defendants sought to base their defence on foreign law, they produced evidence in support of that defence in an attempt to meet the evidential burden on them. Having done so, the evidential burden then shifted to Microsoft Ireland to adduce expert evidence of that law in response. Microsoft Ireland sought to do so through the evidence of Mr. Al Dehais. However, at all times, the legal burden of demonstrating that the *ex parte* order of the High Court giving leave to issue and serve notice of the proceedings outside the jurisdiction on the defendants under O. 11, r. 1(e)(iii) was properly made remained with Microsoft Ireland.

(2) The Standard of Proof

(a) General

57. Microsoft Ireland and the defendants were in agreement that the standard of proof to be met by a plaintiff who seeks to establish that its case falls within one of the paragraphs of O. 11, r. 1 is that of a *"good arguable case"* and that the standard of proof with respect to the merits of the case, in the sense of the plaintiff having a good cause of action is that there is a *"serious issue to be tried"* on the merits of the case. While it might seem, therefore, that there was much agreement between the parties on the question of the standard of proof, that agreement was ultimately more apparent than real.

58. There was significant disagreement between the parties as to what is meant by the standard of a *"good arguable case"*. The defendants relied upon a series of English cases which they maintained require a plaintiff in the position of Microsoft Ireland to demonstrate that it has the *"better of the argument"* on the material available and that the test is, therefore, a relative one.

59. Microsoft Ireland strongly disputed that contention, pointing out that the *"better of the argument"* test has never been applied by an Irish court and that it is inconsistent with

the judgment of the Supreme Court in *Irish Bank Resolution Corporation Limited (In Special liquidation) v. Quinn & ors* [2016] 3 IR 197 ("*IBRC*").

60. The defendants disputed Microsoft Ireland's reading of *IBRC* and submitted that the judgment in that case was dealing not with the *"good arguable case"* test for establishing jurisdiction under one of the paragraphs of O. 11, r. 1, but, rather, the question as to whether a *"serious issue to be tried"* had been shown in respect of the cause of action being relied upon by the plaintiffs in the case.

61. It will, therefore, be necessary for me to review the Irish and English cases in some detail and to analyse carefully the judgment of the Supreme Court in *IBRC*. It should, however, also be noted at this point that Microsoft Ireland submitted that, even if the court were to conclude that the *"good arguable case"* test required a plaintiff to demonstrate that it had the *"better of the argument"*, it nonetheless satisfied the test.

62. In light of the agreement between the parties, I will proceed on the basis that a plaintiff who seeks to rely on one of the paragraphs or sub-rules of O. 11, r. 1 to obtain leave to serve proceeding (or notice of proceedings) outside the jurisdiction must demonstrate a *"good arguable case"* that the case falls within one of the paragraphs or sub-rules of O. 11, r. 1 and must also satisfy the court that there is a *"serious issue to be tried"* in respect of the merits of the cause of action on which it relies. I will proceed on that basis in light of the agreement between the parties and without reaching a definitive decision on the point (as the question as to the extent of the test which a plaintiff must meet in terms of the merits of the cause of action relied on is in issue in another case in which I have reserved judgment and may have to be decided in that case). For the purposes of this case, however, I will proceed on the basis of the parties' agreement.

(b) Analog Devices

63. A convenient starting point in the analysis of what is meant by a *"good arguable case"* is the judgment of the Supreme Court in *Analog Devices B.V. v. Zurich Insurance*

Company [2002] 1 IR 272 ("*Analog*"). In that case, the plaintiffs relied on two paragraphs of O. 11, r. 1 for the purposes of their application for leave to serve notice of proceedings outside the jurisdiction on the second defendant. The first was another part of O. 11, r. 1(e)(iii) under which the plaintiffs contended that the relevant claim against the second defendant was for a breach of contract by that defendant allegedly committed within the jurisdiction. The second paragraph relied on was O. 11, r. 1(h). The plaintiffs argued that the second defendant was a *"necessary or proper party"* to the proceedings brought by the plaintiffs against the first defendant within the jurisdiction. Leave to issue and serve outside the jurisdiction on the second defendant was granted under both of those provisions. The second defendant applied for an order under O. 12, r. 26 setting aside the service out of the jurisdiction and discharging the order permitting such service. Its application was unsuccessful in the High Court and was appealed to the Supreme Court. The judgment of the Supreme Court was delivered by Fennelly J..

64. The Court first dealt with the issue of whether the Irish Courts had jurisdiction under Order 11, rule 1. Fennelly J. noted that *"international comity of the courts have long required"* that (i) the Irish courts examine applications for leave to issue and serve proceedings outside the jurisdiction *"with care and circumspection"*; (ii) an applicant for such leave must furnish an affidavit verifying the facts on which it bases the cause of action relied on; (iii) it is not sufficient that the applicant merely assert that it has a cause of action; but (iv) the court must assess the strength of the cause of action on a test of *"good arguable case"* (per Fennelly J. at p. 281).

65. I pause here to note that Fennelly J. appeared, at first blush, at least, to be saying here that the merits of the case in terms of the cause of action relied on ought to be assessed on the basis of the *"good arguable case"* standard. That is not, however, what the parties on this application have agreed is the test to be applied by the court in respect of the merits of the cause of action on an application for leave to serve out of the jurisdiction.

They have agreed that the test to be applied in respect of the merits of the cause of action is that of a *"serious issue to be tried"*. The parties' position is consistent with some of the English cases which were referred to later in the judgment in *Analog*. Fennelly J. noted that the parties were in dispute in respect of the existence of circumstances justifying the grant of leave to serve out of the jurisdiction and were in dispute on issues of fact relevant to the reliance by the plaintiffs on Order 11, rule 1(e)(iii). The plaintiffs contended that the court should apply the test of *"fair arguable case"* (in respect of the relevant paragraph or sub-rule of O. 11, r. 1). However, Fennelly J. stated that such an approach needed to be applied with *"special circumspection in a case where the issue in contention is whether the court can take upon itself jurisdiction over a foreign person or corporation"* and he distinguished such a situation from the test applied in applications for interlocutory injunctions or on an application for leave to seek judicial review (see Fennelly J. at p. 281). The reason for such circumspection being necessary was explained on the basis that, if the court granted leave to serve outside the jurisdiction, the court was thereby asserting that it had jurisdiction and the foreign defendant was required to submit to the jurisdiction with a failure to do so being at that defendant's peril. Where the court declined to set aside an order for service outside the jurisdiction, that ended the dispute about jurisdiction and there would be no later opportunity for the defendant to re-agitate that issue (see Fennelly J. at pp. 281-282).

66. Fennelly J. then referred to the judgment of Barrington J. for the Supreme Court in *Short v. Ireland* [1996] 2 IR 188 ("*Short*"). He also referred to the speech of Lord Goff in the House of Lords in *Seaconsar Far East Limited v. Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 ("*Seaconsar*") to which I will shortly turn. Before noting what Fennelly J. said about *Seaconsar* in his judgment in *Analog*, it is necessary to double back to *Short*. In that case, the plaintiffs had obtained leave to serve proceedings outside the jurisdiction on the third defendant, based on injuries allegedly suffered by them arising from the

operation by that defendant of a publicly funded nuclear reprocessing plant in England. The plaintiffs relied on O. 11, r. 1(h) (the *"necessary or proper party"* provision). The plaintiffs also relied on O. 11, r. 1(f) (as they claimed that the action was founded on a tort committed within the jurisdiction). In the High Court in *Short*, O'Hanlon J. cited with approval the decision of the House of Lords in *Seaconsar* and that court's conclusion that, in considering whether jurisdiction was established under one or more of the paragraphs of O. 11, r. 1, the standard of proof was that of the *"good arguable case"* and that in respect of the merits of the plaintiff's claim, it was sufficient for the plaintiff to establish that there was a *"serious issue to be tried"* (per O'Hanlon J. at 206). However, having cited that decision with approval, O'Hanlon J. actually appears to have gone on to consider the merits of the claim (for the purposes of O. 11, r. 5 RSC which requires, amongst other things, that there must be an affidavit setting out that in the belief of the deponent the plaintiff has a good cause of action) by reference to the *"good arguable case"* standard (see pp. 206-208). Ultimately, O'Hanlon J. refused to set aside the service outside the jurisdiction and the third defendant appealed to the Supreme Court.

67. The Supreme Court dismissed the appeal in *Short*. For present purposes, it is notable that in his judgment on behalf of the Supreme Court, Barrington J. considered whether service out of the jurisdiction could be permitted under Order 11, rule 1(f), (g) and (h). Noting that the plaintiffs' application for service out of the jurisdiction was supported by affidavits from two experts and that it would be unreal to assume that the allegations contained in those affidavits would not be fiercely contested at the hearing, Barrington J. held that O'Hanlon J. was correct in holding that the plaintiffs had established a *"good arguable case"* for the purposes of its application for service out of the jurisdiction under Order 11. It appears (but I must admit that it is not entirely clear) that Barrington J. was applying the *"good arguable case"* to the merits of the case, rather than to whether the claim was one which fell within one of the paragraphs or sub-rules of Order 11, rule 1 (and

that seems to have been the understanding of Fennelly J in *Analog* as to the approach of Barrington J. in Short). The House of Lords in *Seaconsar* (which was cited with approval by O'Hanlon J. in the High Court in *Short*) decided that the *"good arguable case"* test applied to whether the claim fell within one of the paragraphs or sub-rules of O. 11, r. 1 and that the merits of the claim were to be assessed by reference to the *"serious issue to be tried"* standard. It is not entirely clear that that was the approach actually adopted by the Supreme Court in *Short*. It does not seem to have been. That appears to have been confirmed by the Supreme Court in *Analog*. Fennelly J. observed (at p. 282) that when Barrington J. referred to a *"good arguable case"* in *Short*, he was referring to the *"merits of the substantive claim of the plaintiffs"* against the third defendant.

68. Fennelly J. referred to the speech of Lord Goff in *Seaconsar* and noted that Lord Goff was principally concerned with the assessment of the strength of the plaintiffs' case on the merits, as opposed to the question as to what test should be applied on an application for service out of the jurisdiction. Then Fennelly J. observed that the speech of Lord Goff and his discussion of an earlier House of Lords decision in *Vitkovice Horni A Hutni Tezirstvo v. Korner* [1951] AC 869 ("*Korner*") showed *"how confused the English Courts were about the matter"*. Nonetheless, despite that confusion, Fennelly J. accepted that the appropriate standard was the *"good arguable case"* standard and he certainly appeared to endorse that standard as being the relevant standard for determining whether a claim fell within one of the paragraphs or sub-rules of O. 11, r. 1 so as to permit service out of the jurisdiction to be ordered. Importantly, Fennelly J. went on to observe as follows:-

> *"When it comes to apply a test so worded or any varied wording, I think it must be borne in mind that the issue of jurisdiction is being determined irrevocably and that a foreign defendant is being summoned involuntarily before our courts. Therefore, I believe that, though disputes of facts cannot always be satisfactorily resolved on affidavit, the court must look at the matter carefully. It is not a case where the*

applicant's allegations must be presumed to be true. The foreign party's affidavit evidence must also be considered." (per Fennelly J. at p. 282).

69. Fennelly J. then went on to consider the plaintiffs' claim that the case fell under Order 11, rule 1(e)(iii). He analysed the affidavit evidence before the court and concluded that there was not sufficient evidence before the High Court to demonstrate, for the purpose of establishing the jurisdiction of the Irish courts, that the second defendant had breached the contract relied on in Ireland and that, therefore, the order permitting service out had not been correctly made under Order 11, r. 1(e)(iii) based on an alleged breach in Ireland. The defendants, in the present case, rely on the fact that the Supreme Court in *Analog* did analyse the evidence and concluded (on the basis of the *"good arguable case"* standard) that the order permitting service out had not been correctly made by the High Court.

70. The Supreme Court in *Analog* did, however, conclude that the order was properly made by the High Court under Order 11, rule 1(h). In reaching that conclusion, Fennelly J. stated that (i) there had to be a *"sound basis for the contention that a party to be served out of the jurisdiction is a proper party"*; (ii)that there had to be *"reality in law and in fact in the case against the party within the jurisdiction"*; (iii) that the inclusion of that party within the jurisdiction must not have been a *"mere device to get the foreign party before the Irish Courts"*; and (iv) that there had to be a *"substantial element in the claims against the two parties"* (see Fennelly J. at p. 286). He concluded on the facts that when considering the cases and the *"common sense of the matter"*, there was little doubt that the second defendant was a proper party to the action against the first defendant. Again, it appears (although not expressly stated) that the court reached that conclusion on the application of the particular paragraph or sub-rule of O. 11, r. 1 on the basis of an application of the *"good arguable case"* standard.

71. The defendants relied on the fact that the Supreme Court in *Analog* scrutinised the evidence put forward by the plaintiffs in that case to demonstrate that the claim fell within the relevant paragraphs of O. 11, r. 1 and submitted that such scrutiny was inconsistent with the suggestion that the court was bound to take the evidence of Microsoft Ireland at its height for the purpose of establishing jurisdiction. Microsoft Ireland accepted that the Supreme Court in *Analog* applied the *"good arguable case"* test in determining whether the claim fell within one of the paragraphs of O. 11, r. 1, but contended that the suggestion that court should apply a *"better of the argument"* or relative test was not supported by *Analog* or by the other Irish cases including, most significantly for present purposes, *IBRC*.

(c) The English Cases

72. This is an appropriate point to pivot from my consideration of the Irish cases to a closer examination of some of the English cases on which the defendants relied, starting with *Seaconsar*. In *Seaconsar*, the plaintiffs sought and obtained leave to serve proceedings outside the jurisdiction under O. 11, r. 1(1)(d) and (e) of the then applicable English Rules (equivalent to our O. 11, r. 1(e)(i), (ii) and (iii) RSC). An application to set aside the order giving leave to serve out of the jurisdiction was partially successful and ultimately came before the House of Lords. The House of Lords had to consider the relationship between those provisions of O. 11, r. 1(1) of the English Rules and O. 11, r. 4 (equivalent to our O. 11, r. 5 RSC). In his speech, Lord Goff traced the development of the requirement for an applicant seeking leave to serve out of the jurisdiction to provide an affidavit stating that, in the belief of the deponent, the plaintiff had a good cause of action (as is required under O. 11, r. 5 RSC). Lord Goff noted that following the introduction of that requirement in the English Rules in 1883, it was held in *Societe Generale de Paris v. Dreyfus Brothers* (1885) 29 Ch.D. 239; (1887) 37 Ch.D 215 that it would not necessarily be enough for that purpose to establish the existence of the relevant cause of action, as the court still had to decide whether it should exercise its discretion to give leave to serve out

of the jurisdiction. For that purpose, the court had to consider whether the evidence showed that the cause of action on which the plaintiff relied was *"sufficiently firmly established"* (per Lord Goff at pp. 450-451).

73. Lord Goff reviewed the English cases, including *Korner*, which he concluded was *"in some disarray when it came before the House of Lords"* (at p. 453). He noted that the *"good arguable case"* test was derived from the various speeches of the Law Lords in that case and that that was the test to be applied in determining whether the claim fell within one of the paragraphs of O. 11, r. 1(1) of the English Rules. He had earlier noted that, as the court could not resolve disputed questions of fact on affidavit evidence, the standard of proof in respect of the merits of the cause of action was whether there was a *"serious question to be tried"* (per Lord Goff at p. 452). Lord Goff stated that the *"good arguable case"* test did not apply to the consideration of the merits of the plaintiffs' case, with the exception of those paragraphs of O. 11, r. 1(1) to which some aspects of the merits were relevant in order for the claim to fall within the relevant paragraph or sub-rule. One such example was O. 11, r. 1(1)(e) of the English Rules, under which three elements had to be established, namely, the existence of a contract, a breach of that contract and the place of breach before the plaintiff could successfully invoke the jurisdiction of the court under the paragraph. In respect of that paragraph, Lord Goff observed that no separate issue would then arise on the merits of the plaintiff's cause of action to which a lower standard of proof might be applied (as those merits would already have been considered, to the "*good arguable case*" standard, in determining whether the claim was one which fell within the relevant paragraph or sub-rule of Order 11, rule 1(1)). Lord Goff noted that the same would not apply in respect of a number of the other paragraphs of O. 11, r. 1(1), where once the plaintiff's claim was shown to have been made under a particular statutory provision or where certain relief was being sought, the plaintiff would establish jurisdiction under the relevant paragraph or sub-rule without having to embark on an analysis of the

merits of the case to the higher *"good arguable case"* standard. A separate question would arise in respect of those paragraphs on the merits of the claim which would be assessed by reference to the *"serious issue to be tried"* standard.

74. I should observe that that is undoubtedly also the case in respect of some of the paragraphs of O. 11, r. 1 RSC in this jurisdiction. Where reliance is placed on one of the paragraphs of sub-rules of O. 11, r. 1(e) RSC, the merits of the claim are relevant in order to establish that the claim falls within the relevant paragraph or sub-rule. Those merits to that extent would have to be determined on the *"good arguable case"* standard. However, in respect of some of the other paragraphs, that would not be so. Examples under the RSC would include cases where reliance is placed on O. 11, r. 1(c) (where relief is sought against a person domiciled or ordinarily resident within the jurisdiction), on O. 11, r. 1(i) (where the proceedings relate to an infant or person of unsound mind domiciled in, or a citizen of, Ireland), on O. 11, r. 1(n) (where the proceedings are brought under the provisions of the Air Navigation and Transport Act, 1936) or on O. 11, r. 1(o) (where the proceedings relate to a ship registered or required to be registered under the Mercantile Marine Act, 1955).

75. The position is obviously different in a case where reliance is placed on Order 11, rule 1(e) RSC. As noted by Lord Goff in *Seaconsar*, where reliance was placed on the then English equivalent of O. 11, r. 1(e) RSC, the plaintiff had to establish the various elements of that paragraph to the *"good arguable case"* standard. However, apart from that paragraph (and a number of other paragraphs of O. 11, r. 1), the court had to consider the merits of the plaintiff's claim on the basis of the *"serious issue to be tried"* standard (see Lord Goff at p. 456). Lord Goff summarised the position as follows:-

> *"Accordingly, a judge faced with a question of leave to serve proceedings out of the jurisdiction under Order 11 will in practice have to consider both (1) whether jurisdiction has been sufficiently established, on the criterion of the good arguable*

case laid down in Korner's case, under one of the paragraphs of rule 1(1), and (2) whether there is a serious issue to be tried, so as to enable him to exercise his discretion to grant leave, before he goes on to consider the exercise of that discretion, with particular reference to the issue of forum conveniens."

(per Lord Goff at pp. 456-457)

76. Lord Goff concluded that, insofar as a number of the subparagraphs of O. 11, r. 1(1)(d) of the then English rules were concerned, the Court of Appeal had been incorrect in holding that the appellant had to establish under those subparagraphs that it had a *"good arguable case"* on the merits of the case. He stated that it was sufficient for the appellant to establish under the relevant subparagraphs that there was, on the merits of the case, a *"serious issue to be tried"*. He went on to consider that there was a serious issue to be tried on the merits and concluded that the appellant should not be shut out from making its case on the merits.

77. While *Seaconsar* provides authority for the agreed position of Microsoft Ireland and the defendants in this application that a plaintiff who seeks an order under O. 11, r. 1 RSC for leave to serve (notice of) proceedings outside the jurisdiction must establish (a) a *"good arguable case"* that the claim falls within one of the paragraphs or sub-rules of O. 11, r. 1 and (b) that there is a *"serious issue to be tried"* on the merits of the case, the House of Lords in *Seaconsar* did not provide any further explanation as to what it meant by *"good arguable case"* in that context. The English courts in subsequent cases attempted to explain what a plaintiff would have to establish in order to meet that test.

78. The concept of the *"better of the argument"* was first raised and applied in a subsequent decision of the Court of Appeal of England and Wales in *Canada Trust Co v. Stolzenberg & ors (No. 2)* [1998] 1 WLR 547 ("*Canada Trust*"). The plaintiffs in that case alleged fraud on the part of the defendants and brought proceedings against them in England. In respect of some of the defendants, the plaintiffs obtained leave to issue and

serve the proceedings outside the jurisdiction under O. 11, r. 1(1)(c) of the then English Rules (being the equivalent of O. 11, r. 1(h) RSC). Service was effected on a number of the other defendants in accordance with the Lugano Convention. Both sets of defendants sought to set aside the service on jurisdictional grounds. Those defendants who were served in accordance with the leave granted under O. 11, r. 1(1)(c) of the English Rules argued that the leave to serve out of the jurisdiction had been wrongly granted as it had been sought before any defendant had been duly served and that, therefore, the English courts had no jurisdiction over any defendant. The Court of Appeal had to consider the test to be applied in respect of both groups of defendants.

79. With regard to the defendants served under O. 11, r. 1(1)(c), which is the relevant part of the judgment for present purposes, Waller L.J. in the course of his judgment considered *Seaconsar* and what Lord Goff had meant by a *"good arguable case"*. He commented as follows:-

> *"But Lord Goff was not concerned to explore in Seaconsar case… the application of the standard 'good arguable case' to all the various factors that can arise. It is I believe important to recognise, as the language of their Lordships in Korner's case… demonstrated, that what the court is endeavouring to do is to find a concept not capable of very precise definition which reflects that the plaintiff must properly satisfy the court that it is right for the court to take jurisdiction. That may involve in some cases considering matters which go both to jurisdiction and to the very matter to be argued at the trial (e.g. the existence of a contract), but in other cases a matter which goes purely to jurisdiction (e.g. the domicile of a defendant). The concept also reflects that the question before the court is one which should be decided on affidavits from both sides and without full discovery and/or cross examination, and in relation to which therefore to apply the language of the civil burden of proof applicable to issues after full trial, is inapposite… It is also*

important to remember that the phrase which reflects the concept 'good arguable case' as the other phrases in Korner's case 'a strong argument' and 'a case for strong argument' were originally employed in relation to points which related to jurisdiction but which might also be argued about at the trial. The court in such cases must be concerned not even to appear to express some concluded view as to the merits, e.g. as to whether the contract existed or not. It is also right to remember that the 'good arguable case' test, although obviously applicable to the ex parte stage, becomes of most significance at the inter partes stage where two arguments are being weighed in the interlocutory context which, as I have stressed, must not become a 'trial'. 'Good arguable case' reflects in that context that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction." (per Waller L.J. at p. 555) (emphasis added)

80. It is important to draw attention to the admonition given in that passage that, on a jurisdiction challenge, the court should not express a concluded view on the merits of the case (such as on the question as to whether a contract existed or not). It should also be noted that this appears to be the source of the requirement (discussed in some of the English cases) that a plaintiff had to establish *"a much better argument on the material available"* in order to satisfy the *"good arguable case"* standard, on which the defendants in this application placed some reliance, although without the word "*much*".

81. Continuing on the same theme, Waller L.J. then stated:-

"The civil standard of proof has itself a flexibility depending on the issue being considered and the concept 'good arguable case' has a similar flexibility. It is natural, for example, in a case concerned with a contract where the jurisdiction

depends on whether the breach took place within the jurisdiction, but where the issue to be tried will be whether there was a contract at all, not to wish to give even the appearance of pre-trying the central issue, even though the concept of being satisfied must apply both to the existence of the contract and the place of the breach. It is equally natural for the court in the process of being satisfied to scrutinise most jealously that factor which actually provides jurisdiction. It is equally natural that where the foundation of jurisdiction is domicile, i.e. an issue that will not arise at the trial, that particular scrutiny of the material available takes place in the context of the limitations applied to an interlocutory process."

(per Waller L.J at 555-556)

Here again, the judge was cautioning against giving *"even the appearance of pre-trying the central issue"* in the case on an interlocutory jurisdiction application.

82. The UK Supreme Court considered the meaning of *"good arguable case"* in this context in two recent decisions, on which the defendants relied. The first was *Brownlie v. Four Seasons Holdings International* [2018] 1 WLR 192 ("*Brownlie*"). The second was *Goldman Sachs International v. Novo Banco SA* [2018] UKSC 34 ("*Goldman Sachs*").

83. In *Brownlie*, Lord Sumption (with whom Lord Hughes agreed) reviewed the genesis and evolution of the *"good arguable case"* standard in observations which were *obiter* in that case. Lord Sumption noted (echoing what Lord Goff had said in *Seaconsar*) that some of the jurisdictional gateways in the relevant jurisdiction rules in England and Wales (Practice Direction 6B supplementing CPR Pt 6) merely required that the claim at issue should be of a particular character (such as a claim for an injunction regulating conduct within the jurisdiction (being the equivalent of our O. 11, r. 1(g) RSC)), whereas others (including the equivalent of our O. 11, r. 1(e) and (f) RSC) depended on the court being satisfied of some jurisdictional fact. He continued:-

"A relevant contract must, for example, have been made or breached in England or relevant damage sustained there. There are two closely related problems about this. The first is a legal one, namely that none of the law's established evidential standards satisfactorily meets the case. The second is a practical one, namely that some jurisdictional facts, for example the existence of the contract said to have been made or breached in England, may be in issue at trial if the case is allowed to proceed, when they will in all probability be determined on fuller material than is likely to be available at the interlocutory stage. The same is true of the more general requirement that if it proceeds the claimant should have a reasonable prospect of success."

(Per Lord Sumption at para. 4, p. 197)

84. Lord Sumption then considered *Korner*, *Seaconsar* and *Canada Trust*, noting the statement of Waller L.J. in the latter case that a *"good arguable case"* required that one side have *"a much better argument on the material available"*. Lord Sumption described the test as so described by Waller L.J. as being a *"serviceable test, provided that it is correctly understood"* (para. 7, p. 198). He continued:-

"The reference to 'a much better argument on the material available' is not a reversion to the civil burden of proof which the House of Lords had rejected in [Korner]. *What is meant is (i) that the claimant must supply <u>a plausible evidential basis</u> for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a <u>plausible (albeit contested) evidential basis for it</u>. I do not believe that anything*

is gained by the word 'much', which suggests a superior standard of conviction that is both uncertain and unwarranted in this context." (per Lord Sumption at para. 7, pp. 198-199) (emphasis added)

85. While those observations were *obiter* in *Brownlie*, they were repeated by the UK Supreme Court as part of the *ratio* of its decision in *Goldman Sachs*, in a judgment again delivered by Lord Sumption. Having described *Goldman Sachs* as a case in which the fact on which jurisdiction depended was also likely to be decisive of the action itself if it proceeded, Lord Sumption went on to set out again the reformulation of the test for determining jurisdiction, which required that the claimant had *"the better of the argument"* on the facts going to jurisdiction as he had done in *Brownlie*. This reformulation was endorsed by a unanimous Supreme Court in *Goldman Sachs*. That reformulation of the *"better of the argument"* description of the *"good arguable case"* standard was itself further considered in a recent judgment of the English Court of Appeal in *Kaefer Aislamientos SA de CV v. AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10 ("*Kaefer*").

86. In *Kaefer*, the English Court of Appeal sought to explain how the test worked in practice, what was meant by *"plausible"* and how it related to *"good arguable case"*. The defendants placed reliance upon *Kaefer* in support of their contention that, in considering whether Microsoft Ireland had established a *"good arguable case"* that its claim fell within the jurisdictional gateway provided by one of the paragraphs or sub-rules of O. 11, r. 1 RSC, I should consider whether Microsoft Ireland had *"the better of the argument"* on the material available.

87. In *Kaefer*, the English Court of Appeal considered each of the three limbs of the test as reformulated by the UK Supreme Court in *Brownlie* and *Goldman Sachs*. The court first considered limb (i) which referred to the need for a *"plausible evidential basis"* for the application of a relevant "jurisdictional gateway". Green L.J. observed that the

reference to a *"plausible evidential basis"* in limb (i) was a reference to *"an evidential basis showing that the claimant has the better argument"* and that the UK Supreme Court had confirmed the relative test which had first been formulated in *Canada Trust* (per Green L.J. at para. 73). The court confirmed that the burden of proof remained on the claimant under limb (i) and that the test under that limb was not on the balance of probabilities, as that was the test appropriate for use at the trial when the court could weigh up the evidence in its totality but was not an appropriate standard for use at an interlocutory stage of the proceedings. Green L.J also stressed that the court had to be astute not to express any view on the *"ultimate merits of the case"*, even where there was a close overlap between the issues going to jurisdiction and the ultimate substantive merits of the case (para. 76). Green L.J. also accepted that the adjunct *"much"* in the *"better of the argument"* had to be ditched or *"laid to rest"*. He stated that *"a plausible case is not one where the claimant has to show it has 'much' the better argument"* (para. 77).

88. With respect to limb (ii), the court in *Kaefer* observed that under that limb, the court was required to seek to overcome evidential difficulties and to arrive at a conclusion if it *"reliably"* could do so. However, Green L.J. noted that jurisdiction challenges are invariably taken at what we would call the interlocutory stage and would be characterised by *"gaps in the evidence"*. Green L.J. noted that limb (ii) was *"an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with 'due despatch and without hearing oral evidence'"* (referring to Lord Steyn in *Canada Trust* and Lord Rodgers in *Bols Distilleries v. Superior Yacht Services Limited* [2006] UKPC 45)("*Bols*").

89. With regard to limb (iii), the court in *Kaefer* recognised that that limb was intended to address a situation where a court finds itself unable to reach a conclusion on the evidence before it and unable to say who has the better argument. In that respect, the test is

only *"in part"* a relative test. Green L.J. observed that limb (iii) was intended to address that situation. He continued:-

> *"To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits."*
>
> (per Green L.J. at para. 80)

90. The position, therefore, in England and Wales appears to be that the courts will attempt to resolve the question of the *"good arguable case"* in terms of whether a claim comes within one of the paragraphs or sub-rules of the relevant English rule or practice direction or "jurisdictional gateway" (as it has been conveniently described) by applying the three limbs set out by the UK Supreme Court in *Brownlie* and *Goldman Sachs*, as explained by the English Court of Appeal in *Kaefer*. Where possible, the courts in that jurisdiction will consider whether a claimant has established that it has a *"good arguable case"* by reference to whether it has *"the better of the argument"* on the relevant facts going to jurisdiction. In part, therefore, the English courts apply a relative test. However, it is clear from limb (iii) of the test as reformulated by the UK Supreme Court, that it may not be possible at the interlocutory stage reliably to assess whether the claimant has *"the better of the argument"* on the relevant facts and, in such a situation, it is not possible to apply a relative test and the court should consider whether there is a *"plausible (albeit contested) evidential basis"* for the application of the relevant jurisdictional gateway.

(d) <u>The "Better of the Argument": Part of Irish Law?</u>

91. Microsoft Ireland rightly pointed out that the *"better of the argument"* version of the *"good arguable case"* has never been approved of or applied by an Irish court. Fennelly J. in the Supreme Court in *Analog* noted that Barrington J. in the Supreme Court

in *Short* had referred to *"good arguable case"*, but in the context of the merits of the substantive claim rather than in the context of whether the claim fell within one of the paragraphs of O. 11, r. 1 RSC. While the Supreme Court in *Analog* did refer to *Seaconsar* and agreed that the appropriate standard by which to determine whether the claim fell within one of the paragraphs of O. 11, r. 1 was the *"good arguable case"*, it did not refer to or approve of the subsequent elaboration of or gloss on that standard by reference to the *"better of the argument"* developed by the English Court of Appeal in *Canada Trust* and discussed in the subsequent cases. It is true that the Supreme Court in *Analog* did analyse the affidavit evidence and concluded that there was insufficient evidence before the High Court to establish jurisdiction on the basis that the alleged breach of contract relied upon had occurred within the jurisdiction and that, as a result, there was insufficient evidence to found jurisdiction under O. 11, r. 1(e)(iii) RSC. The Supreme Court did not, however, reach that conclusion by applying, expressly at least, any *"better of the argument"* test.

92. Microsoft Ireland contended that to apply the *"good arguable case"* standard by considering whether the plaintiff had the *"better of the argument"* on the facts relevant to jurisdiction would be inconsistent with the judgment of the Supreme Court in *IBRC*. The defendants on the other hand contended that *IBRC* was concerned, not with the test for establishing jurisdiction under one of the paragraphs or sub-rules of O. 11, r. 1 RSC, but rather with the substantive merits of the case. There was, therefore, a fundamental disagreement between the parties as to what the Supreme Court in *IBRC* was concerned with and what it decided in that case. It is appropriate at this point to consider the judgment in *IBRC* and to see whether it supports or undermines the defendants' contention that, in considering whether Microsoft Ireland has a *"good arguable case"* that its claim comes within one of the paragraphs or sub-rules of O. 11, r. 1 RSC, it must establish that it has *"the better of the argument"* in relation to the facts necessary to establish jurisdiction under one of those paragraphs.

(e) IBRC

93. In *IBRC*, the plaintiffs obtained leave to serve notice of the proceedings on a defendant (the sixteenth defendant), Mecon FZE ("Mecon"), a UAE company, outside the jurisdiction. The plaintiffs alleged that Mecon was involved in a conspiracy to place assets beyond the reach of the first plaintiff, IBRC. Leave was granted to the plaintiffs under O. 11, r. 1(f) (on the basis that the action was founded on a tort committed within the jurisdiction), O. 11, r. 1(g) (on the basis that an injunction was sought as to things to be done within the jurisdiction) and under O. 11, r. 1(h) (on the basis that Mecon was a necessary or proper party to proceedings properly brought against some other person duly served within the jurisdiction). Mecon applied, unsuccessfully, for an order under O. 12, r. 26 RSC to discharge the order giving liberty to serve out of the jurisdiction and to stay the proceedings against it under the inherent jurisdiction of the court. Mecon appealed to the Supreme Court. The Supreme Court dismissed the appeal.

94. In the High Court, Mecon contended that the plaintiffs had provided insufficient evidence in support of the allegations that it was involved in the wrongful removal of assets. The plaintiffs argued that there was sufficient evidence before the court to justify proceedings being brought against Mecon under each of the paragraphs of O. 11, r. 1 RSC, on foot of which leave to serve out of the jurisdiction had been granted. The High Court (Charleton J.) was satisfied that the plaintiffs had placed sufficient evidence or materials before the court to demonstrate that the wrong alleged by the plaintiffs against Mecon was capable of proof at the trial. The High Court also rejected the application to stay the proceedings on the grounds of *forum non conveniens*. That aspect of the case is not relevant for present purposes. What is relevant is how the Supreme Court approached the jurisdiction issue under Order 11.

95. In considering that aspect of the appeal, Clarke J. (who delivered the judgment on behalf of the Supreme Court) summarised the requirement on a plaintiff who seeks leave to serve out of the jurisdiction under O. 11 RSC as follows:-

> *"It is clear, for reasons which will be briefly addressed in due course, that, so far as the claim which is said to warrant the granting of leave to serve outside the jurisdiction is concerned, it is necessary that the Court be satisfied that there is a claim which comes within one of the relevant sub-rules of O. 11 and which is shown to be reasonably capable of being proven so as to justify the proceedings being maintained in this jurisdiction rather than somewhere else."* (para. 40, pp. 210-211)

96. What is not entirely clear from this passage is whether the Court was referring to both of the matters which a plaintiff must establish when seeking leave, namely, (1) that the claim falls within one of the paragraphs or sub-rules of O. 11, r. 1 RSC and (2) that the plaintiff has a good cause of action on the merits of the claim. Nor is it entirely clear from the passage the standard to which the court must be satisfied in respect of both of those matters or whether, when referring to a claim which must be shown to be *"reasonably capable of being proven"*, the Court was referring to the overall merits of the claim or whether it was referring to the question as to whether the claim fell within one of the paragraphs or sub-rules of O. 11, r. 1 RSC.

97. Clarke J. continued:-

> *"In that context it is not necessary for the Court to resolve any issues as to the substance of the case (whether of fact or of law) save to the minimal extent necessary to determine whether the claim is reasonably capable of being proven. In the main the assessment will be based, therefore, on evidence or materials put forward by the plaintiff, for the fact that the plaintiff's claim may be denied, however strenuously, will not normally mean that there is* [not] *nonetheless a*

sufficient claim which requires to be determined. The fact that the claim is contested however strongly is irrelevant to the question of whether leave to serve outside the jurisdiction should be granted." (para. 40, p. 211)

98. That passage does appear to be referring to the overall merits of the claim, rather than to the issue as to whether the claim falls within one of the paragraphs or sub-rules of O. 11, r. 1 RSC. Although not expressly put in those terms, the reference to a claim being *"reasonably capable of being proven"* may have been intended to be synonymous with the requirement on a plaintiff to demonstrate a *"serious issue to be tried"* on the overall merits of the case.

99. Clarke J. went on to observe that in some cases an argument or evidence or materials may be put forward by a defendant which, unless countered or explained, would provide a *"knockout blow to the case"* (he gave the example of a claim based on a contract where the defendant was not a party to the contract). In such a situation, there would be no claim against the relevant defendant which was capable of being proven and the order granting leave to serve out would have to be set aside (see para. 41, p. 211).

100. Clarke J. continued:-

"However, the overriding consideration is that the starting point of an assessment of whether the plaintiff has established a sufficient case must be an assessment of the claim as pleaded together with such evidence as the plaintiff may put forward. Defence evidence which goes no further than establishing that the claim is disputed will not be relevant. There may, however, be limited cases where the defence evidence might, unless explained or countered by sufficient argument, amount to a knockout blow. In such a case the defence evidence may be relevant not merely to assert the immaterial fact that the claim is contested but to assert the highly material fact that the claim is unstateable." (para. 42, p. 211)

101. I would observe that this passage does appear to be focused on the overall merits of the case and whether it is stateable or not, as opposed to whether the claim is one which falls within one of the paragraphs or sub-rules of O. 11, r. 1 RSC.

102. In that context, Clarke J. stated that:-

> *"The Court is not engaged in some assessment of the relative strengths of IBRC's and Mecon's case. Rather the Court has to determine whether there is a sufficient basis for the proposition that IBRC may have a claim under one of the qualifying categories in O. 11 which could justify bringing Mecon to this jurisdiction to answer the claim concerned. The bar is a low bar. It is simply designed to prevent a defendant being brought to this jurisdiction to answer an unstateable claim which has no reasonable prospect of being capable of proof."* (para. 43, pp. 211-212)

103. In this passage, the Court appeared to be referring initially to the overall merits of the case, but it then referred to the question as to whether the plaintiffs might have had a claim under one of the paragraphs of Order 11, rule 1. On one view, the Court may have been conflating the two issues required to be decided (leaving aside the *forum conveniens* requirement in O. 11, r. 2 RSC), namely, whether the claim falls within one of the subparagraphs of O. 11, r. 1 RSC and whether the plaintiff has a good cause of action (assessed by reference to the appropriate standard). However, that might not be a correct reading of this passage.

104. Clarke J. rejected the argument advanced by Mecon that there was something wrong with the plaintiffs relying on evidence which could not be tested. He stated that such an objection was misplaced as the court was concerned with whether there was a claim *"sufficient to warrant proceedings being brought"* and the time to test whether that claim could be made out was at the trial itself and not during the challenge to jurisdiction. Clarke J. continued:-

> *"Except in quite extraordinary circumstances it is difficult to envisage on what basis it could be contended that there should be a testing of evidence purely designed to meet a very low threshold of demonstrating that the plaintiff has a claim which is reasonably capable of proof."* (para. 43, p. 212)

That passage appears again to be directed to the merits of the claim rather than the paragraph, sub-rule or jurisdictional gateway in O. 11, r. 1 RSC on which the plaintiffs were relying.

105. However, in the next paragraph (para. 44), Clarke J. did expressly consider the issue as to whether the claims came within any of the relevant subparagraphs of O. 11, r. 1 RSC. He stated:-

> *"The final aspect of the argument on the question of whether the trial judge was incorrect not to set aside the order granting leave concerned whether it could properly be said that the claims sought to be brought against Mecon in these proceedings came within any of the relevant sub-rules of O. 11, r. 1 of the Rules. In that context it must also be recalled that it is only necessary that the claim sought to be advanced comes within one of the relevant sub-rules in order for the claim to be properly maintained in this jurisdiction."* (para. 44, p. 212)

106. However, the Court did not elaborate on the standard to be applied in determining whether the plaintiffs had established that the claims sought to be brought against Mecon came within one of the relevant paragraphs of O. 11, r. 1 RSC relied upon by the plaintiffs. Clarke J. did proceed in para. 45 to look at the particular subparagraphs or sub-rules of O. 11, r. 1 relied upon, namely, (f), (g) and (h). He stated that, whatever about subparagraphs (f) and (g), it was *"difficult to see how a credible argument could be put forward to suggest that sub-rule (h)… is not met"* and he explained why that was so. He noted that the specific allegation made against Mecon was that a share transfer involving that entity formed part of a broad conspiracy or plan to place assets beyond the reach of IBRC. Clarke

J. noted that whether that was so was a matter for the trial, but that was the allegation being made against Mecon. He stated that it was very difficult to see how Mecon could not be regarded as a proper party to the proceedings in circumstances where the allegation was that it formed a central part of at least one aspect of the alleged conspiracy or a plan. Once reliance could properly be placed by the plaintiffs on sub-rule (h), it was unnecessary to consider the merits or otherwise of the other possible bases for granting leave to serve out of the jurisdiction. Having made those observations, Clarke J. set out later in the judgment the Court's conclusions on service outside the jurisdiction.

107. In setting out the Court's conclusions, Clarke J. noted first that it is necessary that the statement of claim makes claims which come within one or other of the paragraphs of O. 11, r. 1 RSC. If no such claim is made then leave to serve outside the jurisdiction cannot be granted and, if leave has been granted, it should be set aside. Clarke J. continued:-

> *"But when it comes to the question of determining whether the undoubtedly very low threshold for establishing that there is a sufficient case to justify the bringing of the defendant to this jurisdiction is concerned, it seems to me that the Court can and should look at any relevant affidavit evidence proffered. In my view the trial judge was completely correct to suggest that it would, at least in many cases, be inadvisable simply to take the statement of claim as being necessarily capable of proof. Rather, as the trial judge suggested, the Court should come to a view as to whether it has been established that whatever is alleged may be reasonably capable of being proven in evidence to an extent that a judge might reasonably hold in favour of the plaintiff. It is not necessary for a plaintiff to establish, on affidavit evidence, a prima facie case. Rather the plaintiff is required to put forward sufficient evidence on affidavit to meet the test identified by the trial judge which is that its case is, both on the law and the facts, reasonably capable of being proven."*
>
> (para. 53, pp. 214-215)

108. In this passage, the Court seemed to be referring both to the requirement to demonstrate that the claim falls within one of the paragraphs of O. 11, r. 1 RSC and to the requirement that there be a sufficient case to justify bringing a defendant to this jurisdiction, which must be assessed on the basis of affidavit evidence which satisfies the *"very low threshold"* for establishing there is a sufficient case which, as identified by the High Court in that case, was whether the plaintiff has a case which, on the facts and on the law, is *"reasonably capable of being proven"*. While I cannot be certain, it does seem to me that in this passage, the Supreme Court was referring both to the requirement to establish that the claim falls within one of the paragraphs of O. 11, r. 1 RSC and to the requirement to establish that the plaintiff has a good cause of action on the merits with the standard for the latter question being determined by reference to whether the case is *"reasonably capable of being proven"*, which may be the same as, or equivalent to, the *"serious issue to be tried"* standard, although that was not expressly stated by the Supreme Court.

109. Clarke J. observed that on an application for leave to serve outside the jurisdiction (or to set aside such leave), the issue before the court is *"simply whether it is appropriate to bring the defendant to this jurisdiction to answer the claim"* (para. 54, p. 215). He continued:-

> *"The low barrier is designed to exclude imposing on defendants the obligation to come to Ireland to defend cases which have no prospect of being capable of being proven. The bar needs to be seen in the light of that underlying requirement…"*
>
> (para. 54, p. 215)

110. This appears to me again to be a reference to the merits of the claim rather than to whether the claim falls within one of the paragraphs of O. 11, r. 1 RSC, although I cannot be absolutely certain of that.

111. Having described the *"overall test"* in those terms, Clarke J. outlined how the test is met. He stated:-

> *"The question of whether that test is met does not involve attaching weight to differing evidence or, indeed, argument. It simply involves determining whether a very low threshold has been met by the plaintiff..."* (para. 55, p. 215)

112. Clarke J. continued:-

> *"Not alone was there no necessity for the trial judge to resolve any questions of fact for the purposes of this application, any purported resolution would have been entirely irrelevant. The only issue was as to whether IBRC had demonstrated that it had a case which was reasonably capable of proof... I am satisfied that the trial judge was entitled to conclude that IBRC had put forward sufficient evidence and materials to establish that its case against Mecon was reasonably capable of proof..."*
>
> (para. 56, p. 215)

113. The court concluded that the requirements of O. 11, r. 1(h) RSC were clearly met, and, on that basis, it was unnecessary to decide whether there were any other bases for the grant of leave to serve Mecon outside the jurisdiction.

(f) Conclusions on the Standard of Proof

114. Microsoft Ireland and the defendants advanced diametrically opposed interpretations of what the Supreme Court was dealing with in *IBRC*. The defendants contended that the Court's observations in relation to the standard to be applied were directed to the overall merits of the case. Microsoft Ireland disagreed and contended that the Court was addressing the test for determining whether a claim fell within one of the paragraphs of O. 11, r. 1 RSC and that the Court's description of the test to be applied in

determining whether leave to serve outside the jurisdiction should be granted or whether, if granted, it should be set aside, is completely inconsistent with the *"better of the argument"* gloss which the defendants sought to place on the *"good arguable case"* requirement that a claim fell within one of the paragraphs or sub-rule of O. 11, r. 1 RSC.

115. It seems to me that both sides are partly correct in their analysis of *IBRC*. I have sought to identify, by reference to certain of the passages in the judgment, where, it seems to me, the Court was seeking to address both the question as to whether a claim fell within one of the paragraphs of O. 11, r. 1 RSC and whether the plaintiffs had demonstrated to the appropriate standard whether they had a good cause of action. While the judgment in *Analog* was mentioned by the Supreme Court in the course of its judgment dealing with the *forum non conveniens* part of the case, *Analog* was not referred to or discussed in that part of the judgment dealing with the O. 11 point. I agree with the defendants that if the Supreme Court had intended to disagree with what was said in *Analog* as to the test to be applied for the grant of leave under one of the paragraphs of O. 11, r. 1 RSC, it would expressly have said so. It is open to infer, from the absence of any reference in this context to *Analog* and of any disagreement with that judgment, that the Supreme Court was not departing from the test of *"good arguable case"* that the claim fell under one of the paragraphs of O. 11, r. 1 RSC referred to by Fennelly J. in *Analog*. I note that the Court of Appeal in *Albaniabeg* did not think that *IBRC* introduced any new test or "*greatly changes our existing understanding with regard to the application of Ord. 11*" (Per Hogan J. at para. 29. p. 14) I am inclined to the view that the references to the *"low bar"*, the *"low barrier"* and the *"very low threshold"* were intended by the Supreme Court to refer to the overall merits of the case, rather than to the issue as to whether the claim was one which fell within one of the paragraphs of O. 11, r. 1 RSC. The same applies to the Court's reference to a plaintiff being required to provide sufficient evidence on affidavit that its case was *"reasonably capable of being proven"* on the law and the facts. While I cannot

be absolutely certain, and while some of the passages in the judgment in *IBRC* may be intended to refer to both of the relevant issues, on balance I believe that the Supreme Court was mainly considering the test to be established by the plaintiff in dealing with the overall merits of the case. Support for that somewhat tentative conclusion may, I think, be found in the fact that the plaintiffs had put forward an overwhelming case for leave to serve outside the jurisdiction under O. 11, r. 1(h) RSC. It is difficult to see how, on the facts, it could have been successfully contended that Mecon was not a necessary or proper party to an action properly brought against another person duly served within the jurisdiction. The case on jurisdiction appeared to be overwhelming.

116. However, notwithstanding that somewhat tentative conclusion on my part, I also feel that the judgment of the Supreme Court in *IBRC* would not be consistent with there being a requirement for a plaintiff to establish that it had the *"better of the argument"* in order to demonstrate that there was a *"good arguable case"* that its claim fell within one of the paragraphs or sub-rules of O. 11, r. 1 RSC. I believe that that sort of relative test would invite the court to embark on an exercise which would be inconsistent with the exercise which the Supreme Court envisaged the court carrying out at the interlocutory jurisdictional stage of the case. The Supreme Court's numerous references to the trial being the place to test the claims and allegations are, in my view, inconsistent with the sort of exercise which would be inherent in applying the *"better of the argument"* approach urged by the defendants. To adopt that approach would run the risk of requiring the court to embark on a sort of mini trial (without all of the evidence) of issues which are more properly to be addressed at the trial itself. The sort of testing of evidence inherent in the exercise urged by the defendants, in my view, sits uncomfortably with what the Supreme Court in *IBRC* stated was appropriate. I appreciate that in this case, in addition to affidavit evidence from the representatives of the parties, there was oral evidence and cross-examination of the Saudi lawyers. That exercise itself may well have gone beyond what

the Supreme Court might have regarded as appropriate on an application to set aside the grant of leave to serve outside the jurisdiction. It ran the risk, at least, of the court being invited to engage in an exercise and to reach findings on issues which will inevitably arise at the trial (albeit to a different standard).

117. In those circumstances, notwithstanding that I cannot be absolutely certain in my interpretation of the judgment of the Supreme Court in *IBRC*, on balance, I have come to the conclusion that the defendants were not correct in their contention that in determining whether Microsoft Ireland can demonstrate a *"good arguable case"* that its claim falls within one of the paragraphs of O. 11, r. 1 RSC, it is required to show that it has the *"better of the argument"* on the law and on the facts relevant to jurisdiction on the material available. While the Courts of England and Wales have accepted that the test is in part a relative one, they have also accepted that, by reason of the nature of the issue and the limitations of the material available at interlocutory stage of the proceedings, it may not be possible to make a reliable assessment on who has the better of the argument at that stage and, if that is so, they proceed to consider whether there is a *"plausible (albeit contested) evidential basis"* for the case on jurisdiction made by the plaintiff. The *"better of the argument"* gloss on the *"good arguable case"* standard has not been accepted or applied in any decision of an Irish Court to date. For the reasons I have sought to explain, it does not seem to me that such a gloss on the test would find favour with the Supreme Court in light of the judgment in *IBRC*. I conclude, therefore, that the *"better of the argument"* gloss on the *"good arguable case"* standard for the purpose of determining whether a claim falls within one of the paragraphs of O. 11, r. 1 RSC does not form part of Irish law and I should not apply it. I prefer to approach the test on the basis that it is a flexible test which is not conditional upon the relative merits of the case on jurisdiction and which can be satisfied by the plaintiff establishing a sound and plausible case on the facts and on the evidence that the claim falls within one of the paragraphs or sub-rules of O. 11, r. 1 RSC,

even though that case is contested by the defendant. I believe that the test can be met where a plaintiff can show that it has good arguments on the jurisdiction issue without necessarily having to demonstrate that its arguments are better or more impressive or persuasive than those which might or could be raised by opposing parties. In my view, that is more consistent with the judgment of the Supreme Court in *IBRC* and is nonetheless still consistent with *Analog.*

118. I propose, therefore, to consider the case made by Microsoft Ireland that it has demonstrated a *"good arguable case"* that its claim falls within O. 11, r. 1(e)(iii) RSC on the basis of my preferred interpretation of that test. I will then consider whether, nonetheless, Microsoft Ireland has demonstrated that it has *"the better of the argument"* or the *"better of the case"* on that issue, as the defendants have contended. Microsoft Ireland submitted that it had put sufficient material before the court to satisfy the test on whatever approach the court decided was appropriate and even if the court accepted the defendants' gloss on the test.

119. In the unlikely event that the Supreme Court in *IBRC* laid down a different test for determining whether leave to serve outside the jurisdiction should be permitted under O. 11 or whether, if such leave has been granted, the order granting leave should be set aside or discharged. I will also consider whether the evidence and material before the court is such that the court can be satisfied *"that there is a claim which comes within one of the relevant sub-rules of O. 11 and which is shown to be reasonably capable of being proven so as to justify the proceedings being maintained in this jurisdiction rather than somewhere else"* (to adopt the words used by Clarke J. at para. 40, pp. 210-211 of *IBRC*). As I have indicated earlier, I do not believe that the Supreme Court in *IBRC* did lay down any new test, as it did not disagree with the test discussed and applied by the court previously in *Analog*.

(3) <u>The Applicable Law</u>

(a) General

120. The next issue to consider is what law should be applied to determining the various issues raised by the defendants in support of their contention that the three agreements relied upon by Microsoft Ireland are not valid or enforceable against ACS and NTG and that, as a consequence, Microsoft Ireland was not entitled to rely on the jurisdictional gateway provided for by O. 11, r. 1(e)(iii) RSC in respect of its claim on foot of those agreements. It will be necessary to consider separately the various arguments raised by the defendants, while recognising that the burden of proof at all times rests with Microsoft Ireland. Bearing in mind the points raised by the defendants, it will be necessary to consider separately the law applicable to the defendants' contention that the three agreements on which Microsoft Ireland has relied in the proceedings are invalid and unenforceable on the grounds that (a) the signatories of those agreements were not actually authorised to sign on behalf of the relevant defendant under the (amended) articles of association of ACS and NTG, as the case may be and (b) the signatories of the agreements on behalf of the defendants, did not have apparent or ostensible authority to sign on their behalf, and that the agreements were not ratified by the defendants and that the defendants are not estopped from denying the absence of authority on the part of the signatories.

(b) Actual Authority of Signatories: Applicable Law

(i) Discussion

121. The defendants contended, and Microsoft Ireland did not dispute, that the question of the actual authority of the signatories to the three agreements and their capacity to bind the defendants under the terms of the constitutions of ACS and NTG must be determined by the law of the place of incorporation of those companies, namely, the law of the Kingdom of Saudi Arabia. I accept that that is the position. It is supported by *Dicey,*

Morris and Collins on the Conflict of Laws (15th Ed.) (2012) ("*Dicey*"). *Dicey's* rule 175(2) states that:-

> *"All matters concerning the constitution of a corporation are governed by the law of the place of incorporation"*

122. Dicey notes (at para. 30-028) that the principle of that rule *"has been increasingly accepted by the authorities"*. The authors continue:-

> *"The case is at least established that the law of the place of incorporation determines the composition and powers of the various organs of the corporation, whether directors have been validly appointed, the nature and extent of the duties owed by the directors to the corporation, who are the corporation's officials authorised to act on its behalf..."* (para. 30-028, p. 1542-1543, footnotes omitted)

123. Various cases are cited in support of the proposition that the law of the place of incorporation determines what persons within the company are authorised to act on its behalf. Those cases include: *Carl Zeiss Stiftung v. Rayner & Keeler Limited (No. 2)* [1967] 1 AC 853. Support for the proposition can also be seen in a recent judgment of the English Court of Appeal in *Integral Petroleum v. SCC-Finanz* [2015] EWCA Civ 144. The principle was also accepted by Walsh J. in the Supreme Court in *Kutchera* (with whom Hederman J. agreed). Commenting on the possible need to refer to the law of Alberta in that case, Walsh J. stated:-

> *"It may well be necessary at some stage to refer to the law of Alberta in so far as any issue may arise concerning the constitution of the defendant company, because under the conflict of law rules matters concerning the constitution of a corporation are governed by the laws of the place of the incorporation of the company. In so far as the case may be concerned with the capacity of the corporation to enter into any legal transaction, this is a question which would be governed by the constitution of*

the company itself and by the law which governs the transaction, namely, Irish law." (per Walsh J. at p. 68)

(ii) Conclusion on Actual Authority Applicable Law

124. These dicta in *Kutchera* in effect endorse rules 175(1) and (2) as subsequently stated in *Dicey* (15th Ed., 2012). I am satisfied, therefore, that the issue as to whether the signatories of the three agreements at issue had actual authority or were expressly authorised to enter into agreements on behalf of ACS and/NTG, must be determined by reference to Saudi law.

(c) Apparent or Ostensible Authority/Ratification/Estoppel: Applicable Law

(i) Discussion

125. A more controversial question concerns the law applicable to the issue as to whether the signatories of the three agreements had apparent or ostensible authority and to the related issue as to whether the agreements were ratified by ACS and/or NTG or whether they are estopped from denying the validity and existence of those agreements. It should, of course, be remembered that whatever the law to be applied to these issues, the test to be satisfied by Microsoft Ireland is not whether it will succeed at trial in establishing any of these issues, but rather whether it has established a *"good arguable case"* with regard to the existence and validity of the relevant agreements for the purpose of establishing the jurisdictional gateway contained in O. 11, r. 1(e)(iii) RSC.

126. Microsoft Ireland contended that these issues must be determined by reference to Irish law, having regard to the choice of law clauses contained in each of the three agreements at issue. The defendants, on the other hand, contended that, like the issue of actual authority, these issues also had to be determined by reference to Saudi law. A large number of cases and textbook authorities were cited by the parties in support of their

respective positions on this question. It is necessary now to examine some of those authorities.

127. There is no Irish authority on the point. The English cases, if accepted by the court, would strongly suggest that the position adopted by Microsoft Ireland is correct and that these issues should be determined (to the appropriate standard) by reference to Irish law. The academic publications acknowledge the thrust of English cases but are critical of the reasoning and some offer possible alternative solutions. There is no doubt, however, that if I were to accept the English cases, the position of Microsoft Ireland on this issue would prevail and I would be required to assess these issues of apparent or ostensible authority and the related issues by reference to Irish law.

128. The starting point in the case law is the judgment of the English Court of Appeal in *Compania Navéra Micro S.A. v. Shipley International, Inc. ("The Parouth")* [1982] 2 Lloyd's Rep. [351] ("*The Parouth*"). In that case, the English Court of Appeal held that leave to serve proceedings out of the jurisdiction was properly granted. The plaintiffs alleged that they had entered into a charterparty with the defendants for the shipment of cargo from Germany to Mexico. They alleged that the defendants failed to provide the cargo. It was alleged that the terms of the charterparty were evidenced by a telex in which it was provided that there should be arbitration in the event of any dispute and that that arbitration should take place in London. The defendants denied that there was a concluded contract at all but said that if there was, it was made by brokers who were not acting for them or, alternatively, who had no authority to so act and that there was no basis for any suggestion that the defendants had held those brokers out as having authority. Leave was granted to serve the proceedings outside the jurisdiction under the then English equivalent of our O. 11, r. 1(e)(iii) RSC. That leave was set aside by the English High Court but upheld by the English Court of Appeal. In his judgment, Ackner L.J. referred to the 10th edition of *Dicey* and to the following principle stated there:-

"The formation of a contract is governed by the law which would be the proper law on the contract if the contract was validly concluded." (Rule 146 at p. 775)

129. It was accepted before the Court of Appeal that if the case was heard, the probabilities were that the putative proper law, namely, English law, would be applied to resolve the issue as to whether there was a binding contract between the parties. Ackner L.J. concluded that the arbitration clause had the important result of making the proper law of the dispute probably English law. He further stated that what made this a case to which the relevant rule applied was that it was arguably a contract which, by its terms or implication was governed by English law. The Court held that there was a good arguable case that there was a contract and that the contract was, by its terms or implication, governed by English law. That was sufficient to bring the case within the relevant English rule equivalent to O. 11, r. 1(e)(iii) RSC. While I accept that certain concessions were made on behalf of the defendants in the appeal in that case, that case is authority for the proposition advanced by Microsoft Ireland that since each of the agreements at issue contain an express choice of Irish law as the law governing the relevant agreement, the putative proper law of the contract is Irish law, notwithstanding the issues as to lack of authority raised by the defendants in that case.

130. A similar conclusion was reached by the English Court of Appeal in *Britannia Steamship Insurance Association Limited v. Ausonia Assicurazioni S.p.A.* [1984] 2 Lloyd's Rep. 98 ("*Britannia Steamship*"). In that case, the plaintiffs claimed against the defendants under two contracts of reinsurance contending that under those contracts the defendants had agreed to accept the reinsurance of certain risks insured by the plaintiffs. Both contracts were, by their terms or by implication, governed by English law, within the meaning of the equivalent English rule to O. 11, r. 1(e)(iii) RSC and the proper or putative proper law of the contract was English law. The essential dispute between the parties was whether or not those contracts were validly made and, therefore, binding. The resolution of

that issue was dependent on whether the contracts were signed by those having ostensible authority and, if not, whether the contracts were ratified by those who had ostensible authority to ratify. It will readily be appreciated that those are similar issues to those arising in the present case. Leave to serve out of the jurisdiction was granted to the plaintiffs. An application by the defendants to set aside such service was dismissed by the High Court and an appeal from that decision was dismissed by the English Court of Appeal. It was not disputed in that case that the proper or putative proper law of the contracts was English law. It was also accepted that the apparent authority of an agent and the question of ratification was governed by English law. The English Court of Appeal held that the proper law of the contract was English law because the contract had its closest and real connection with English law (although there was no express choice of English law in the contracts at issue in that case). It was not disputed before the English Court of Appeal that the plaintiffs had a *"good arguable case"* and the sole question was whether the plaintiffs had made it *"sufficiently to appear to the court that the case was a proper one"* for service out of the jurisdiction (under the equivalent English rule to O. 11, r. 5 RSC in this jurisdiction). To that extent, the issue in the case was somewhat different to the issue which I am now considering. However, the following *dicta* of Ackner L.J. are relevant. He stated:-

> *"Once it is accepted that English law was the proper law of the contracts, if contracts had been entered into, then it seems to me that it is for English law to decide whether the conduct of the two 'managers' of the defendants who had signed the agreements had been so held out by the defendants as to give rise to a valid plea of ostensible authority, or whether the conduct which has been referred to in summary by the learned judge was such as, under English domestic law, to have amounted to a ratification of the disputed contracts. This does not seem to me to involve the application of any English private international law. Once it is accepted*

that the proper law, or the proper putative law (sic), is English, then under English law the plaintiffs did have what the judge referred to as 'the rights', that is, the entitlement to say: 'We can validly base our case upon ostensible authority and/or upon ratification in the manner in which we have alleged'."

(per Ackner L.J. at pp. 100-101)

131. It is notable that there was agreement in that case that the proper law or the putative proper law was English law and that the apparent authority of an agent and the question of ratification was governed by English law. There is no such acceptance by the defendants in the present case. It is, however, relevant that the English Court of Appeal did not, in any way, dispute the correctness of those accepted propositions and proceeded on the basis that they were correct. The case does, therefore, provide some support for the proposition advanced by Microsoft Ireland and is against that advanced on behalf of the defendants, although, in light of the concessions made in the case, it is not a particularly strong authority either way.

132. Subsequent English cases confirmed that where an issue as to the alleged ostensible authority of a person to enter into a contract on behalf of another arose in the context of an application for leave to serve out of the jurisdiction and where that contract contained an express choice of law clause providing for English law, the issue of ostensible authority was to be determined by English law as the putative proper law.

133. That was the conclusion reached by Steel J. in the English High Court in *Rimpacific Navigation Inc v. Daehan Shipbuilding Co Limited* [2009] EWHC 2941 (Comm) ("*Rimpacific*"). The court in that case rejected a challenge to jurisdiction where reliance was placed on contracts which contained an express English law choice of law clause, where the argument was that the person who signed the contracts at issue had no actual authority to do so. Reliance was placed by the plaintiffs, in resisting an application challenging jurisdiction, on the ostensible authority of the signatory. Referring to cases,

including *Britannia Shipping*, the Court held that the ostensible authority of the signatory had to be determined as a matter of English law (as the law applicable to the alleged agreements relied upon by the plaintiffs). The Court cited with approval *Merrill Lynch Capital Services Inc v. Municipality of Piraeus* [1997] C.L.C. 1214 ("*Merrill Lynch*") where, the High Court (Cresswell J.) stated:-

> *"Questions of ostensible authority, ratification and estoppel are governed by English law as the putative proper law."* (at p. 1231)

134. The English cases have confirmed that the putative proper law of the contract at issue should govern the question as to the ostensible authority of the person who entered into the contract relied upon, where the actual authority of that person is disputed. The territory was extensively considered by the English High Court in *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Company Limited* [2013] EWHC 4071 (Comm) ("*Habas Sinai*"). That case dealt, in part, with an application to challenge the jurisdiction and award of an arbitrator on the grounds that the arbitrator erred in finding that there was a binding arbitration agreement between the parties, in circumstances where it was alleged that agents did not have actual or ostensible authority to conclude the arbitration agreement on behalf of the claimant. There was no express choice of law in the agreement and the argument, on the basis of clear authority, was that the applicable law was that of the country of the seat of the arbitration. The claimant argued, however, that there was good reason as to why the court should disregard the seat of the arbitration when seeking to determine the applicable law. Although, unlike the present case, the contract at issue in *Habas Sinai* did not contain an express choice of law, and although the route to determining the applicable law was, therefore, different in that case to the present case, the conclusions reached by Hamblen J. on the issues raised in the case are very relevant for present purposes. The claimant had argued in that case, based on certain passages in *Dicey* (15th Edition) (on which the defendants in the present case also relied), that the court

should not have regard to a choice of law provided for in the contract, where it was alleged that the contract was entered into in excess of the actual authority of the agent who purported to enter into it on behalf of its principal.

135. Hamblen J. rejected the claimant's arguments in that case in a series of conclusions, some of which are relevant for present purposes (see paras. 106-119 of the judgment). It is unnecessary to set out the conclusions in full, but I will refer to the most relevant ones here. In his third conclusion, Hamblen J. stated that the claimant's argument *"potentially makes major and uncertain inroads into the well-established common law doctrine that validity is determined by the putative proper law of the contract"*. In his fifth conclusion, Hamblen J. stated that the claimant's argument *"would potentially affect the validity of many contracts which would otherwise be valid and binding because the agent had ostensible authority as a matter of English law as the putative applicable law…"*. In his eighth conclusion, he stated that there was no authority in support of the claimant's argument or for the argument put forward in *Dicey*. In his ninth conclusion, the judge stated that there were *"a number of decisions in which ostensible authority has been treated as being governed by English law as the result of putative agreement to a clause in a contract without any consideration of actual authority to agree that clause and notwithstanding that it was being alleged that there was no actual authority to enter into the contract"* (para. 115).

136. Hamblen J. referred to a number of the cases, including *Merrill Lynch* and *Rimpacific* and concluded that there were *"authoritative decisions in which arguments similar to that advanced by* [the claimant] *have been rejected"*. He referred in that context to *The Parouth.* He noted that in that case, the English Court of Appeal held that *"it was inconsistent with the common law conflicts rule that the formation of a contract is governed by the putative applicable law of the contract if validly concluded"*(para. 116). The judge noted that *The Parouth* was followed by the English Court of Appeal in *The*

Atlantic Emperor [1989] 1 Lloyd's Rep. 548. He concluded that even if it was the case that there was no actual authority to agree the arbitration clause providing for arbitration in London, the applicable law in respect of the arbitration agreement was still English law (at para. 118).

137. It was accepted by the claimant in *Habas Sinai* that the law governing the question as to whether the agents had ostensible authority to bind the claimant to an arbitration agreement, and any issues of ratification of their authority to do so, was the same as the law governing the putative arbitration agreement and, on the findings made by the court, that was English law (para. 121).

138. In my view, *Habas Sinai* provides strong support for the position advanced by Microsoft Ireland that the law to be applied in determining whether the signatories of the three agreements at issue had apparent or ostensible authority or whether their authority and the agreements themselves were ratified is the putative proper law of the relevant contracts, in this case, Irish law. That is the law provided for in the choice of law clauses in each of the three agreements at issue. I will have to decide, in light of the various arguments advanced by the defendants, whether I should accept that the position adopted by the English courts is also the position in Irish law. Before expressing my ultimate conclusion on that issue, there is one further English case to which I must refer: *PEC Limited v. Asia Golden Rice Company Limited* [2014] EWHC 1583 (Comm) ("*PEC*").

139. In *PEC* there was an issue as to whether the claimant had entered into an arbitration agreement in relation to a contract to buy rice. The claimant's case was that neither of the individuals who allegedly orally agreed to the contract and the arbitration agreement and who signed an alleged written confirmation of that agreement had authority to enter into the contract or the arbitration agreement. The question of the apparent authority of one of the agents arose for consideration. The English High Court (Andrew Smith J.) had to consider whether that issue was to be determined by English law or Indian law. The

defendant relied on the principle stated in *Dicey* (15th Ed.) that the issue as to whether an agent is able to bind a principal to a contract with a third party, or to a term of that contract, is *"governed by the law which would govern that contract, or term, if the agent's authority were established"* (*Dicey* (15th Ed.) at para. 33R-432). On that basis, it was contended that the issue of the agent's apparent authority was governed by English law as the governing law of the putative purchase agreement. While recognising the general principle stated in *Dicey*, the claimant submitted that it was not an absolute rule and that it should not be followed if it would lead to unfairness. The claimant submitted that the issue was governed by Indian law, as that was the law most closely related to the issue of whether the claimant, an Indian government company, had held out the agent, an Indian businessman, as having authority to make contracts for international trading in rice.

140. The Court agreed that if the issue were not decided by reference to the governing law of the putative contract but rather the law most closely connected with the issue itself, it would be Indian law. The Court had sympathy with the claimant's submission that the general principle stated in *Dicey* (above) would not be applied if *"it resulted in distinct unfairness or there were other strong reasons for modifying it"* (para. 75). The Court gave an example of where this might arise, where an agent *"chose a law unconnected with the contract simply to clothe himself with authority"*. However, the Court was not persuaded that in the case at hand, *"fairness or any other reason"* demanded that it should depart from the general principle. Andrew Smith J. held that the parties had impliedly chosen that their dealings were to be governed English law by agreeing to English arbitration. In those circumstances, he held that it was *"entirely fair"* to decide whether the agent had apparent authority to make the purchase agreement at issue by reference to English law (para. 75).

141. The decision in *PEC* supports the general principle referred to in the earlier authorities that the putative proper law of the contract should determine the question of apparent or ostensible authority, although the court did raise the possibility that if the

application of the general principle would result in *"distinct unfairness"*, or if there were *"other strong reason for modifying it"*, the issue might be determined by reference to a different law. Those observations were *obiter*, but I will nonetheless consider whether if I accept the general principle relied on by Microsoft Ireland that Irish law, as the putative proper law of all of the agreements at issue, should govern the question of the apparent or ostensible authority of those who signed the agreements on behalf of ACS and/or NTG, it would nonetheless be unfair to apply that principle in the present case.

142. As noted earlier, the parties made reference to a number of textbooks which have addressed this issue and to which I will now make brief reference. It is fair to say that while the authors of some of textbooks question the correctness of the approach taken by the English Courts and suggest potential alternative ways of dealing with the issue, all of the authors accept that the approach adopted by the English Courts is to determine questions of apparent or ostensible authority and related questions such as ratification by reference to the putative proper law of the relevant contract.

143. While *Dicey* (15th Ed.) (2012) (para. 33-447) questioned the approach taken by the English Courts, the authors comments were criticised and were not followed by Hamblen J. in *Habas Sinai*, as noted earlier.

144. In *Agreements on Jurisdiction and Choice of Law* (2008), *Briggs* referred to the conundrum faced by a court in having to decide what law should be applied to determine the validity of a contract and whether it should be the proper or putative proper law of that contract or some other law. At para. 2.32, the author stated:-

> *"It is notorious that the identification of a choice of law rule to assess such arguments* [on validity etc.] *is difficult. Though the common law never came to a wholly satisfactory solution, the reason for the failure was easily understood. A court will wish to give effect to an agreement on choice of law if there was one, and will wish to not do so if the proposed choice of law was not agreed to. But it will*

have to reach this decision before the facts have had [the] *chance to become clear, and if 'agreement' means 'contractual agreement', the imagery of the chicken and the egg is unavoidable. If a contract is valid, it would be unprincipled for a law other than that chosen for it to govern these issues of contractual validity. If the alleged contract is not valid, it would in principle be just as objectionable to look to the law which would have governed if it had been valid and effective to determine issues which put that very validity in question. It is generally understood that common law adopted a 'putative proper law' to solve the problem, though this plainly failed to quell the objection that a law derived from the alleged contract which one party sought to uphold was also derived from the denied, non-contract, which the other party said generated nothing at all…"* (para. 2.32, p. 38, footnotes omitted)

145. While describing the common law approach as having a *"fundamental flaw"*, and while suggesting that the approach adopted under the Rome Convention (now the Rome I Regulation, i.e. Regulation (EC) No. 593/2008 on the law applicable to contractual obligations) provided for a better solution, nonetheless the author accepted that the common law approach was as stated. He described the approach adopted by the common law as involving *"whirlpools of theory"*.

146. In a later paragraph, the author again accepted that it was:-

"…now generally accepted and where the matter is contested, an expressly chosen law may be applied to answer the question whether a substantive contract came into being in the first place. Problems of contractual formation are notorious for throwing up puzzles which test logic to destruction: if the parties do not agree that they made a binding contract, it is hard to see how the law which governs or would have governed that both – alleged – and – denied contract can have any legitimate role in resolving the dispute about formation. If one party admits that there were

negotiations but denies that this resulted in contractual agreement, why should the law which would have governed that alleged contract be used to test a proposition which is, logically, anterior to it? To put the matter yet another way, though a contract has a governing law, that governing law comes from and after the contract. To use it to decide whether there was a contract in the first place is to place the cart before the horse. However, if the agreement on choice of law stands apart from the substantive contract, it may be seen to have an independent basis for application and use, even though the validity and existence of the substantive contract which governs it has not yet been established." (para. 3.64, pp. 94-95, footnotes omitted)

147. The author referred to *The Parouth* as an example of the *"generally accepted"* position adopted in English law to resolve this sort of issue. Therefore, while criticising the solution adopted by the English Courts, *Briggs* nonetheless accepted that that is the approach which was applied by the English Courts and, since the publication of that textbook, it has been further considered and applied, as noted earlier.

148. In *The European Private International Law of Obligations* (4th Ed.) (2014), *Plender* and *Wilderspin* discussed this issue at para. 5-058. This is how they put it:-

"…[I]f the agent acts outside the scope of his actual authority, it is relevant to determine whether he nonetheless had ostensible authority to bind the principle. Which law should govern that determination? On one view, the question of ostensible authority should be referred to the law of the country in which the agent has acted. This approach would seem to be fair if the agent actually had authority to act in that country (although, ex hypothesi he must be acting outside the terms of that authority for the problem to have arisen) but it may be unfair to the principle if the agent had no authority whatsoever to act in that place. On another view, the question should be determined by the law applicable to the contract created

> *between the agent and the third party. This is the solution which has been adopted under English law which focuses on the situation seen from the point of view of the third party, but it, too, may be inequitable to the principle if the agent and third party have selected as applicable law a law which has no objective connection with the situation and whose application could not reasonably have been anticipated by the principle. A third solution might be to refer the matter to the law which would have been applicable if parties had not selected the applicable law, i.e. the law of the country with which the situation has its closest connection. None of the solutions appears ideal, although the third may, perhaps, be preferred."* (para 5-058, p. 123, footnoted omitted)

149. While referring to these various views, the authors expressly acknowledged that the solution adopted under English law is that the question as to whether the agent had ostensible authority to bind the principal should be determined by the law applicable to the contract created between the agent and the third party. They referred to *Rimpacific* as an example of the approach taken by the English Courts. However, they expressed the view that that might be unfair on the principal in certain circumstances, such as where the law chosen by the agent and the third party had *"no objective connection"* with the situation and where the application of that law *"could not reasonably have been anticipated by the principal"*. That possibility was subsequently considered by Andrew Smith J. in *PEC*.

150. It is difficult to see how it could be said that the law chosen in the choice of law clauses in the agreements at issue in this case had no objective connection with the parties and could not reasonably have been anticipated by the defendants, in light of the long history of dealings between them. However, I will consider whether this is so when considering the evidence and material before the court which must, of course, be assessed by reference to the standard applicable to this stage of the proceedings, rather than to the standard which would apply at the trial.

151. The final textbook to which the parties referred was *Stone on Private International Law in the European Union* (4th Ed.) (2018). At para. 15.28, when considering the authority other than actual authority of an agent who has purported to enter into an agreement with a third party on behalf of its principal, the author noted that the *"current trend in English law is to refer to the putative proper law of the main contract (the contract concluded between the agent and the third party), as determined under the Rome I Regulation"*. The author made reference in that context to various cases including *Rimpacific*, *Habas Sinai* and *PEC*. The author noted that the putative proper law of that contract is used to determine the apparent or ostensible authority of the agent and questions of ratification. The author observed that different solutions were adopted elsewhere, such as under The Hague Convention of 14th March, 1978 on the law applicable to agency. He noted that neither of the approaches was satisfactory in that both involved in some cases *"an undesirable risk of imposing obligations under the main contract on the principle by reference to a law with which he has no direct connection and whose application he had no reason to foresee"* (echoing what was said in *Plender and Wilderspin*). However, the author continued (at para. 15.29) by stating that the English rule referring these issues primarily to the putative proper law of the main contract *"seems acceptable"*, but did suggest that there should be an exception to the rule analogous to that provided for in Article 10(2) of the Rome I Regulation in relation to formation such that the law governing the main contract might be disapplied if it appeared, from the circumstances, that it would be unreasonable to determine the effect of the principal's conduct by reference to that law. It was noted that that suggestion had some support in the *dicta* of Andrew Smith J. in *PEC*.

(ii) Conclusion on Apparent/Ostensible Authority Applicable Law

152. While I accept that it might on the face of it seem to be unfair to assess the question of the apparent or ostensible authority of an agent who has purported to enter into a contract with a third party on behalf of its principal which contains a choice of law clause

by reference to that law, where the authority of the agent is challenged, it might also be unfair not to apply that law, but some other law. Whichever approach is taken might in some circumstances be seen to be unfair. However, some solution has to be adopted to resolve the question as to what law should be applied to determine the apparent or ostensible authority of the agent in such circumstances. The English cases and all of the textbooks relied on acknowledge that the approach adopted under English law is to apply the putative proper law of the contract in determining the issue of apparent or ostensible authority and ratification. While the authors of the textbooks criticise that approach and suggest ways of improving it, they accept that it is the approach adopted by English law and that has been confirmed in *Habas Sinai* and *PEC*.

153. I find the approach taken by the English Courts and, in particular, by Hamblen J. in *Habas Sinai* and by Andrew Smith J. in *PEC* persuasive. In my view, it also represents the approach which should be adopted under Irish law. It is, in my view, fairer to look at the question of apparent or ostensible authority and ratification from the point of view of the third party with whom the allegedly unauthorised agent has purportedly entered into the contract on behalf of its principal. Where the third party enters into the contract on the basis of a choice of law clause, it is reasonably entitled to believe that the law provided for in that clause is the law which should be applied in determining questions of the apparent or ostensible authority of the agent and ratification. However, I also accept that there may be circumstances in which it might be particularly unfair on the principal to apply that law. It would be appropriate, in my view, to provide for an exception to the applicable law being the putative proper law of the contract, where that would result in particular unfairness to the principal or where there are other good reasons for not applying that law. In that regard, I would accept as also representing Irish law the approach adopted by Andrew Smith J. in *PEC*, which would enable a court in exceptional circumstances not to apply that law where it would be particularly unfair on the principal, such as where the

chosen law was selected by the agent for the purpose of clothing the agent with authority it would not otherwise possess and where the chosen law could not reasonably have been anticipated by the principal.

154. To summarise, therefore, I am satisfied that the questions as whether the signatories of the three agreements had apparent or ostensible authority or whether there was ratification or whether the defendants are estopped from denying the validity of the agreements should all be determined by reference to Irish law as the law chosen in the choice of law clauses in each of the three contracts, unless it could be shown that the application of that law would be particularly unfair on the defendants. I will, therefore, consider whether Microsoft Ireland has a *"good arguable case"* that the defendants are bound by the agreements by reason of the alleged apparent or ostensible authority of the signatories, that the defendants have ratified the agreements and the authority of the signatories and that the defendants are estopped from denying the existence and validity of the agreements by reference to Irish law, as the law provided for in the choice of law clause contained in each of the three agreements, unless to do so would be particularly unfair on the defendants.

(4) <u>Actual Authority: Application of Saudi Law</u>

155. As I concluded earlier, the actual authority of the persons who signed the agreements on behalf of ACS and/or NTG must be determined in accordance with Saudi law. Having regard to the burden of proof and the standard of proof which must be met by Microsoft Ireland on this application, in order for it to establish the jurisdictional gateway for the proceedings under O. 11, r. 1(e)(iii) RSC on the basis of the actual authority of those persons, Microsoft Ireland would have to establish that there is a *"good arguable case"* that those persons had actual authority to sign the agreements on behalf of ACS and/or NTG.

156. There is no real dispute on the facts or on the law on the issue of the actual authority of the persons who signed the agreements.

157. With regard to the two Microsoft Channel Partner Agreements, the position may be summarised as follows. Mr. Abdulaleem signed the First Microsoft Channel Partner Agreement on behalf of ACS on 29th September, 2014. Mr. Mounir signed the amendment to that agreement on 21st January, 2016. Mr. Mounir signed the Second Microsoft Channel Partner Agreement on behalf of ACS on 1st November, 2016.

158. Mr. Al-Ballaa exhibited the amended articles of association of ACS dated 27th September, 2010 to his first affidavit. While the translation of the document exhibited refers to it as amendments to the articles of association of ACS, the document is referred to in Mr. Al-Ballaa's first affidavit (at para. 21) as the amended memorandum of association of the company. The three legal experts who provided opinions on Saudi law and gave evidence referring to the articles of association of the company, rather than the memorandum. While nothing turns on it, I am assuming that the constitution of ACS (and indeed that of NTG also) is set out in the articles of association of the company as amended.

159. Article 10 of the articles of association of ACS, which concerns the management of the company, was amended on 27th September, 2010 (before either of the Microsoft Channel Partner Agreements were signed by Mr. Abdulaleem and Mr. Mounir). The amendment to article 10 stated that ACS was to be managed by a Board of Directors consisting of three directors (including Mr. Al-Ballaa) and that the Board was to be responsible for the management of ACS from the date of the amendment. Article 10 (as amended) sets out in some detail the powers of the directors. It states specifically that they *"have the right to conclude all contracts and agreements to which the company is a party inside and outside the Kingdom, for example, contracts of sale, purchase, tenders…"*. Article 10 (as amended) states that the board of directors *"has the right to delegate all or*

some of the powers conferred on them by others under written authorisation or by virtue of legal instruments or powers of attorney…". It further states that Mr. Mohamed Rashid Al-Ballaa (who appears to be the same Mr. Al-Ballaa who swore the affidavits on behalf of the defendants) was appointed Chairman of the Board of Directors as well as *"Executive Director"* of the company *"to manage day to day business and implement policies and programs formulated by the Board of Directors"*. It further states that the Board *"shall authorise the Chairman… and the Executive Director in all the powers vested in the Board of Directors"* and that the Chairman and Executive Director *"have the right to delegate all or some of the powers vested in them by others under written authorisation or under the instruments or legal powers of attorney…"*.

160. While there is a dispute between the parties and their respective Saudi legal experts as to whether any power of attorney or written authorisation to others to exercise a power delegated by the Board of Directors or by the chairman and Executive Director would be publicly available, there is no dispute on the affidavits that Mr. Abdulaleem and Mr. Mounir were not authorised on foot of a power of attorney or written authorisation or other legal instrument to sign the Microsoft Channel Partner Agreements on behalf of ACS. That point was expressly asserted by Mr. Al-Ballaa in his first affidavit (at paras. 21 and 26) and was not disputed in the affidavits sworn by Mr. Moran on behalf of Microsoft Ireland. Nor was it disputed by Mr. Al Dehais, the legal expert on behalf of Microsoft Ireland, that in order for the signatories to have actual authority to enter into the relevant agreements on behalf of ACS, a power of attorney, written authorisation or other legal instrument would have been required. It follows, therefore, that in the absence of a power of attorney, written authorisation or other legal instrument expressly authorising Mr. Abdulaleem and Mr. Mounir to sign the agreements on behalf of ACS, those individuals were not expressly authorised and did not have actual authority to do so as a matter of Saudi law.

161. I am satisfied, therefore, that on this issue, this is one of the rare cases referred to by Clarke J. in *IBRC* where the argument, evidence and materials put forward by the defendants provide a *"knockout blow"* to any case which Microsoft Ireland might have wished to make to the effect, that the persons who signed the Microsoft Channel Partner Agreements had actual authority to do so. It seems clear that they did not have actual authority. In fairness, Microsoft Ireland did not press the case on actual authority, but rather relied on apparent or ostensible authority and related points. It can safely be concluded, therefore, that Microsoft Ireland has not demonstrated (and did not really attempt to demonstrate) that it had a *"good arguable case"* that the signatories of the Microsoft Channel Partner Agreements had actual authority to do so. Therefore, Microsoft Ireland has not established that the jurisdictional gateway for its claim under those agreements has been opened under O. 11, r. 1(e)(iii) RSC based on any actual authority of the signatories to conclude the Microsoft Channel Partner Agreements on behalf of ACS.

162. A similar conclusion must be reached for the same reasons in respect of any alleged actual authority on the part of Mr. Al Zeer who signed the Guarantee on behalf of NTG on 19th December, 2011. Although he was described as the "*Managing Director*" of NTG, Mr. Al Zeer was not listed as a member of the Board of Directors in the amended articles of association of NTG dated 10th October, 2010 and was not identified in that document as a person who had the right to conclude contracts and agreements to which NTG was a party inside and outside the Kingdom of Saudi Arabia. Nor was Mr. Al Zeer a person to whom was expressly delegated, under a power of attorney, written authorisation, or other legal instrument, the power to enter into a contract on behalf of NTG. For the same reasons as apply in respect of ACS, Microsoft Ireland does not have a *"good arguable case"* to open the jurisdictional gateway under O. 11, r. 1(e)(iii) RSC on the basis of any actual authority on the part of Mr. Al Zeer to enter into the Guarantee on behalf of NTG.

(5) Apparent or Ostensible Authority: Application of Irish Law

(a) General

163. I have concluded earlier that, subject to any particular unfairness on the defendants, I must apply Irish law in considering whether the persons who signed the two Microsoft Channel Partner Agreements and the Guarantee, namely, Mr. Abdulaleem, Mr. Mounir and Mr. Al Zeer, had apparent or ostensible authority to enter into the relevant agreements with Microsoft Ireland on behalf of ACS and/or NTG, whether on the basis of the flexible standard of *"good arguable case"* referred to earlier or on the basis of the *"better of the argument"* gloss on that standard such that its claim falls within the jurisdictional gateway under O. 11, r. 1(e)(iii) RSC. I stress that I am not dealing with the overall merits of Microsoft Ireland's claim against the defendants. I will refrain from expressing any conclusions on the overall merits of the claim, save on the question as to whether Microsoft Ireland has established a serious issue to be tried on the merits (which I consider briefly later). The merits are for determination at the trial and not on this interlocutory jurisdiction application.

164. I am satisfied that for the various reasons set out below, on the basis of the evidence, material and arguments, Microsoft Ireland has discharged the burden of demonstrating that it has a *"good arguable case"* that the persons who signed the three agreements had apparent or ostensible authority to enter into those agreements on behalf of ACS and/or NTG, as the case may be. Alternatively, I am satisfied on the basis of that same material that Microsoft Ireland has demonstrated a *"good arguable case"* that the defendants are estopped from denying the authority of the persons who signed the agreements and the existence and validity of the agreements themselves. I am also satisfied on the basis of that material that Microsoft Ireland has demonstrated a *"good arguable case"* that the authority of the persons who signed the agreements and the agreements themselves were ratified by those responsible for the management and operation of the defendant companies.

(b) Irish Legal Principles: Apparent and Ostensible Authority

165. There is no dispute between the parties as to the relevant legal principles under Irish law for establishing apparent or ostensible authority. Both sides referred to the decision of the Supreme Court in *Kett v. Shannon* [1987] ILRM 364 ("*Kett*") and agreed that it is the leading authority on the law on apparent or ostensible authority in this jurisdiction. In his judgment for the Supreme Court, Henchy J. distinguished between actual authority and ostensible authority. He observed that actual authority existed when authority is based on *"an actual agreement between the principal and the agent"*. However, he stated that:-

> *"Ostensible authority, on the other hand, derives not from any consensual arrangement between the principal and the agent, but is founded on a representation made by the principal to the third party which is intended to convey, and does convey, to the third party that the arrangement entered into under the apparent authority of the agent will be binding on the principal…"* (per Henchy J. at p. 366)

166. Henchy J. continued:-

> *"The essence of ostensible authority is that it is based on a representation by the principal… to a third party… that the alleged agent… had authority to bind the principal by the transaction he entered into."* (per Henchy J. at p. 366)

167. Henchy J. explained that the law on ostensible or apparent authority was *"fully and illuminatingly dealt with"* by Diplock L.J. in the English Court of Appeal in *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Limited* [1964] 2 QB 480 ("*Freeman & Lockyer*"). In his judgment in that case, Diplock L.J. held that in order to establish ostensible authority to contract, the following matters had to be proved:-

> *"(1) That a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;*

(2) *that such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates;*

(3) *that he (the contractor) was indeed induced by such representations to enter into the contract, that is, that he in fact relied upon it; and*

(4) *that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority enter into a contract of that kind to the agent."* (per Diplock L.J. at 506)

168. In *Kett*, having referred to *Freeman & Lockyer*, Henchy J. that referred to a passage from the judgment of Robert Goff L.J. in the English Court of Appeal in *Armagas Limited. v. Mundogas SA* [1985] 3 All ER 795 ("*Armagas*"), where he stated:-

> *"It appears, from that judgment* [i.e. Freeman & Lockyer]*, that ostensible authority is created by a representation by the principal to the third party that the agent has the relevant authority, and that the representation, when acted on by the third party, operates as an estoppel, precluding the principal from asserting that he is not bound. The representation which creates ostensible authority may take a variety of forms, but the most common is a representation by conduct, by permitting the agent to act in some way in the conduct of the principal's business with other persons, and thereby representing that the agent has the authority which an agent so acting in the conduct of his principal's business usually has."* (per Robert Goff L.J. at 804)

On the facts, the Supreme Court found that there was no representation made and, therefore, no apparent or ostensible authority.

169. As noted in <u>*Courtney*</u>*: The Law of Companies* (4th Ed.) (2016), at para. 7.022:-

"The doctrine of apparent or ostensible authority may be seen as a form of estoppel which prevents the company from denying an agent's ostensible authority, which the company represented the agent as having. The law views the company as 'misrepresenting' the agent's authority, or lack of it. In consequence the company is estopped from later denying that agent's authority to bind the company. Implicit in this analysis is that there must be a representation from someone with actual authority." (para. 7.021, pp. 399-400)

170. As is clear from the Supreme Court decision in *Kett* and from the *dicta* of Robert Goff L.J. in *Armagas* which was approved by the Supreme Court, the representation creating the ostensible authority can be by conduct where the principal has permitted the agent to act in the conduct of the principal's business with third parties and has thereby represented that the agent has the relevant authority.

171. Microsoft Ireland relied primarily on the alleged representation by conduct by the defendants as to the authority of the persons who signed the agreements to do so on behalf of the relevant defendant. The defendants contended that the evidence was not such as to establish, as a matter of Irish law, that the persons who signed the agreements had apparent or ostensible authority to do so. They contended that even if (contrary to their principal submission which was that Saudi law governed this issue) the issue was to be determined by reference to Irish law, it was still necessary to have regard to the law and commercial practice in Saudi Arabia in relation to corporate governance, capacity and authority and as to the expectation and understanding concerning job titles and the usual authority which comes with those titles in Saudi Arabia. In that regard, the defendants relied on the evidence of Mr. Al-Ballaa and on the evidence of the Saudi lawyers called by them.

(c) Conclusions on Apparent/ Ostensible Authority Under Irish Law

172. I am satisfied on the basis of the evidence and materials and argument before me that Microsoft Ireland has demonstrated a *"good arguable case"* that the persons who

signed the two Microsoft Channel Partner Agreements on behalf of ACS, Mr. Abdulaleem and Mr. Mounir, and the person who signed the guarantee on behalf of NTG, Mr. Al Zeer, had apparent or ostensible authority to do so on behalf of the relevant defendant company.

(i) The Microsoft Channel Partner Agreements: ACS

173. With regard to the First Microsoft Channel Partner Agreement, Mr. Mr. Abdulaleem who signed that agreement on behalf of ACS was described in the agreement as *"General Manager"*. The impression given in the agreement was that Mr. Abdulaleem was the general manager of ACS. However, Mr. Al-Ballaa explained that Mr. Abdulaleem was not the general manager of ACS as such but of Arabsoft, a *"department"* of ACS (para. 12 of Mr. Al-Ballaa's third affidavit). However, when one looks at the other documents apparently signed by Mr. Abdulaleem in respect of sales of Microsoft product by ACS, it is clear that he was a person who was authorised to sign documents and to enter into arrangements on behalf of ACS valued at many millions of US dollars. The extension to the First Microsoft Channel Partner Agreement was signed by Mr. Mounir who was described in the document amending the agreement as the *"General Manager, Arabsoft"*. Mr. Mounir signed the Second Microsoft Channel Partner Agreement, again as the *"General Manager, Arabsoft"*. The documents exhibited by Mr. Al-Ballaa also disclosed that Mr. Mounir signed documents on behalf of ACS in respect of sales valued at millions of US dollars. Mr. Al-Ballaa stated on affidavit (at para. 12 of his third affidavit) that in their capacity as general managers of Arabsoft, Mr. Abdulaleem and Mr. Mounir were *"authorised to negotiate purchases from Microsoft and sales to end customers"*.

174. Those persons do appear to have been held out as having that authority in some of the documents exhibited by Mr. Al-Ballaa.

175. Examples of those documents include the following. Mr. Abdulaleem signed Microsoft volume licensing-channel sheet-final pricing documents in respect of a number of large customers of ACS in his capacity as "*General Manager*" and "*Partner Contact*" in

ACS. These documents include the final pricing sheet in respect of a three-year agreement with the National Commercial Bank (NCB) with a total deal value (over three years) of US$7,912,824.51. Mr. Abdulaleem signed a similar final pricing document in the same capacity in respect of the customer, Saudi Basic Industries Corporation (SABIC) with a total deal value over three years of US$26,794,093.02. He signed a similar document in respect of the Ministry of Labour where the total deal value over three years was US$3,696,810.99 and another in respect of Saudi Arabian Oil Company (Saudi Aramco), the total deal value of which over three years was US$31,107,325.11 (the copies of these documents are all in tab 2 of exhibit "RMAB1" to Mr. Al-Ballaa's first affidavit).

176. Mr. Mounir signed final pricing documents in respect of a number of customers in respect of substantial sums including a final pricing document signed by him in his capacity as "*General Manager*" and "*Partner Contact*" within ACS in respect of the National Commercial Bank (NCB) on 19th June, 2016 in respect of a two-year agreement with the value of US$295,120.00. He signed a final pricing sheet in respect of another customer, Abdul Latif Jameel Co Limited on 19th May, 2016 in respect of a three-year agreement with a value (for one year) of US$162,896.45. He signed another final pricing document in the same capacity in respect of another customer, Bank Albilad, on 29th June, 2016 in respect of a three-year deal where the total value over that period was US$1,115,048.24 and another document in the same capacity signed on 21st February, 2016 in respect of the Royal Commission for Jubail & Yanbu in the total amount over three years of US$982,390.08 (all in tab 12 of exhibit "RMAB2").

177. There was undisputed evidence before the Court that Microsoft Ireland had entered into Channel Partner Agreements with ACS dating back to 2000, and copies of such agreements dating from 2007 were exhibited by Mr. Moran to his first affidavit (tab 2 of exhibit "JDPM1"). Most of the agreements in the period between 2007 and 2013 appear to have been signed by the then General Manager of Arabsoft, ACS, Mr. Rafe' Al-Khaldi so

there appears to have been nothing unusual about the General Manager signing the Microsoft Channel Partner Agreements during that period. The first such agreement signed by Mr. Abdulaleem was in 2013 where he signed the relevant agreement in his capacity as "*General Manager*" on 27th September, 2013. It does appear, at least from those agreements, that in respect of the relevant Microsoft Channel Partner Agreements, at least in the period from 2007 up to the date of the First Microsoft Channel Partner Agreement which is at issue in these proceedings, the practice was for the General Manager of Arabsoft to sign the agreement on behalf of ACS. The signing by Mr. Abdulaleem and Mr. Mounir of the First and Second Microsoft Channel Partner Agreements (and the amendment to the First Microsoft Channel Partner Agreement) appears, therefore, to be consistent with the practice adopted up to 2014.

178. When Mr. Mounir took over as General Manager from Mr. Abdulaleem in December, 2015/January, 2016, Emerson Canlas of ACS-Arabsoft sent an email to Victor Molins Vizcaino of Microsoft Ireland on 28th December, 2015 to introduce Mr. Mounir as the new General Manager (tab 16 of exhibit "JDPM1" to Mr. Moran's first affidavit). In a follow-up email to Mr. Vizcaino on 4th January, 2016, Mr. Canlas referred again to *"our New GM"*, Mr. Mounir, and requested that communications be sent to Mr. Mounir's email address and not to that of Mr. Abdulaleem. Mr. Mounir was being introduced as the General Manager and Microsoft Ireland was being requested to communicate with him rather than Mr. Abdulaleem. It is not suggested in any of the affidavits sworn on behalf of the defendants that Mr. Canlas did not have authority to introduce Mr. Mounir as the new General Manager or to request that communications be sent to his email address rather than to Mr. Abdulaleem's.

179. There is evidence that Mr. Al-Ballaa was aware of the fact that Mr. Mounir was being asked to sign the amendment to the First Microsoft Channel Partner Agreement. Mr. Moran exhibited an exchange of emails for the period between November, 2015 to March,

2016 concerning the amendment to the First Microsoft Channel Partner Agreement at tab 8 of exhibit "JDPM2" to his second affidavit.

180. In an email sent by Mr. Al-Khaldi (described as "*Group General Manager, Arabic Computer Systems, Limited*") to Mr. Al-Ballaa, Mr. Al-Khaldi forwarded to Mr. Al-Ballaa an email from Mr. Abdulaleem of the same date which referred to certain certificates. Mr. Al-Ballaa forwarded on those emails to Kostas Bikos (of Microsoft Ireland) and to other Microsoft personnel and copied it various others (including Mr. Al-Khaldi and Mr. Abdulaleem). The attachments to that email were exhibited by Mr. Al-Ballaa (at tab 4 of exhibit "RMAB3" to his third affidavit). One of the three attachments was a *"Non-Exclusive Distributorship Agreement"* between Microsoft Ireland and ACS dated 1st August, 2014. While this appears to be a different agreement to the First Microsoft Channel Partner Agreement signed by Mr. Abdulaleem on 29th September, 2014, it was also signed by Mr. Abdulaleem on behalf of ACS. Further, it provided in Article (10) that the agreement was to be *"governed by and interpreted in accordance with the laws of Ireland"* and that the parties *"consented to the exclusive jurisdiction of and venue in the Irish Courts for all disputes connected to this Agreement"*. It is relevant to observe that Mr. Al-Ballaa sent on the three attachments (including the *"Non-Exclusive Distributorship Agreement"* between Microsoft Ireland and ACS which was signed by Mr. Abdulaleem) to Mr. Bikos of Microsoft Ireland and to others within Microsoft and within ACS itself. There does not appear to be any suggestion at the time from Mr. Al-Ballaa that Mr. Abdulaleem did not have authority to sign that agreement on behalf of ACS. Nor was that suggested in any of Mr. Al-Ballaa's affidavits. It is certainly arguable that by forwarding the agreement as signed by Mr. Abdulaleem, Mr. Al-Ballaa was representing to Microsoft Ireland that Mr. Abdulaleem had authority to sign the attached agreement on behalf of ACS.

181. Mr. Al-Khaldi's email to Mr. Al-Ballaa of 9 November, 2015 also referred to the "*temporary renewal for our partnership that we need MS to extend for one year"* which

appears to be a reference to the proposed amendment to the First Microsoft Channel Partner Agreement which was subsequently signed by Mr. Mounir on behalf of ACS.

182. Mr. Al-Khaldi had received an email in respect of the certificate from Mr. Abdulaleem. As just noted, Mr. Al-Ballaa forwarded on various documents (including the *"Non-Exclusive Distributorship Agreement"* dated 1st August, 2014 between Microsoft Ireland and ACS) to persons within Microsoft Ireland and ACS on 13th November, 2015. On 18 November, 2015, Yasser Hassan of ACS sent an email to Mohammed Fouad of Microsoft in which he sought an update in respect of various issues including an extension to ACS's agreement until June, 2016. After a number of further emails, Mr. Vizcaino of Microsoft Ireland sent an email to Mr. Mounir on 2nd March, 2016, copied to Mr. Al-Ballaa, which confirmed that the First Microsoft Channel Partner Agreement had been signed on behalf of ACS. By that stage, Mr. Mounir had signed the amendment on 21st January, 2016.

183. In the course of this application, Microsoft Ireland made the point that Mr. Al-Ballaa did not query who had signed the amendment (Mr. Mounir) and did not raise any issue in relation to the authority of the person who had signed the agreement on its behalf. In response, at para. 19 of his third affidavit, Mr. Al-Ballaa stated that the email thread was not referring to the Microsoft Channel Partner Agreements but to the requirement to obtain a commercial agency registration certificate from the Saudi Ministry of Commerce for provision on to one of its customers. However, he did not engage on the point that the amendment to the First Microsoft Channel Partner Agreement had been signed on behalf of ACS by Mr. Mounir.

184. Mr. Al-Ballaa was also copied on another email exchange concerning the amendment to the First Microsoft Channel Partner Agreement. The amendment appears to have been sent on behalf of Microsoft Ireland to Mr. Abdulaleem on 18th January, 2016 (a copy of the email was provided at tab 7 of exhibit "JDPM2" to Mr. Moran's second

affidavit). Mr. Abdulaleem forwarded that email on to Mr. Al-Ballaa, Mr. Mounir and Mr. Al-Khaldi. Mr. Mounir then emailed Mr. Vizcaino of Microsoft Ireland later on 19th January, 2016. He did not copy Mr. Al-Ballaa on that email but did copy Mr. Al-Khaldi and Mr. Canlas of ACS. In that email, Mr. Mounir asked for the documentation to be amended to replace Mr. Abdulaleem's name and email details with those of Mr. Mounir. Ultimately, the amendment was signed by Mr. Mounir on 21st January, 2016.

185. Microsoft Ireland relied on that email exchange to show that Mr. Al-Ballaa was aware that the amendment to the agreement was sent to Mr. Abdulaleem and that Mr. Abdulaleem had forwarded it on to (amongst others) Mr. Al-Ballaa to *"do the needful"*. Mr. Al-Ballaa does not appear to have raised any objection to the amendment being signed by Mr. Mounir and does not appear to have made any enquiries as to who was to sign the amendment. Mr. Al-Ballaa did not comment on that particular email exchange in his third affidavit when responding to Mr. Moran's second affidavit. Nor, as noted above, does it appear that Mr. Al-Ballaa raised any issue with Mr. Abdulaleem signing the *"Non-Exclusive Distributorship Agreement"* between Microsoft Ireland and ACS which Mr. Al-Ballaa had forwarded with his email of 13th November, 2015.

186. With regard to Mr. Abdulaleem, Mr. Al-Ballaa exhibited a document to his third affidavit (at tab 3 of exhibited "RMAB3" to that affidavit) which made reference to Mr. Abdulaleem. The document is a *"Microsoft Representative Questionnaire"* apparently completed by Mr. Abdulaleem in August, 2014 and sent to Microsoft Ireland. Mr. Al-Ballaa relied on the document (at paras. 14 and 15 of his third affidavit) and noted that Mr. Abdulaleem described himself *"as being in charge of sales, services and other business relations with Microsoft"* and referred later in the document (according to Mr. Al-Ballaa) to *"the directors of ACS (i.e. those who could have bound ACS to the alleged agreements)"*. Microsoft Ireland, however, relied on that document in support of its

contention that Mr. Abdulaleem had apparent or ostensible authority to enter into agreements with it such as the First Microsoft Channel Partner Agreement.

187. I agree that it does appear to provide some support for Microsoft Ireland's contention. In response to Question 10 in the Questionnaire, Mr. Abdulaleem was described as the *"General Manager"* of Arabsoft and his role and responsibilities with regard to Microsoft were described in the following terms:-

> *"[General Management for whole Microsoft relation in terms of sales, services and other business relation]"*

188. In response to Question 14, which sought a list of the people that owned 5% or more of ACS and the directors or primary officers of the company and its beneficial owners, various names were given including that of Mr. Al-Ballaa (who was described as "*Head of Finance*" and whose role or responsibility with Microsoft work was described as *"running finance and coordinating supplier payments to Microsoft"*) and that of Mr. Al Zeer (who was described as "*Managing Director*" and whose role or responsibility with regard to Microsoft work was described as *"running the group operation including Microsoft business"*).

189. In response to Question 19, Mr. Abdulaleem was identified as the "*Authorised Representative*" and his email and contact details were provided. Mr. Abdulaleem signed the document on 18th August, 2014 having confirmed that the information contained in the Microsoft Representative Questionnaire was correct.

190. It is arguable that the Microsoft Representative Questionnaire provides further support for Mr. Abdulaleem having apparent or ostensible authority to enter into agreements with Microsoft Ireland and that his reference to the directors and others in response to Question 14 does not undermine the relevance of the document in that context and does not necessarily afford support for Mr. Al-Ballaa's contention that the listing of

the directors in the document meant that it was only those persons who could have bound ACS to the agreements relied upon by Microsoft Ireland in the proceedings.

191. Another document relied upon by Microsoft Ireland in support of its claim that Mr. Abdulaleem had apparent or ostensible authority to enter into the relevant agreement with Microsoft Ireland on behalf of ACS was a document said to evidence Mr. Abdulaleem's interaction with Microsoft Ireland in January, 2014 when ACS was put on a *"detailed Performance Improvement Plan (PIP)"*. Microsoft Ireland wrote to Mr. Abdulaleem on 27th January, 2014 referring to an agreement between ACS and Microsoft under which ACS was appointed a "*Large Account Reseller*" dated 27th September, 2013 (tab 10 of exhibit JDPM 1 to Mr. Moran's first affidavit). Microsoft Ireland informed Mr. Abdulaleem that it had activated a detailed PIP that set out areas of improvement and what needed to be done and by when. The letter stated that:-

> *"These targets need to be met, otherwise this might lead to non-renewal/termination of your LAR contract with Microsoft…"*

192. That letter does provide some support for the position that Mr. Abdulaleem had apparent or ostensible authority to deal with Microsoft Ireland in relation to important issues concerning agreements between Microsoft Ireland and ACS, including the potential non-renewal or termination of those agreements. It arguably provides further support for Microsoft Ireland's contention that Mr. Abdulaleem had apparent or ostensible authority to bind ACS.

193. Also, I think potentially relevant, is an email from ACS dated 30th September, 2016 which lists specific invoices issued by Microsoft Ireland to ACS to which a cash payment to Microsoft Ireland of US$7,901,746.62 was made by ACS to Microsoft Ireland's bank account in September, 2016. That email (which was exhibited at tab 5 of exhibit "JDPM1" to Mr. Moran's first affidavit) was copied to Mr Al-Ballaa. It does not appear, at least, from the evidence before the court on this application, that Mr. Al-Ballaa queried why an

amount of almost US$8 million was being paid by ACS to Microsoft Ireland. Nor does it appear that he queried the existence or validity of the agreement under which those payments were made (at that stage the First Microsoft Channel Partner Agreement as extended and amended). Nor does it appear that he queried the authority of the person who signed the agreement with Microsoft Ireland (Mr. Abdulaleem in respect of the First Microsoft Channel Partner Agreement and Mr. Mounir in respect of the amendment to that agreement in January 2016). The Second Microsoft Channel Partner Agreement was signed by Mr. Mounir a few weeks after the email of 30th September, 2016, on 1st November, 2016.

194. Microsoft Ireland has put further evidence before the Court on this application to support its contention that Mr. Al-Ballaa was aware of the Microsoft Channel Partner Agreements. Apart from the examples just referred to, Microsoft Ireland also relied on correspondence between Mr. Al-Ballaa on behalf of ACS and Microsoft Ireland in May and June, 2017 when Microsoft Ireland gave notice of its intention to terminate the Second Microsoft Channel Partner Agreement. Mr. Moran of Microsoft Ireland wrote to ACS on 21st May, 2017 pointing out that ACS was in breach of its agreement with Microsoft Ireland in that more than US$33 million was then allegedly due by ACS to Microsoft Ireland. The letter stated that as a result of the failure to discharge that amount, Microsoft Ireland intended to terminate the agreement and gave 30 days' notice of termination. That letter was copied to Mr. Al-Ballaa's email address on 21 May, 2017 (as appears from the documents contained in tab 9 of exhibit "JDPM1" to Mr. Moran's first affidavit). Mr. Al-Ballaa replied to Mr. Moran and Mr. Bikos of Microsoft Ireland by email sent on 12th June, 2017 and requested that Microsoft Ireland "*cancel the termination letter sent earlier and replace it with a letter of non-renewal of the agreement expiring Aug 2017*".

195. Mr. Al-Ballaa did not appear to question the authority of the person who signed the agreement referred to on behalf of ACS and appears, at least, to have proceeded on the

basis that the agreement was valid and subsisting, while requesting Microsoft Ireland to confirm that it would not be renewing the agreement when it expired in August, 2017.

196. It would also appear to be the case on the basis of the evidence presented on this application that ACS received 4,671 invoices from Microsoft Ireland in the period between 2007 and 2017 in respect of licensed Microsoft offerings and that those invoices had a combined value of US$696.2 million. The vast bulk of that sum was apparently paid by ACS to Microsoft Ireland on foot of those invoices. As recently as September, 2016, ACS made a payment of US$7.9 million to Microsoft Ireland in respect of licensed Microsoft offerings under the Microsoft Channel Partner Agreements. Throughout the period 2007 to 2017, it does not appear that Mr. Al-Ballaa or any other director or controller of ACS raised any issue in relation to the authority of the persons who had signed the Microsoft Channel Partner Agreements on behalf of ACS.

197. It would also appear that the first time at which any issue was raised in relation to the authority of the persons who had signed was in the letter sent by the defendants' solicitors, Hayes, on 12th October, 2018 in respect to the pre-action correspondence from Microsoft Ireland's solicitors, Matheson. In that letter, it was contended that the appointed managers of ACS (including Mr. Al-Ballaa) had not authorised ACS to enter into the Microsoft Channel Partner Agreements and it was said that those persons were not aware that those agreements were executed at all. That does not appear consistent with the evidence and material before the Court on this application. It was contended in the letter that the "*General Managers*" who signed the agreements were not authorised to do so under the articles of association of ACS and that Microsoft Ireland *"was made aware of the limited authority of ACS to enter into such agreements"*. That last point was not pursued by the defendants in the affidavits sworn for the purposes of this application. The case made in those affidavits was that Microsoft Ireland ought to have been aware of the alleged lack of authority of the persons who signed the agreements on behalf of ACS. It

was not maintained on affidavit that Microsoft Ireland was actually aware of that alleged lack of authority. The potential relevance of this letter is that it appears to have been the first time that the question of an alleged lack of authority on the part of those who entered into the agreements on behalf of the defendant companies was raised by the defendants. As this letter was sent after the agreements were entered into, after the licensed offerings were made available to ACS by Microsoft Ireland and after invoices were sent (and some were paid), and to that extent, it may not be probative of Microsoft Ireland's case that the persons who signed the relevant agreements had apparent or ostensible authority to do so. However, it is at least arguable that the letter confirms the absence of any issue concerning the authority of those who signed the Microsoft Channel Partner Agreements and the other agreements before those agreements until the pre-action correspondence was sent by Microsoft Ireland. To that extent, it is at least arguable that the fact that the issue was first raised in the Hayes letter of 12th October, 2018 supports the case made by Microsoft Ireland in respect of the existence and validity of the Microsoft Channel Partner Agreements.

198. It should be said that these are not exhaustive examples of the evidence and material put before the court in respect of the alleged apparent or ostensible authority of the persons who signed the Microsoft Channel Partner Agreements on behalf of ACS. The examples given above represent a selection of material put before the Court. It is also critical to stress that the defendants have disputed the relevance of the material relied upon by Microsoft Ireland and have contended that none of that evidence or material supports the case made that the persons who signed the agreements had apparent or ostensible authority to do so.

199. It is not my function to decide the merits of that issue on this application. It is, however, my view that Microsoft Ireland has established a *"good arguable case"* that the Microsoft Channel Partner Agreements are valid and enforceable and that the persons who

signed those agreements on behalf of ACS had apparent or ostensible authority to do so. Adopting a flexible interpretation and application of the term *"good arguable case"* test, I am satisfied that Microsoft Ireland has put forward good arguments to the effect that the signatories had apparent or ostensible authority to enter into the Microsoft Channel Partner Agreements. In the event that, contrary to the view which I expressed earlier, the notion of a *"good arguable case"* requires Microsoft Ireland to demonstrate that it has the *"better of the argument"*, I am satisfied that it does. That is not to say that at the trial the defendants might succeed in persuading the Court that they have a good answer to the case made by Microsoft Ireland as to apparent or ostensible authority on the merits. Finally, in this context, in the event that the Supreme Court in *IBRC* intended to vary the applicable test (which I do not believe to be the case), I am also satisfied that Microsoft Ireland has put forward sufficient evidence on affidavit and has advanced sufficient arguments to demonstrate that its case on apparent or ostensible authority is, both on the law and on the facts, reasonably capable of being proven at the trial.

200. I do not believe that it is necessary separately to analyse the claim advanced by Microsoft Ireland that it has a *"good arguable case"* that ACS is estopped from denying the existence and enforceability of the Microsoft Channel Partner Agreements. I agree with the defendants that the estoppel claim is bound up with the ostensible authority claim. That is supported by the passage from *Courtney* set out earlier and from the judgment of the Supreme Court in *Kett* and from the *dicta* of Robert Goff L.J. in *Armagas* which was cited with approval by the Supreme Court. If I am wrong about that and if it is necessary separately to consider the estoppel claim, I should make clear that I am satisfied that Microsoft Ireland has demonstrated a *"good arguable case"* to the required standard that ACS is estopped from denying the existence and enforceability of the Microsoft Channel Partner Agreements and, in particular, the authority of the persons who signed those agreements on its behalf for all of the reasons outlined above.

201. In light of those conclusions, it is, strictly speaking, not necessary for me to go on to consider Microsoft Ireland's claim that it has demonstrated a *"good arguable case"* that ACS ratified the Microsoft Channel Partner Agreements. For completeness, however, I should make clear that I am also satisfied that Microsoft Ireland has demonstrated a *"good arguable case"* that those agreements were ratified by ACS. Some of the evidence and material discussed earlier in relation to the apparent or ostensible authority claim is relevant in this context also. Particularly relevant are the following: the existence of Microsoft Channel Partner Agreements between Microsoft Ireland and ACS since 2000 (with copies for the period from 2007 to 2017 exhibited to Mr. Moran's first affidavit); the issuing of more than 4,600 invoices by Microsoft Ireland to ACS in the period from 2007 to 2017 in respect of Microsoft products licensed under the agreements and the payment of more than US$696 million by ACS to Microsoft Ireland's bank account during that period; the visit paid by Mr. Al-Ballaa on behalf of ACS to Microsoft Ireland's premises in Dublin to meet with representatives of Microsoft Ireland in November, 2015; the awareness of and knowledge of Mr. Al-Ballaa of the Microsoft Channel Partner Agreements (as discussed earlier); and the reference to those agreements by Mr. Al-Ballaa in his email of 12th June, 2017, in which he requested Microsoft Ireland to cancel the letter giving notice terminating the most recent agreement and requesting Microsoft Ireland instead to issue a letter confirming that it would not renew that agreement after August, 2017 (and Microsoft Ireland's agreement to that request).

202. It is also arguable on the basis of the evidence of Mr. Al Dehais (the Saudi lawyer called on behalf of Microsoft Ireland) that it would have been highly unlikely ACS would have done business in the volumes mentioned and for the value mentioned without there being in existence a written agreement setting out the terms on which such business was done. Again, I fully accept that the defendants have contested this evidence and these arguments. They may succeed in countering them at trial. For present purposes, however, I

am satisfied that Microsoft Ireland has demonstrated a *"good arguable case"* that ACS ratified the Microsoft Channel Partner Agreements and that, for that alternative basis, they are binding on that defendant. To be clear, if Microsoft Ireland were required to demonstrate that it had the *"better of the argument"* on this point, I am also satisfied that it does. Microsoft Ireland has also, in my view, put forward sufficient evidence on affidavit and advanced sufficient arguments based on that evidence and material to show that its case is, on the law and on the facts, reasonably capable of being proven at the trial.

(ii) The Guarantee: NTG

203. I turn now briefly to consider the Guarantee. There is not a great deal of evidence before the court in relation to the Guarantee. The Guarantee was signed on behalf of NTG by Mr. Al Zeer. Mr. Al Zeer was described in the document as the "*Managing Director*" of NTG. There is an NTG stamp beside his signature. While there was some debate between the Saudi legal experts called by the parties in relation to the nature of the stamp, it does not seem to me that that debate bears on the issue that I have to consider at this stage which is whether Microsoft Ireland has established a *"good arguable case"* that Mr. Al Zeer had apparent or ostensible authority to sign the Guarantee on behalf of NTG.

204. It is not disputed on behalf of the defendants that Mr. Al Zeer was at the relevant time the "*Managing Director*" of that company. Mr. Al Zeer is mentioned in the Microsoft Representative Questionnaire exhibited by Mr. Al-Ballaa (at tab 3 of exhibit "RMAB3" to his third affidavit). He is identified as "*Managing Director*" in the Questionnaire (albeit that the document may have been referring only to NTG's subsidiary, ACS). Mr. Al Zeer is referred to in the Questionnaire as *"Manging Director"* with the role or responsibility related to Microsoft work being described as *"running the group operation including Microsoft business"*. While it is strongly disputed by the defendants that Mr. Al Zeer had apparent or ostensible authority to sign the Guarantee on behalf of NTG, I am satisfied that Microsoft Ireland has established a *"good arguable case"* that in signing the guarantee on

behalf of NTG in his capacity as the "*Managing Director*" of that company, in circumstances where his authority to sign was never disavowed by NTG until these proceedings were commenced, Mr. Al Zeer had apparent or ostensible authority to sign on behalf of that company. Were it necessary for me to do so, I would also be satisfied that Microsoft Ireland had the *"better of the argument"* on this point, although fully accepting that the defendants may be in a position to defeat the argument at trial. So too am I satisfied that the evidence and material put before the Court and the arguments advanced by Microsoft Ireland are such as to show that Microsoft Ireland's case on this issue is, on the law and on the facts, reasonably capable of being proven.

(d) Unfairness to Defendants?

205. I have given consideration as to whether it would be unfair on the defendants to apply Irish law in determining whether Microsoft Ireland had demonstrated a *"good arguable case"* on these points, as raised as a possibility by the Court in *PEC*. Applying Irish law in determining these issues to the required standard at this point in the proceedings would not, in my view, create any unfairness for the defendants. There is no evidence or, indeed, suggestion that the persons who signed the agreements chose a law (Irish law) which was unconnected with the relevant agreements, still less that the person signing did so *"simply to clothe himself with authority"* (to adopt the phrase used by Andre Smith J. at para. 75 of *PEC*). Irish law could not be said to be unconnected with the agreements in circumstances where the relevant Microsoft contracting entity is Microsoft Ireland, a company incorporated and based in Ireland. Nor could it be said that ACS could not reasonably have anticipated the application of Irish Law. In the case of the agreements between Microsoft Ireland and ACS, the agreements for the period from 2010 onwards contained an express choice of law clause providing for Irish law to apply. The agreements

in respect of the period between 2010 and 2013 were signed by Mr. Al-Khaldi (and it was not suggested by the defendants that he had no authority to sign on behalf of ACS). I do not believe that there is any unfairness to the defendants in applying Irish law to determine the issues of apparent or ostensible authority and the related issues to the required standard at this stage of the proceedings. Nor, in my view, is there any other strong reason not to apply Irish law. I believe that it is entirely fair to decide those issues at this stage by reference to Irish law.

(6) Apparent or Ostensible Authority: Application of Saudi Law

(a) General

206. If, contrary to the conclusion I reached earlier that the question of the apparent or ostensible authority of the persons who signed the agreements at issue on behalf of the defendants is to be determined to the appropriate standard under Irish law, and if that question must, as the defendants contended, be determined as a matter of Saudi law, I would nonetheless be of the view that Microsoft Ireland has demonstrated that there is a *"good arguable case"* that in entering into the Microsoft Channel Partner Agreements on behalf of ACS, and in entering into the Guarantee on behalf of NTG, Mr. Abdulaleem, Mr. Mounir and Mr. Al Zeer had apparent or ostensible authority or the equivalent under the law of the Kingdom of Saudi Arabia to do so. If, also contrary to the view I expressed earlier, it were appropriate for me to assess that question by reference to whether Microsoft Ireland had the *"better of the argument"* on the point, I would be satisfied that it did have. I also confirm that I would be satisfied that Microsoft Ireland had put forward sufficient evidence, material and argument (including evidence from Mr. Al Dehais) to demonstrate that its case on the point of ostensible or apparent authority, or the equivalent under Saudi law is, on the law and on the facts, reasonably capable of being proven in accordance with the standard discussed by the Supreme Court in *IBRC*.

207. As explained earlier, Mr. Al Shuaibi and Mr. Trabulsi provided expert reports and gave evidence by video link on behalf of the defendants and were cross-examined on behalf of Microsoft Ireland. Mr. Al Dehais provided an expert report and gave evidence on behalf of Microsoft Ireland and was in turn cross-examined on behalf of the defendants.

(b) Preliminary Observations

208. In light of the conclusions I have reached on the required application of Irish law to determine these issues, I do not propose to spend a great deal of time and space in addressing the evidence of the Saudi lawyers. I do wish to refer to some aspects of that evidence. Before doing so, however, I make some preliminary remarks.

209. It was somewhat surprising that the Saudi lawyers gave evidence and were cross-examined on their reports on this jurisdiction challenge. I was informed that this was at the request of Microsoft Ireland. It was unusual as the test to be applied on the defendants' application was whether Microsoft Ireland had demonstrated a *"good arguable case"* that its case fell within the applicable jurisdictional gateway under O. 11, r.1 RSC. Normally, that will not require oral evidence and cross-examination. In most cases, it would be unnecessary and possibly inappropriate as, on an application such as that brought by the defendants, the Court is not conducting a trial on the merits of the case. It would often not be appropriate to have such evidence and cross-examination in circumstances where the very issues, the subject of that evidence, would be likely to be issues at a trial on the merits, in the event that the jurisdiction of the Irish courts were upheld. There is, therefore, a risk of the Court in determining the jurisdiction issue trespassing into the merits which must necessarily be determined at the trial. Counsel for the parties were properly careful in their approach to the evidence from the Saudi lawyers and very properly kept their examination and cross-examination of the witnesses, as best they could, to the evidence strictly relevant to the jurisdiction issue. I must also exercise the same restraint in my assessment of that evidence. I must be careful not to form and express conclusions more

appropriately to be considered at the trial of the merits of the case when assessing the evidence for the purposes of the jurisdiction issue.

210. That said, however, I should also observe that my overall impression of the evidence was that Mr. Al Dehais, the Saudi lawyer called on behalf of Microsoft Ireland, was a more impressive witness on the issues relevant to jurisdiction. I found his evidence more clear and more coherent than the evidence given by Mr. Al Shuaibi and by Mr. Trabulsi. That is not to say, however, that in the event that there is, in due course, a full trial of the proceedings (and I am not to be taken as deciding that a full trial will be necessary as these are summary proceedings and Microsoft Ireland will be entitled to apply for summary judgment and it will be a matter for the court dealing with that application to decide whether the case does go to plenary hearing), it may be that the trial judge would prefer the evidence of Mr. Al Shuaibi and Mr. Trabulsi. In assessing the issues relevant to jurisdiction, I preferred the evidence of Mr. Al Dehais over the evidence of Mr. Al Shuaibi and Mr. Trabulsi on the relevant issues of Saudi law which arose on the question of apparent or ostensible authority or the equivalent under Saudi law. I should note, however, that the evidence from each of the Saudi lawyers was difficult and complex and, on occasion, very hard to follow.

211. I am grateful to counsel for the defendants for preparing a speaking note setting out the evidence of the Saudi lawyers which the defendants contended supported the case that the agreements were unauthorised either actually or impliedly under Saudi law. I have carefully reviewed the expert reports of the Saudi lawyers and the transcript of their evidence. I have also noted the aspects of the evidence of the Saudi lawyers relied upon by Microsoft Ireland in its submissions.

212. Having regard to the standard which Microsoft Ireland has to meet on this application, namely, that of the *"good arguable case"* that the defendants are bound by the agreements entered into on their behalf by those who signed those agreements, such that

the jurisdictional gateway under the relevant paragraph of O. 11, r. 1 RSC applies, it is unnecessary to rehearse all of the evidence given by the Saudi lawyers. It is necessary only to stress some important aspects of that evidence on the issue of implied or ostensible authority.

213. I was satisfied that each of the Saudi lawyers was qualified to give evidence on Saudi law which is based in large part on Sharia law derived from the Koran and the words and actions of the prophet Mohammed as discussed and interpreted by Islamic/Sharia scholars.

(c) The Evidence of the Saudi Lawyers

214. Mr. Al Shuaibi (on behalf of the defendants) accepted that Saudi law recognises a principle of implied or apparent or ostensible authority. In his first report, he confirmed that Saudi law did recognise such authority on a *"case per case"* basis and that it would be determined by the judge's *"discretionary power"*. He did, however, state that if a party to a contract had express or constructive notice of the articles of association of the other contracting party which contained restrictions on the authority of persons to bind the company, the first party could not rely on any implied or apparent authority and that the contract would be considered void. He also expressed the view that performing or acting in accordance with the contract would not amount to the approval of the contract and that would only happen if a person authorised by the company confirmed that the contract was binding on the company before the courts. He disputed the suggestion that a contract containing a jurisdiction clause could be ratified in circumstances where the other party to the contract was unaware of the existence of that clause. His view was that under Islamic Sharia law and under the laws and regulations of Saudi Arabia, the contracts the subject of the proceedings would be regarded as being invalid.

215. Mr. Trabulsi's evidence was generally in support of that given by Mr. Al Shuaibi. On the question of whether Saudi law recognised implied or apparent or ostensible

authority, Mr. Trabulsi agreed that each situation would be decided on a *"case by case"* basis and that judges would apply their discretionary power and their own interpretation of the particular facts of the case without reference to precedent. Precedent does not exist under the Saudi legal system. Mr. Trabulsi did accept that Sharia law recognised a principle equivalent to estoppel such that a person could be prevented from going back on a promise, although Mr. Trabulsi's view was that the requirements for such would not be satisfied in the present case, in circumstances where the agreements were entered into without the authorisation of the relevant companies or any formal delegation. He made an additional point that the signatures on the agreements would be deemed null and void under the Saudi Electronics Transaction Law Act of 2007 which governs electronic signature and electronic communication and under the implementing regulations in respect of that law as the required procedures under that law were not followed as since digital certificates had not been approved by the relevant authority in Saudi Arabia.

216. Both Mr. Al Shuaibi and Mr. Trabulsi, while accepting that a judge in Saudi Arabia would consider all of the facts of the case and decide each case on its own merits, were of the view that the agreements relied on by Microsoft Ireland would not be regarded as valid in Saudi Arabia. They appeared to downplay the relevance of the historical record of dealings between Microsoft Ireland and ACS, and facts such as the number of invoices and the number and amounts of payments made over the years to Microsoft Ireland. They did not address in detail all of the documentation referred to in the affidavits, some of which was discussed earlier. They both expressed the view that even if the requirements for the equivalent of apparent or ostensible or estoppel under Saudi law were satisfied, a Saudi Court would be likely only to enforce the payment obligation under a contract, but not other provisions in the contract, such as the choice of law or jurisdiction provisions.

217. Mr. Al Dehais disagreed. His view was that under Saudi law, the agreements relied on by Microsoft Ireland would be regarded as valid and would be enforced. He expressed

the view that a party who acts on foot of agreements or on the basis that agreements applied, could be deemed under Saudi law to have accepted or ratified the relevant agreements. He disagreed with Mr. Al Shuaibi and Mr. Trabulsi that it was possible to establish as a matter of public record what persons may be authorised as nominated signatories on behalf of a company (apart from those referred to in the articles of association). He stated that there was no publicly searchable register to find out that information. He also expressed the view that it was not ordinary commercial practice in Saudi Arabia for a person proposing to enter into a contract with a Saudi Arabian company to carry out a pre-contract search to see who was authorised to sign on behalf of that company. Mr Al Shuaibi and Mr. Trabulsi disagree.

218. Significantly for present purposes, Mr. Al Dehais stated that Saudi law does recognise principles of implied, apparent and ostensible authority and that Mr. Abdulaleem and Mr. Mounir would be regarded as having such authority under Saudi law. He stated that the principle of implied or apparent or ostensible authority is recognised under Islamic (Sharia) principles/Saudi law and that the Saudi Courts have held in cases that an implied authority would be enough to enforce a contract entered into by a company, even where the owners or managers of the company disputed the authority of the signatory. He referred to one such case in 2018 in the Second Commercial Circuit in Skaka's General Court where the Court cited the views of a prominent Islamic (Sharia) principles scholar, Ibn Taymiyyah. The defendants' Saudi lawyers did not accept Mr Al Dehais's interpretation of the case. On the question of estoppel or its equivalent, Mr. Al Dehais expressed the view that under Sharia principles, if the relevant agreement was entered into by an unauthorised representative of a company but the company later benefits from that agreement and acts in accordance with it, it would be considered to be authorised by the company and the company should be estopped from disputing such authorisation. However, he did emphasise that the courts in Saudi Arabia have a wide discretion in choosing what

evidence is accepted and what is not and the strength or otherwise of that evidence. Mr. Al Shuaibi on behalf of the defendants agreed that the judges have a wide discretion and are not bound by precedent and look at each case separately. He did not agree that a company in such circumstances would be estopped from denying the authority of the signatory although he accepted that the judge would deal with each case on a case by case basis.

219. There was a dispute between the Saudi lawyers as to whether a Saudi court might enforce the payment obligations under a contract, where the contract was signed by a person without authorisation from the company but where the company may have benefitted from that contract, but not enforce a choice of law or jurisdiction clause contained in the contract. Mr. Al Dehais's evidence was that a Saudi judge would enforce the entire contract including the choice of law and jurisdiction clauses.

220. Mr. Al Dehais disagreed with Mr. Trabulsi's evidence in relation to the Saudi Electronics Transaction Law of 2007. His evidence was that that law dealt with issues concerning the authentication of electronic signatures and not the issue as to whether the agreements were signed without authorisation. He stated that, even if the provisions of the Saudi Electronics Transaction Law were not complied with, the documents would still be admissible in court as presumptive evidence although the other party could dispute the authenticity of the signature or the agreement itself. He referred to certain provisions of the law and to an order of a Saudi court to that effect.

(d) Conclusions on the Evidence of the Saudi Lawyers

221. I do not regard the evidence given by the Saudi lawyers on behalf of the defendants as providing any *"knockout blow"* point of the type referred to by the Supreme Court in *IBRC*. On the contrary, I consider the evidence given by Mr. Al Dehais on behalf of Microsoft Ireland to be sufficient to enable Microsoft Ireland to demonstrate at this stage that it has a *"good arguable case"* that the agreements would be enforced by the Saudi courts applying Islamic Sharia law principles. I was more impressed with the cogency and

clarity of the evidence given by Mr. Al Dehais than the evidence given by Mr. Al Shuaibi and Mr. Trabulsi on those issues. If it were necessary to express a view on whether Microsoft Ireland had *"the better of the argument"*, I would be satisfied that it did have on the disputed issues of Saudi law referable to the issues of apparent or ostensible authority, estoppel and ratification. Therefore, if I am incorrect in my view that these issues should be assessed to the appropriate standard by reference to Irish law and if they should be assessed by reference to Saudi law, I would be equally satisfied that Microsoft Ireland had established a *"good arguable case"* to the required standard that the agreements would be enforced by the Saudi courts. In reaching that view, I have carefully considered all of the evidence provided by the parties on Saudi law, including the expert reports and the transcript of the evidence of the three Saudi lawyers.

(7) <u>Whether Contracts were with Microsoft Ireland or Microsoft Arabia</u>

222. As noted earlier, one of the arguments made in the affidavits sworn on behalf of the defendants in support of the application was that ACS contracted on an *ad hoc* basis with Microsoft Arabia and not with Microsoft Ireland and that there were, therefore, no agreements in place between ACS and Microsoft Ireland to found jurisdiction under O. 11, r. 1(e)(iii) RSC.

223. Mr. Al-Ballaa explained in his various affidavits the basis on which the defendants contended that the contracts were between ACS and Microsoft Arabia and not with Microsoft Ireland. That contention was disputed in the affidavit sworn by Mr. Moran on behalf of Microsoft Ireland. He exhibited the copies of the written agreements on which Microsoft Ireland was relying, which on their face referred to the relevant Microsoft contracting entity as Microsoft Ireland and not Microsoft Arabia.

224. I have not found it necessary to spend much time on this point as it is clear on the basis of the evidence before the court that Microsoft Ireland has demonstrated a *"good arguable case"* that ACS did enter into the Microsoft Channel Partner Agreements with

Microsoft Ireland and also that NTG entered into the Guarantee with Microsoft Ireland. Bearing in mind the nature of the test to be applied (as discussed earlier), I have no doubt but that Microsoft Ireland has established a *"good arguable case"* to that effect.

225. Mr. Moran exhibited the two Microsoft Channel Partner Agreements which show the parties as being ACS and Microsoft Ireland. He also exhibited the Guarantee which showed the parties as being NTG and Microsoft Ireland. Other agreements between ACS and Microsoft Ireland were exhibited (including the *"Non-Exclusive Distribution Agreement"* between ACS and Microsoft Ireland which was exhibited by Mr. Al-Ballaa to his third affidavit). Leaving aside, therefore, the issues of authority (which are discussed earlier), on the issue as to the relevant Microsoft entity with which ACS contracted, the evidence is such that I can, I believe, safely conclude that Microsoft Ireland has demonstrated a *"good arguable case"* that it and not Microsoft Arabia entered into the relevant agreements with ACS and that it entered into the Guarantee with NTG. If I were required to consider that issue by reference to the *"better of the argument"* gloss referred to in the English authorities, I should make clear that I am also satisfied that Microsoft Ireland has the "*better of the argument*" on the point. It has also provided sufficient evidence, material and argument to establish that its case is, on the law and on the facts, reasonably capable of being proven at the trial. It seems to me that this must be so irrespective of whether the issue is to be determined by reference to Irish or Saudi law, as I did not understand from the evidence of any of the Saudi lawyers that the Saudi courts would ignore the fact that written agreements on which Microsoft Ireland relies clearly state that the Microsoft contracting entity is Microsoft Ireland and not Microsoft Arabia (leaving aside, of course, any separate issue concerning the alleged lack of authority of the persons who signed those agreements on behalf of the defendant companies).

(8) <u>Serious issue to be Tried on Merits</u>

226. Finally, in addition to Microsoft Ireland having to establish a *"good arguable case"* that the jurisdictional gateway provided for in O. 11, r. 1(e)(iii) applies, it also has to demonstrate that there is a serious issue to be tried on the merits of the case. There was no great debate between the parties on that issue. Having regard to the relatively low bar to be surmounted to demonstrate the existence of a *"serious issue to be tried"*, I should make clear that I am satisfied that Microsoft Ireland has demonstrated a *"serious issue to be tried"* on the merits of its claim, for the purposes of the defendants' jurisdiction challenge, in light of all of the evidence put before the Court, including the agreements themselves, the invoices, the demands and, of course, the affidavit evidence and submissions. Whether it succeeds, ultimately, is a matter for another day (whether on a summary judgment application or at a full hearing).

Summary and Concluding Comments

227. In summary, I have reached the following conclusions on the defendants' application:-

(1) The burden of proof is on Microsoft Ireland to demonstrate that the order of the High Court (McDonald J.) of 21st August, 2018 giving Microsoft Ireland liberty to issue and serve the proceedings outside the jurisdiction was properly made under O. 11, r. 1(e)(iii) RSC and that Microsoft Ireland was entitled to avail of the jurisdictional gateway provided for under that provision.

(2) The parties were agreed that in terms of the standard of proof, Microsoft Ireland had to establish a *"good arguable case"* that its claim fell within the jurisdictional gateway contained in O. 11, r. 1(e)(iii) RSC and that there is a serious issue to be tried on the overall merits of its case. I was prepared to accept, for the purposes of this application, that that was the test to be applied. However, there was a major dispute between the parties as to the

nature and components of the *"good arguable case"* test. Having considered the relevant Irish and English authorities, I have concluded that the defendants were incorrect in their contention that in order to demonstrate that it had a *"good arguable case"* for the purposes of the jurisdictional gateway under O. 11, r. 1 RSC, Microsoft Ireland had to show that it had the *"better of the argument"* on the material available. I am not satisfied that that gloss on the test reflects the correct position under Irish law. I have concluded, therefore, that it is not necessary for a party such as Microsoft Ireland, in order to demonstrate that it has a *"good arguable case"* for the purposes of establishing jurisdiction under one of the paragraphs of O. 11, r. 1 RSC, to demonstrate that it has the *"better of the argument"* on the material available. I have concluded that the *"good arguable case"* test is a flexible one which can be met where the plaintiff can show that it has good arguments on the jurisdiction issue without necessarily having to demonstrate that its arguments are better or more impressive or persuasive than those which might or could be raised by the opposing party. I have concluded that the (part) relative test applied by the English Courts should not be followed in this jurisdiction as it runs the risk of requiring the court to conduct something in the nature of a mini-trial or to express views on the merits of the case which are ultimately a matter for the judge conducting the trial.

(3) The parties were in dispute as to the laws which should be applied to determining various issues to the required standard of *"good arguable case"*. I have concluded that insofar as the issue of the actual authority of those who signed the various agreements at issue is concerned, that issue must be determined by reference to the law of the Kingdom of Saudi

Arabia. However, as regards the issues of apparent or ostensible authority and related issues, such as estoppel and ratification, I have concluded that those issues must be determined by reference to Irish law as the putative proper law of the agreements in light of the choice of law clauses in each of the three agreements on which Microsoft Ireland relies.

(4) I have concluded that as a matter of Saudi law, the persons who signed the three agreements were not actually authorised to do so under the terms of the constitutions of ACS and NTG as contained in the amended articles of association of those companies. The signatories were not actually or expressly authorised to sign the agreements on behalf of ACS and/or NTG. Therefore, Microsoft Ireland could not establish a *"good arguable case"* that the agreements were in existence and enforceable on the basis of the actual authority of the persons who signed them on behalf of the relevant defendant company.

(5) However, I have concluded that applying Irish law principles, and having regard to the evidence and material before the court, Microsoft Ireland has established that it has a *"good arguable case"* that the persons who signed the agreements had apparent or ostensible authority to do so on behalf of ACS and/or NTG. I have set out examples of the evidence and material to support that conclusion. It should be noted, however, that the defendants disputed this evidence and the conclusion sought to be drawn from it. My conclusion that Microsoft Ireland has established a *"good arguable case"* on the issue of apparent or ostensible authority and related issue of ratification and estoppel is not determinative of the merits of the case on those issues. Those issues may ultimately be determined at trial or, if appropriate, on an application for summary judgment. I have also made

clear that if I were required to consider the *"good arguable case"* test with the *"better of the argument"* gloss, I would be satisfied that Microsoft Ireland had the *"better of the argument"* on the issues of apparent or ostensible authority and related issues. I am also satisfied that Microsoft Ireland has put forward sufficient evidence to demonstrate that on the facts and on the law, its claim on these points is reasonably capable of being proven at trial (to adopt the words of the Supreme Court in *IBRC*).

(6) In the event that I were required to consider the questions of apparent or ostensible authority and related questions by reference to Saudi law, I have also concluded that on the basis of the evidence before the court, including the evidence of the Saudi lawyers, Microsoft Ireland has also established that there is a *"good arguable case"* and has, if necessary, done so to the *"better of the argument"* standard. To the limited extent necessary to resolve the issue at this stage of the proceedings, I have preferred the evidence of the Saudi lawyer called on behalf of Microsoft Ireland.

(7) I have also concluded that that Microsoft Ireland has demonstrated that there is a *"good arguable case"* that the agreements in respect of Microsoft licensed offerings were between ACS and Microsoft Ireland and not Microsoft Arabia. Microsoft Ireland produced in evidence the two Microsoft Channel Partner Agreements between it and ACS and the Guarantee between it and NTG. These agreements, together with the evidence provided in relation to them, is sufficient to establish that Microsoft Ireland has a *"good arguable case"* that the relevant agreements were between it and ACS and not between ACS and Microsoft Arabia.

(8) I have also concluded that Microsoft Ireland has demonstrated that there is a "*serious issue to be tried*" on the merits of the case, for the purpose of the defendants' jurisdiction challenge.

228. In those circumstances, Microsoft Ireland has met the two limbs of the test which the parties agreed was required to be established in order to demonstrate its entitlement to rely on the jurisdictional gateway under O. 11, r. 1(e)(iii) RSC and to obtain an order giving leave to serve out of the jurisdiction.

229. There was no real dispute between the parties as to compliance with O. 11, r. 2 RSC. However, I should confirm formally at this point that it was appropriate for the Court to give leave to issue and serve notice of the proceedings on the defendants outside the jurisdiction, having regard to the amount or value of the claim made in the proceedings and the comparative cost and convenience of proceedings in Ireland for the purposes of O. 11, r. 2 RSC. I note, in particular, what was said at paras. 56 to 58 of Mr. Moran's first affidavit. Further, I am satisfied on the evidence that Microsoft Ireland has complied with the requirement of O. 11, r. 5 RSC in that Mr. Moran has deposed to the existence of a cause of action in favour of Microsoft Ireland and to the other matters required under that sub-rule to be addressed. I am satisfied that on the basis of the evidence, material and argument made to the court, this is a case in which it was proper for the court to give leave to serve notice of the proceedings outside the jurisdiction under Order 11.

230. In light of the defendants' confirmation during the hearing that it was only relying on *forum non conveniens* grounds in seeking to stay Microsoft Ireland's proceedings against NTG if the Court concluded that the order for leave to serve out of the jurisdiction on ACS was not properly made in respect of that defendant and that the Court did not have jurisdiction against that defendant. Since I have concluded that the order giving leave to serve out of the jurisdiction was properly made in respect of ACS, it is unnecessary to consider further the *forum non conveniens* grounds with respect to the claim against NTG.

231. For the detailed reasons set out in this judgment, therefore, I have concluded that the order made by the High Court (McDonald J.) on 21st August, 2018 permitting service of notice of proceeding on the defendants in Saudi Arabia under O. 11, r. 1(e)(iii) RSC was properly made and that the defendants are not entitled to orders under O. 12, r. 26 RSC setting aside the service effected on foot of that order or discharging the order itself. I am, therefore, refusing the defendants' application.

232. I will list the case for mention (remotely) at 10.30am on Friday, 6th November, 2020 to hear the parties as to any further orders which may be required.