AN ARD-CHÚIRT
THE HIGH COURT

[2024] IEHC 454

[Record No. 2023/67 CA]

[Record No. 2023/68 CA]

BETWEEN:

SKYCORP LIMITED

Plaintiff

-AND-

NOPSAR LIMITED

Defendant

AND BETWEEN:

NOPSAR LIMITED

Plaintiff to the Counterclaim

-AND-

SKYCORP LIMITED, JAROSLAW NOWASAD AND HUAWEI TECHNOLOGIES (IRELAND) CO. LTD

Defendants to the Counterclaim

JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on the 17th day of July 2024.

1. These appeals from the Circuit Court relate to procedural issues in litigation relating to the fall-out after termination of contractual arrangements under which Nopsar Limited (Nopsar)

provided services of Skycorp Limited (Skycorp) and other specialists to Huawei Technologies (Ireland) Company Limited (Huawei).

2. Huawei claims that Nopsar's counterclaim against it should be struck out as vexatious and bound to fail. Nopsar seeks to amend this counterclaim to include additional claims.

3. The first application cannot succeed because I am not persuaded that a court must conclude that the release and agreement not to sue which Huawei relies on as precluding this counterclaim was supported by valuable consideration.

4. The second application cannot succeed because pleas which Nopsar seeks to introduce contain unnecessary evidential narrative and do not disclose any additional stateable cause of action. Furthermore, the proposed amendment seeks to introduce a monetary claim which the Circuit Court lacks jurisdiction to entertain.

5. Order 67, rule 16 of the Circuit Court Rules provides as follows: "Where there is no Rule provided by these Rules to govern practice or procedure, the practice and procedure in the High Court may be followed." The power of the High Court strike to out pleadings and stay or dismiss actions on grounds that they disclose no reasonable cause of action is governed by O.19, r.28 of the Rules of the Superior Courts.

6. The High Court has inherent jurisdiction to dismiss actions on grounds of abuse of process. This jurisdiction may be exercised even in cases where such pleadings as there are, viewed in isolation, might show a stateable claim. It may also be exercised in cases where there are, as yet no formal pleadings.

7. An example of such a case is a claim for specific performance of a disputed oral executory contract for a sale of land which has not been evidenced by a note or memorandum in writing within s.51 of the Land and Conveyancing Law Reform Act 2009: see *Barry v. Buckley* [1981] IR 306 where a claim was stuck out in advance of delivery of a statement of claim.

8. The relevant parts of the current version of O.19, r.28, as amended with effect from 22 September 2023 by the Rules of the Superior Courts (Order 19) 2023 (S.I. No. 456 of 2023), provide as follows:

> "28(1) The Court may, on an application by motion on notice, strike out any claim or part of a claim which: (i) discloses no reasonable cause of action, or (ii) amounts to an abuse of the process of the Court, or (iii) is bound to fail, or (iv) has no reasonable chance of succeeding.

(2) The court may, on an application by motion on notice, strike out any defence or part of a defence which: (i) discloses no reasonable defence to the action, or (ii) amounts to an abuse of process of the Court, or (iii) is bound to fail, or (iv) has no reasonable chance of succeeding.

(3) The Court may, in considering an application under sub-rule (1) or (2), have regard to the pleadings and, if appropriate, to evidence in any affidavit filed in support of, or in opposition to the application.

(4) Where the Court makes an order under sub-rule (1), it may order the action to be stayed or dismissed, as may be just, and make an order providing for the costs of the application and proceedings accordingly.

(5) Where the Court makes an order under sub-rule (2), it may make an order giving judgment in such terms as it considers just, and may make an order providing for the costs of the application and the proceedings accordingly."

9. These provisions apply to both claims and counterclaims. They allow all or part of a claim or defence to be struck out, either on the basis that a pleaded claim or defence must fail as disclosing no stateable cause of action or defence, or that the claim defence advanced constitutes an abuse of process, or that on agreed facts and pleadings the plaintiff or defendant cannot succeed. They also allow the High Court to strike out tenuous claims or defences which have no reasonable chance of succeeding.

10. It is evident from the terms of the 2023 revision that the Superior Courts Rules Committee has had due regard to settled jurisprudence as set out in a number of judgments of the Superior Courts. These judgments related to both the previous iteration of O. 19, r. 28 and the inherent jurisdiction.

11. The parties to these appeals have agreed that O.19, r. 28(1) and (3) in their current form should apply to the application by the third defendant to counterclaim to have the defendant's claim against it struck out.

12. Courts are reluctant to strike out actions or defences to actions without providing a hearing on the merits. Courts will not take this step if evidence relied on to ground an application to strike out is seriously contradicted on an issue of fact which will require to be resolved by an oral hearing or if a deficiency in pleading can be corrected by amendment which shows a stateable cause of action.

13. "In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible

to establish the facts which are asserted and which are necessary for success in the proceedings": see Clarke J. in *Lopes v. Minister for Justice Equality and Law Reform* [2014] 2 I.R. 301 ([2014] IESC 21) at pages 309 to 310, para. [19]. A claim may be bound to fail because the facts asserted do not disclose a cause of action or do not answer an unanswerable point of defence, such as absence of a note or memorandum evidencing a contract for the sale of land in *Barry v. Buckley*, or because there is no creditable basis for assertions of fact: see Clarke J. in *Lopez* (supra) at page 309, para. [17].

14. A party which applies to have a claim or defence struck out must identify and establish at least one of the matters set out at (i) to (iv) in Order 28, r.1 or 2. If an issue arises as to whether amendment will save an action which on the current state of pleadings is unsustainable and bound to fail, the party seeking to resist the application must put material before the court which clearly demonstrates that a revised claim has some reasonable prospect of success. An observation of McCarthy J. in *Sun Fat Chan v. Osseous Ltd* [1992] 1 I.R. 425 at 428 that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance does not absolve a party from the obligation to demonstrate a coherent claim.

15. In this litigation one of the defendants to counterclaim asserts that the counterclaim has no reasonable chance of succeeding against it because the defendant entered into an agreement which released any right of action against it and agreed not to take legal action in respect of the matters complained of in that counterclaim.

16. Is it open to a court in this type of application to consider whether the terms of a contract preclude a party to litigation from instituting proceedings or maintaining a defence? A court must give effect to the terms of such a contract which precludes a party from litigating an issue. Such proceedings are an abuse of the court process.

17. The procedure usually adopted where a court is asked to determine whether a party to litigation has contracted not to institute proceedings is for the party relying on that agreement to raise the issue and seek to have that issue tried as a preliminary issue: see, for examples, *Bank of Credit and Commerce International v. Ali* [2002] 1 A.C. 251; *Priory Caring Services Ltd v. Capita Property Services Ltd* [2010] EWCA Civ 226. Similar issues arise where a plea is raised that a cause of action is time barred under a contract or is statute barred.

18. It is unnecessary to conduct a trial on the merits where a party can demonstrate that the action should not have been brought. What is the point of having a Statute of Limitations or agreements not to sue or contractual time bar provisions if it is necessary to run a complete action in order to determine whether a defendant is entitled to the benefit of such a defence? The purpose of these grounds of defence, if they are valid, is to save a defendant from being vexed with having to engage with the merits of barred claims.

19. Issues similar to that presented in this appeal sometimes arise where an injunction is sought to prevent a litigant from bringing an action in a foreign jurisdiction or in relation to whether there has been a settlement which precludes a petition in bankruptcy. These issues can and should be resolved in a summary way if it is possible to make a determination without oral evidence relating to disputed factual matters.

20. Specialist employment agencies provide services of engineers, scientists, and other specialists to industry. A business advantage of this type of arrangement is that the specialist is not directly engaged or employed by the undertaking which receives his or her work product. An agency which employs or engages and pays the specialist is remunerated for provision of the agreed services.

21. What happens if specialists employed or engaged under this type of arrangement and the party availing of their services wish to put an end to the agency arrangement and deal with each other directly? What happens if the agency and the employer have a falling out or if an employer wants to poach specialist staff contractually committed to an agency?

22. Contracts between agency and employer and between agency and specialist may include terms which protect the agency by regulating termination of these relationships. Such contracts will often provide that the employer is liable to pay a recruitment fee equivalent to a proportion of the new annual wages of any former consultant hired directly by the employer. Such contracts may also include terms prohibiting employers from soliciting specialists to work for them or prohibiting specialists from negotiating separate deals with employers during the currency of their agency engagements.

23. In this case a written contract between Huawei and Nopsar dated 27 September 2016 (the Consultancy Master Services Agreement) governed their relationship. In paragraph 9 of an affidavit sworn on 13 December 2022, a director of Nopsar accepted that the relationship between Nopsar and Huawei was governed by this agreement.

24. The term of that agreement expired on 27 September 2018, except in respect of "Purchase Orders" (Purchase Orders) governed by that agreement "still in effect at termination of this Agreement...for the duration of such order", and subject to any right of Huawei to cancel unperformed parts of a Purchase Order by giving notice to Nopsar "as set out in such order." "Purchase Order" was defined in clause 1 e) as follows: "Purchase Order" shall mean a single order for Services, in which either the Parties or Supplier and a Company Affiliate define and specify (i) the Services to be performed or provided by Supplier under this Agreement; or (ii) the relevant Consultant(s)."

25. Clause 5 e) and f) of the Consultancy Master Services Agreement provided as follows:

> "e) Unless otherwise agreed in writing in the specific Purchase Order, if a Consultant covered by a Purchase Order that has not elapsed, ended or terminated is either (i) hired as an employee by Company [Huawei] (or any Company Affiliate); or (ii) approached to be hired by the Company (or any Company Affiliate) and an employment agreement is subsequently concluded, Supplier [Nopsar] may invoice Company a separate one time recruitment fee corresponding to fifteen (15) percent of the annual fixed salary payable to the Consultant according to his or her employment agreement with Company (or the relevant Company Affiliate). Notwithstanding the foregoing, if the Consultant has been providing services to Company (or any Company Affiliate) for an accumulated period (under the current, as well as previous Purchase Orders) exceeding one (1) year, Supplier may merely invoice Company (or the relevant Company Affiliate) a recruitment fee that equals six (6) percent of the annual fixed salary (instead of fifteen (15) percent).
>
> f) For the avoidance of doubt, if the consultant is hired (or approached to be hired) after the term of the relevant Purchase Order (i.e. there exists no current Purchase Order for the Consultant), no recruitment under paragraph 5 e) fee shall be due."

26. The Consultancy Master Services Agreement did not contain any commitment by Huawei to exclusively engage Nopsar specialists or to renew expired Purchase Orders. The Nopsar counterclaim in both its present form and its proposed amended form does not assert that any agreement existed beyond the terms of the Consultancy Services Agreement and any extant Purchase Orders.

27. The key obligation was set out in clause 2 of the Consultancy Services Master Agreement at a) and b):

> "a) Subject to the terms and conditions set forth in this Agreement, Supplier agrees to provide such services as may from time to time be set out in any Purchase order duly executed by either both Parties or a Company Affiliate and Supplier. Once a Purchase Order has been delivered to and accepted by Supplier with the authorised signatures from both Parties, it shall be deemed an integral part of this Agreement.
>
> b) Supplier shall provide the Services described in each Purchase Order subject to and in accordance with all terms and conditions of this agreement."

28. It appears from an affidavit sworn on behalf of Nopsar that services supplied under Purchase Orders may have been rolled-over, in the sense that services were provided after their expiry

and that Nopsar continued to supply specialist contractors to Huawei after the expiry of the Consultancy Master Services Agreement. The extent to which Purchase Orders were rolled-over or allowed continue after expiry is unclear.

29. Relevant clauses of agreements between Nopsar and contractors (the Contractor Agreement) relating to the "Huawei OCEG Assignment" provided as follows:

> "Section 1.0
>
> In this Agreement the following expressions shall, unless the context otherwise requires, have the following meanings:
>
> (b) "confidential Information" – all information, trade secrets, secret or confidential operations, processes, information or dealings of any kind arising from the performance by the Contractor of its duties hereunder or relating to the Company [Nopsar] or any of its affiliates or its clients or its or their organisation, business, finances, transactions, or affairs which may come to the Contractor's knowledge during the term of this Agreement.
>
> (c) "Commencement Date" - as set out in Schedule One
>
> (f) "Services"- the service to be provided by the Contractor to the Company in accordance with this Agreement as described in the Schedule hereto.
>
> Section 2.0
>
> (k) the Schedule to this Agreement shall form part of this Agreement.
>
> Section 5.0
>
> (l) The Contractor shall provide Services for the term specified in the Schedule hereto.
>
> (m) The Contractor shall at all times during any period covered by a Schedule to this Agreement
>
> (i) faithfully and diligently perform those duties and exercise such powers consistent with them which are from time to time necessary in the connections with the provision of the Services, and

(ii) use their best endeavours to promote the interests of the Company.

Section 6.0

(p) The relationship between the Contractor and the Company is that of independent contractor.

Section 10.0

The Contractor shall:

(s) Keep and maintain as confidential the Confidential Information, ...and all other matters arising from them or coming to its attention in connection with the provision of the Services or relating to the Company or its Affiliates or its or their organisation, business, finances, transactions or affairs which may come to its knowledge during the term of this Agreement.

(t) Not disclose or permit to be disclosed, at any time for any reason to any person or persons, or otherwise make use of or permit to be made use of, any information relating to the Company's technology, technical processes, testing procedures, products, business, finances, transactions or affairs or any such information relating to any Affiliate, suppliers, customer or clients of the Company which may have already have been entrusted to the Contractor or which may hereafter come to its knowledge in the performance of or otherwise related to the Services except as permitted hereunder to enable the Contractor to carry out its duties.

(v) The obligations in this Clause shall continue to apply after the expiry or termination of this Agreement without limit in point of time. The obligations of confidence referred to in this Clause shall cease to apply to information or knowledge which may reasonably be said to have come within the public domain other than by reason of breach of this Agreement.

Section 12.0

The Contractor hereby agrees with the Company that in addition to the restrictions contained in Clauses 10 and 11 hereof it will be bound by the following restrictions:

> (bb) That it will not without the written consent of the Company during the term of this Agreement and for a period of 60 days following the date of termination of this Agreement either on its own behalf or on behalf of any other person, firm or company, solicit in competition with the Company in relation to any of the products or services which shall result directly or indirectly from the performance by the Contractor of the services hereunder, the customer (sic) of any person, firm or company which at the time is a client of the Company or, with respect to the 60-day period following the date of termination of this Agreement, was such a client during the term of this Agreement and with respect to whose requirements the Contractors had material knowledge provided, however, that nothing in this 12(a) (*sic*) shall restrict the Contractor within the applicable period from providing to third parties services other than those substantially similar to the Services contemplated by this Agreement.
>
> (cc) That it will not during a period of 60 days following the date of termination of this Agreement solicit, entice away or offer to employ or engage any person who was during the term of this Agreement employed or engaged by the Company and with whom the Contractor had business dealings and who, by means of such employment or engagement, is or is likely to be in possession of Confidential information relating to the Company or any Affiliate or its or their business."

30. Schedule One to this agreement deals with matters such as length of contract, payment, and commencement.

31. Huawei did not make any contractual commitment to Nopsar not to attempt to directly engage specialists supplied by Nopsar. However, terms of the standard Contractor Agreement governing Nopsar's engagements of specialists may have had the effect of precluding specialists engaged by Nopsar from making an arrangements with Huawei while under contract from Nopsar with a view to being employed or directly engaged by Huawei after expiry of those agreements. These terms may also have prevented those specialists from providing details of their remuneration by Nopsar to Huawei.

32. These terms may also have prevented specialists from engaging with Huawei within 60 days of termination of their contracts with a view to providing services in competition with Nopsar. This might be important, depending on contractual validity of an agreement dated 11 September 2019 which purported to extend the term of the Consultancy Master Service Agreement to 31 December 2019.

33. These provisions did not entitle Huawei to solicit specialist contractors supplied by Nopsar, if to the knowledge of Huawei, solicitation would involve breach of a contractual obligation of that specialist to Nopsar.

34. Unlawful interference with contractual relations must involve persuasion, encouragement, or assistance to break a contract. Furthermore, it can only be the subject of a claim for damages where loss to the injured party flows from that interference. That may not arise where damage claimed relates to loss of a prospect of earning from rendering a service to the interferer if the interferer has no intention of engaging for provision of that service from the party claiming to be injured the breach of contract.

35. It might be difficult to establish that parties are in competition to supply a service to a potential client where that client has a fixed intention not to do business with one of them. The existence of an agreement regulating a commitment to provide services if called upon to do so might help establish existence of "competition, "within clause 12.0 of a Contractor Agreement.

36. Skycorp issued a civil bill against Nopsar seeking payment of €44,584.99 on an overdue account relating to professional consultancy services supplied by Skycorp to Nopsar for Huawei on dates between February and June 2019. It is not disputed that Huawei settled Nopsar's bill to it for provision of these services.

37. Skycorp is controlled by Jaroslaw Nowasad. Skycorp was the vehicle for supply of his expertise to Huawei. This claim relied on the terms of Contractor Agreements between Skycorp and Nopsar in 2014 and 16 January 2019.

38. An unexecuted version of the Contractor Agreement between Nopsar and Skycorp dated 16 January 2019 has been exhibited. Schedule One of this document showed a commencement date of 1 February 2019 and stated that it was "estimated that this contract will run…for a period up to and including 30th September 2019."

39. Nopsar Limited delivered a defence and counterclaim which admitted the amount of the debt claimed but refused to pay on grounds of alleged breach of contract by Skycorp. This defence and counterclaim joined Jaroslaw Nowasad and Huawei as additional defendants to counterclaim.

40. Nopsar pleaded in its defence and counterclaim that Nopsar provided Jaroslaw Nowasad's services to Huawei through Skycorp. Jaroslaw Nowasad demanded an increase in remuneration from Nopsar in 2018 and terminated his then agreement with Nopsar in order to force Nopsar to pay him more. Huawei requested that Nopsar carry of the cost of this. Nopsar agreed to increase remuneration payable to Skycorp for these services in January 2019. The document exhibited specified a fee rate of €720 per day, plus VAT.

41. Nopsar got the benefit of these services and is refusing to settle the bill for them. Nopsar pleaded that its contractual arrangement with Skycorp terminated on 30 June 2019 and that Jaroslaw Nowasad took up employment with Huawei in mid-July 2019 Nopsar admitted in para. 9 of the defence that it acknowledged this debt and asserted that at time of acknowledgment it was unaware of any breaches by Skycorp of its contract.

42. However, it is clear from affidavit evidence from Nopsar that it was aware in January 2019 that Skycorp's remuneration from Nopsar was disclosed to Huawei and that Skycorp was about to be employed by Huawei at that time. This disclosure forms a central part of Nopsar's claim against Huawei, Skycorp and Jaroslaw Nowasad of breach of contract and breach confidence and unlawful interference with Skycorp's contract with Nopsar. Nopsar's director also stated on affidavit that the fact that Jaroslaw Nowasad had become an employee of Huawei came to his intention in July 2019.

43. Nopsar alleged that Skycorp and Jaroslaw Nowasad in concert with Huawei, engaged in an inducement of breach of contract which resulted in Huawei engaging Jaroslaw Nowasad directly in July 2019 and that this resulted "in the Plaintiff's complete loss of its business": see para. 24 of the defence and counterclaim. Nopsar alleged breach by Skycorp of Section 5.0 (m)(ii), Section 10 (s), (t), (u) and (v) and Section 12 of Skycorp's Contractor Agreements with the connivance of Huawei and Jaroslaw Nowasad.

44. Paragraph 24 of the counterclaim also asserted that Huawei, Jaroslaw Nowasad and Skycorp conspired to break the Skycorp service agreements with Skycorp, meaning those which were in place between those parties prior to and after January 2019, and thereby caused Nopsar irreparable financial harm.

45. Nopsar alleged that Skycorp broke its contract with Nopsar by providing services to Huawei within 60 days of 30 June 2019.

46. Nopsar alleged that Skycorp and Jaroslaw Nowasad disclosed to Huawei confidential terms relating to remuneration arrangements with Nopsar and that Huawei used this as leverage in relation to his departure from Nopsar. Nopsar alleged that Huawei knew that this information was confidential and that Nopsar had repeatedly refused to provide it to Huawei.

47. It is clear from para. 19 of this counterclaim that Nopsar was aware in January 2019 that Huawei representatives knew the detail of these arrangements and concluded that Jaroslaw Nowasad had disclosed them to Huawei. Nopsar pleaded that in January 2019 Huawei instructed that three specialists supplied by Nopsar to Huawei be removed. Nopsar also pleaded that it was told by Huawei in January 2019 that, based on its profit margin on provision of consultancy services, it was no longer a good business partner for Huawei.

48. This counterclaim does not allege that the Huawei instruction to remove these contractors involved a breach of the terms of any Purchase Order or other contract.

49. In essence, Nopsar's counterclaim against Huawei claimed damages for the tort of intentional interference with contractual relations. This claim was advanced on the basis that Huawei and Jaroslaw Nowasad knowingly interfered with Nopsar's contract with Skycorp by disclosing remuneration details and by negotiating to employ Skycorp and then employing Skycorp within the 60-day period after the end of the Skycorp contract and that this in some unspecified way brought about the complete loss of Nopsar's business.

50. The ingredients of the tort of actionable interference with contractual rights are set out in the judgment of Jenkins L.J. in *D.C Thompson Ltd v. Deakin* [1952] Ch 646 at 690-699 and explained at pages 350 to 352 of *Salmond & Heuston on the Law of Torts* 21st Ed.

51. This exposition of the law is subject to some qualifications: see *OBG v. Allan* [2008] 1 AC 1 ([2007] UKHL 21). This makes clear that positive acts of inducement or procurement are essential. Mere acceptance of the benefit of an inconsistent contract in the knowledge of that inconsistency will not be enough: see para.23.51 *Clerk and Lindsell on Torts*, 24th Ed, at page 1716, citing *Batts Combe Quarry Ltd v. Ford* [1943] Ch 51 (CA). Furthermore, if there was any breach of contract by Skycorp, absent additional features such as conspiracy or dishonesty, Jaroslaw Nowasad will be identified with Skycorp for the purposes of the tort of inducement of breach of that contract: see para.23.45 *Clerk and Lindsell on Torts*, 24th Ed, at page 1711.

52. Huawei claims that that Nopsar's counterclaim against it is not maintainable and should be struck out under inherent jurisdiction or under O.19, r.28(1) of the Rules of the Superior Courts. Huawei claims that Nopsar is precluded from taking these proceedings against it because Nopsar contracted in writing not to do so on 11 September 2019. Huawei claims that Nopsar's claim against it is vexatious and bound to fail.

53. The agreement dated 11 September 2019 recited that Huawei and Nopsar wished to amend the Consultancy Master Services Agreement and "to reach a full and final settlement with regards to all services delivered by Nopsar. In this regard, the Parties have entered into this Amendment and Settlement Agreement to record and implement the terms on which they

have agreed to settle any claims that Nopsar has or may have in connection with the provision of services or otherwise against Huawei or Huawei's officers, employees or workers, whether or not those claims are, or could be, in contemplation of the Parties at the time of signing this Amendment and settlement agreement ("Dispute")."

54. This agreement came into force on 19 September 2019. This was "the Effective Date", as defined. By clause 3.1, the duration of Consultancy Master Services Agreement (referred to as "the Agreement") was extended to terminate on 31 December 2019. By clause 5 Huawei agreed to issue Purchase Orders for services already supplied through three Nopsar specialist contractors in between September 2018 and February 2019 and to pay Nopsar on receipt of appropriate invoices.

55. Clauses 6 and 7 of this agreement provided as follows:

> "6 Release
>
> This Amendment and Settlement Agreement is in full and final settlement of, and each Party hereby releases and forever discharges, all actual and potential claims, rights, demands and set-offs, whether or not presently known to the Parties, including but not limited to in relation to the Dispute, which each Party shall have against the other as of the Effective Date ("Released Claims").
>
> 7 Agreement not to Sue
>
> Each Party agrees not to sue, commence, or cause to be commenced, any action, suit or other proceeding against the other Party (or its directors or employees) in connection with the Released Claims, save to enforce the terms of this Amendment and Settlement Agreement or the Agreement."

56. Huawei claims that it is clear from the pleadings and affidavits that Nopsar's claimed cause of action relates exclusively to events which took place prior to that agreement and that Nopsar was aware of whatever contact took place between Huawei and Jaroslaw Nowasad relating to his remuneration by Nopsar and the fact that Huawei had engaged him prior to that agreement.

57. Nopsar submits that the terms of that agreement were not sufficiently wide to preclude the proposed claim because behaviour which Nopsar now seeks to complain about was not known or in contemplation at the time.

58. Nopsar also submits that the background context to the contact is relevant to interpretation of its terms and there is a real issue to be tried to whether the terms of the "Release" and "Agreement not to sue" clauses relied on by Huawei preclude its counterclaim.

59. Nopsar also submits that the release and agreement not to sue contained in this agreement was not supported by fresh consideration from Huawei and that the only consideration flowing from the promise related to settlement of invoices for services already rendered to Huawei.

60. The law of contract does not concern itself with adequacy or sufficiency of consideration, so long as something of any value, however slight, is given in return for a promise.

61. Huawei's Promise to release claims by it against Nopsar may have had had no value. A promise not to enforce an unknown or theoretical claim against the promise which the promisor has no knowledge of, may not amount to good consideration for a counter-promise. Furthermore, a promise to settle a debt which is due under an existing contract cannot amount to fresh consideration because the promise to make such a payment only relates to what the promisor is already bound to do.

62. In this case the parties agreed that the term of the Consultancy Services Master Agreement was extended to 31 December 2019. That might or might not be adequate consideration. There is a difference between agreeing on terms of a framework which will apply to possible future contracts and entering into those contracts. Huawei was not obliged to issue Purchase Orders to Nopsar. It could source specialist consultants from elsewhere.

63. Evidence relating to background to the agreement dated 11 September 2019 may be relevant to this issue. The continuation of the Consultancy Services Master agreement to 31 December 2019 was specifically agreed between Nopsar and Huawei.

64. What was the reason for this? This may have been perceived as providing some benefit to Nopsar, such as legal certainty relating to previous or current supply of specialists to Huawei.

65. A possible explanation of the significance of 31 December 2019 appears from Nopsar's proposed amended counterclaim and an affidavit sworn on behalf of Nopsar in support of the application to amend its counterclaim. This was the date when it was anticipated that the *Gauss DB Project,* for which Nopsar had supplied specialists to Huawei would terminate.

66. I note that in in *Priory Caring Services Limited v. Capita Property Services Limited* an appeal point which raised absence of valuable consideration for a settlement as a defence in a case somewhat similar to this one was dismissed as a bad point. The basis on which this point was thought to be bad is set out in paras. 38 and 68 of the judgment of Rix L.J.

67. I have not been told whether there were any current contracts between Nopsar and specialist contractors on foot of which they were supplying services to Huawei at the time of this agreement. Information provided points to this being unlikely as all of the Huawei Purchase Orders relating to the eight specialists supplied by Nopsar had expired. The second affidavit on behalf of Huawei suggests that this agreement was entered into by the parties in the context of termination of their relationship.

68. The evidence relating to the amendment agreement is set out in paras. 19 to 21 of an affidavit sworn on behalf of Nopsar and in para.10 of a replying affidavit sworn by Huawei's in-house solicitor. Their respective positions are that the money agreed to be paid by Nopsar was due under the Consultancy Services Master Agreement and that Huawei disputed this liability.

69. I have insufficient undisputed evidence to enable me to determine whether the agreement dated 11 September 2019 was supported by valuable consideration. That issue cannot be resolved without oral evidence.

70. The wording of the agreement dated 11 September 2019, if it were supported by valuable consideration, is potentially wide enough to preclude Nopsar from suing Huawei in respect of losses directly flowing from alleged tortious activity by Skycorp and Jaroslaw Nowasad in league with Huawei because it is acknowledged these activities were known by Nopsar at the time it signed up to this agreement.

71. That would include liability for any loss suffered by Nopsar as a result of use by Huawei of information relating to the confidential terms of Skycorp's contract with Nopsar and as a result of engaging with Skycorp within 60 days of termination of Skycorp's contractor contract with Nopsar.

72. I agree that it would be difficult to convince a court that this wording could also release Huawei from liability for unlawful interference with contracts between Nopsar and its specialist contractors which Nopsar was unaware of and could not reasonably suspect.

73. A court would be unlikely to conclude the parties to the agreement dated 11 September 2019 intended that it cover a situation where Huawei, without Nopsar's knowledge deliberately interfered with contracts between Nopsar and its specialists with a view to engaging or employing those specialists directly. That would involve concealment of tortious activity. It is unlikely that a court would construe a contractual settlement of present or potential disputes as extending to liability for deceitful conduct which the other party is unaware of.

74. It may also be unlikely that agreement dated 11 September 2019 is capable of being construed as releasing Huawei from liability for damage caused to Nopsar as a result of any new wrongful interference with contractual relations with Nopsar's specialists which took place after 19 September 2019.

75. However, neither of these exceptional situations arising from concealment or wrongful interference with contractual relations occurring after the agreement dated 11 September 2019 became effective arises on the case made by Nopsar in either the counterclaim as currently pleaded or in its proposed amended version of that pleading.

76. It is not appropriate for me to usurp the function of a trial judge by expressing any final view on these matters. My role is to determine *in limine* whether the claim ought to be struck out and I have decided that there is insufficient evidence to enable me to conclude decisively at this stage that Nopsar got valuable consideration in return for its release and covenant not to sue.

77. In my view these matters should be dealt with on the trial of a preliminary issue in the Circuit Court.

78. Nopsar seeks liberty to amend its defence and counterclaim in the terms of a draft exhibited in an affidavit in support of a notice of motion dated 20 December 2022.

79. Skycorp, Jaroslaw Nowasad and Huawei submitted that the proposed amendments should not be permitted. They submitted that this is a crude attempt to extract a settlement from Huawei.

80. The proposed amendments include a claim for €373,333 loss of income.

81. Nopsar's proposed counterclaim faces preliminary jurisdictional and procedural hurdles. It ignores statutory provisions which limit the monetary jurisdiction of the Circuit Court. It also ignores mandatory provisions of the Circuit Court Rules which give effect to those statutory provisions.

82. The Circuit Court lacks jurisdiction to entertain claims for damages in contract or tort in excess of its statutory monetary jurisdiction, save where permitted by law.

83. Jurisdiction of the Circuit Court to "hear and determine" actions founded on contract and tort is set out in s.22(1) and paras.1 and 6 of the Third Schedule to the Courts (Supplemental Provisions) Act 1961 (the 1961 Act), as amended.

84. The effect of these provisions is that: "Unless the necessary parties to the proceedings in a cause sign, either before or at any time during the hearing, the form of consent prescribed by rules of court...," the Circuit Court lacks jurisdiction to hear and determine claims for damages for breach of contract or for the type of tort alleged by Nopsar "Where… the amount of the claim exceeds €75,000" in each case: see s,22(1)(b) of the 1961 Act.

85. Order 5, rule 8 of the Circuit Court Rules 2001, as amended, (the Circuit Court Rules) provides that: "The Consent prescribed by Section 48(1) of the Principal Act, as amended, which provides for the enlargement of the jurisdiction of the Court by consent of the parties shall be in the form set forth in Form 1 of the Schedule of Forms hereto, and shall be lodged with the County Registrar either before or at any time during the hearing."

86. Order 5, rule 9 of the Circuit Court Rules provides that: "Whenever an action, cause or matter is instituted which the court has not jurisdiction to try and determine, if the want of jurisdiction appears on the face of the originating document, the Court shall strike out the action, cause or matter with costs, unless the Consent prescribed by Section 48 of the Principal Act has been signed. Whenever an action, cause or matter is instituted which the court has not jurisdiction to try and determine, if the want of jurisdiction relates to venue and appears on the face of the originating document, the Court may transfer the action, cause or matter to the appropriate circuit or may strike out the action, cause or matter with costs as it considers appropriate."

87. Order 10, rule 4 of the Circuit Court Rules provides that: "If a plaintiff, where the amount alleged to be due to him exceeds the jurisdiction of the Court, shall be satisfied to recover such sum as is within the jurisdiction, he shall state upon the face of the Civil Bill that he abandons all claim to any larger amount, and thereupon the Court may deal with the claim, and the decree (if any) made shall be in full satisfaction of the whole of the original demand."

88. These rules are subject to s.21 of the Courts of Justice Act 1936 which provides:

> "(1) Where an action is brought in the Circuit Court which that Court has not jurisdiction to hear and determine, the judge shall, on the application of the defendant or one of the defendants or on his own motion, as soon as such want of jurisdiction becomes apparent (unless such consent as may be sufficient to cure such want of jurisdiction is duly lodged within such time as the judge shall allow) order the action to be struck out and may, if he thinks proper, make an order awarding to the defendant such costs as the Court could have awarded if it had had jurisdiction to hear and determine such action and the plaintiff: either had not appeared or had appeared and failed to prove his demand.

> (2) Whenever a judge of the Circuit Court is required by the foregoing sub-section of this section to order an action to be struck out, such judge may, if he so thinks proper having regard to all the circumstances of the case, in lieu of making such order as aforesaid, transfer such action to the High Court and make such order as to the costs of the proceedings theretofore had in the Circuit Court as shall appear to him to be proper."

89. Order 67, rule 15 of the Circuit Court Rules provide that: "Non-compliance with any of these Rules, or with any practice for the time being in force in the Court, shall not render the proceedings void unless the Court shall so direct, but such proceedings may be set aside wholly or in part as irregular, or may be amended or otherwise dealt with in such manner or upon such terms, as the Court shall think fit."

90. Neither the Circuit Court at first instance, nor the High Court on appeal from the Circuit Court, have power to enlarge the jurisdiction of the Circuit Court by permitting an amendment which allows claims in excess of the monetary jurisdictions of the Circuit Court.

91. The counterclaim in this action, both its present form and in its proposed amended form, omit to confine the monetary limits of Nopsar claims to the jurisdictions of the Circuit Court, as required by the Circuit Court Rules: see O.5, r.5(c) and O.10, r.4.

92. This is not a case, originally properly confined within monetary jurisdiction, in which it became apparent to Nopsar after institution of proceedings that it was more appropriate to bring its action against Skycorp and the other defendants to counterclaim in the High Court because damages were likely to be greater than the jurisdiction of the Circuit Court. The Circuit Court may send these actions forward to the High Court for hearing "…subject to such conditions as to costs or otherwise as may appear to him to be just:" see s.22(8) of the Courts (Supplemental Provisions) Act 1961.

93. Nopsar was obliged to elect at the outset to either confine its counterclaim within the monetary jurisdiction of the Circuit Court or commence proceedings in the High Court. A "preliminary objection" at para. 1 of the defence and counterclaim which purports to reserve a right to apply to have this action remitted to the High Court and to stay Skycorp's action against Nopsar was misconceived.

94. Nopsar's counterclaim did not include a claim for set-off. Set off could not arise. Nopsar does not make any complaint relating to quality of services provided by Skycorp and the money claimed by Skycorp is due as a debt. There could be no question of remitting Skycorp's action for recovery of this acknowledged debt for services rendered in return for an agreed fee to the High Court.

95. The proposed amendments to the counterclaim include many new allegations. In essence, these allegations repeat content of an affidavit sworn by a director of Nopsar. On its own case, Nopsar was aware of many of these matters at the time of the agreement dated 11 September 2019.

96. A director of Nopsar has offered an explanation for the proposed revision. He asserts that extra detail emerged as a result of his recalling matters after reviewing the papers relating to what went on in 2018 and 2019 and contemplating that time.

97. Step number one in litigation is to find out what happened and take a proper detailed statement. If step number one in litigation had been adhered to in this case, this material would have been available to Nopsar's legal advisors at the outset.

98. The question which now arises is whether this extra material which Nopsar seeks to introduce could possibly add anything significant to its case? The answer to that question is "*no*."

99. Order 65, r.1 of the Circuit Court Rules governs amendments. It provides as that: "The Judge or the County Registrar as appropriate may, on such terms as he considers just, at any stage of the proceedings, allow any party to amend or alter his pleading or other document, or may disallow any amendment already made, or may amend any defect or error in any proceeding, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." This provision is virtually identical to O.28, r.1 of the Rules of the Superior Courts.

100. The objective of pleadings is to identify the questions in controversy between the parties. The rules relating to amendment are permissive and courts are not overconcerned with the reasons for deficiencies in the manner in which a claim or defence has been pleaded if these can be corrected by amendment without prejudice to the opposing party. An aspect of this is that proposed amendments must advance a coherent case, capable of surviving an attack under O.18, r.28 of the rules of the Superior Courts: see *Cornhill v. Minister for Agriculture and Food* [1998] IEHC 47. An opposing party cannot be expected to meet amendments which seek to advance a vexatious claim which has no reasonable chance of success. In my view the proposed amendments to Nopsar's counterclaim are a mixture of unnecessary narrative relating to matters already in its counterclaim and assertions which seek to advance or particularise claims which have no reasonable chance of success.

101. Nopsar's director averred in his affidavit that up to July 2018 Huawei Purchase Orders for specialist consultants supplied by Nopsar were automatically renewed, and that these contractors were working at that time on a project called the "*Gauss DB Project."* He alleges that Huawei slowed-up or refused renewal of roll-over of Purchase Orders for Nopsar's

consultants in early 2019 and held up payments to Nopsar. He averred that a Purchase Order for services of head of the Irish team for the *Gauss DB Project* due for renewal on 1 January 2019 was not renewed and that Huawei contacted him with a view to employing him directly in April 2019.

102. He averred that Jaroslaw Nowasad advised in January 2019 that he had secured a job in Dublin and wished to "resign" from Nopsar and that when Huawei was advised of this, they got on to Nopsar and indicated that Jaroslaw Nowasad was dissatisfied with his remuneration. He averred that Jaroslaw Nowasad had in fact been employed by Huawei and that they connived at interference with his contract with Nopsar to increase the Skycorp charge out rate.

103. While the proposed amended counterclaim provides further narrative in relation to this and other complaints about Skycorp and Huawei, the gist of any stateable complaints about Skycorp and Huawei is already adequately set out in the existing iteration of Nopsar's counterclaim.

104. Nopsar includes material which strays beyond the obligation to plead only material facts in summary form in the proposed amended counterclaim. Much of this material is narrative of proposed evidence relating to alleged motivation of Huawei executives for terminating Huawei's engagement with Nopsar and putting pressure on Nopsar by withholding payment, requiring removal of specialist contractors, slowing or not rolling-over Purchase Orders and facilitating the hiking up of the daily rate of payment to Skycorp.

105. This material is dressed-up in the language of conspiracy. However, the allegations have nothing got to do with any coherently pleaded conspiracy to damage Nopsar by unlawful means or to engage in tortious behaviour for the purpose of damaging Nopsar. Nopsar alleges that Huawei stopped renewing Purchase Orders for specialist contractors for some ulterior purpose and the relationship broke down as a result. Huawei was not contractually bound to continue to continue to engage the services of Nopsar or its specialist contractors and its motives for refusing to continue to use Nopsar were irrelevant.

106. This material is not an essential element of the material facts necessary to establish Nopsar's claimed causes of action against Skycorp, Jaroslaw Nowasad and Huawei. These relate to alleged unlawful interference with Nopsar's contractual relations with its specialists and how it was brought about that Nopsar ceased to be engaged by Huawei and that these specialists came to be directly engaged by Huawei.

107. Nopsar could make its case and introduce evidence relevant to motivation in the context of breach of contract and unlawful interference in contractual arrangements in without including

these details in amendments. It would be a matter for a court of trial to decide whether this evidence was relevant to any issue it had to decide.

108. This content is "unnecessary" within O.19, r.27 of the Rules of the Superior Courts. While the Circuit Court Rules do not contain similar provisions, it is appropriate to apply the practice and procedure of the High Court in considering whether to permit amendments. Pleadings should not include collateral narrative or content which is "unnecessary" or "scandalous."

109. Nopsar has not pleaded the existence of any contract which obliged Huawei to renew expired Purchase Orders relating to any specialists under the control of Nopsar. It is evident from details provided in the proposed amended counterclaim that Huawei Purchase Orders for services of eight specialist contractors supplied by Nopsar expired on 15 January 2019, 30 June 2019, and 31 July 2019.

110. Nopsar now alleges that in the months following July 2019, three other former Nopsar specialist contractors were directly employed by Huawei.

111. Nopsar alleges that the information about rates of pay obtained from Skycorp and Jaroslaw Nowasad was confidential and used to engage in a campaign of "financial harm." The gist of this allegation seems to be that this information about pay rates of Skycorp was used by Huawei to induce these three specialist contractors to work for Huawei.

112. Nopsar's case is that as a result of these alleged actions Huawei stopped taking supply from Nopsar of services provided by these individuals and engaged them directly. Paragraph 47 of the affidavit of Nopsar's director referred to these three specialists, without specifically asserting that they engaged with Huawei in competition with Nopsar within 60 days of the termination dates of their Contractor Agreements or otherwise unlawfully interfered with performance of those agreements.

113. It is evident from the proposed amended counterclaim and the affidavit evidence that the Huawei Purchase Orders for services of two of these specialists terminated on 15 January 2019 and that they continued to provide services during January and February 2019 which Nopsar was paid for as agreed in the agreement dated 11 September 2019. The Huawei Purchase Order for the third specialist terminated on 30 June 2019. Nopsar does not disclose when they ceased to be engaged by Nopsar under their Contractor Agreements.

114. Nopsar does not suggest that any of these three specialists continued to be employed or engaged by Nopsar under Contractor Agreements when they started to work for Huawei. It is not pleaded that they were in breach of any of the terms of their Contractor Agreements by taking up such employment. At para. 35 of the proposed amended counterclaim Nopsar

pleads that "in the following number of months" after mid-July 2019 Huawei employed three of these specialists directly.

115. These proposed amendments do not identify any basis on which Huawei or Skycorp or Jaroslaw Nowasad was involved in any breach of contract or wrongdoing when Huawei did not renew expired Purchase Orders or hired these three specialists.

116. It is impossible to see any reality in the fantastic claim that Nopsar lost the benefit of a revenue stream of €373,333 from employment by Huawei of eight specialists on the *Gauss DB Project* as a result of disclosure by Jaroslaw Nowasad of Skycorp's remuneration to Huawei in January 2018, even assuming that this was wrongful. This claim is based on an alleged profit margin for Nopsar if Huawei had continued to engage for services of specialist contractors the *Gauss DB Project* through Nopsar. This was something which Huawei was not contractually obliged to do after Purchase Orders for contractors expired.

117. If there was unlawful interference by Huawei in performance of the Skycorp contract in January 2019, it is difficult to see how loss as a result of that could be more than whatever extra money Nopsar was obliged to pay Skycorp during the period between January and July 2019 as a result of the increase in this specialist's daily rate. It is clear that at some point during that period Nopsar stopped paying Skycorp.

118. It is therefore unnecessary to consider whether leave to amend Nopsar's counterclaim should be subject to a condition that it include in that amendment an abandonment of claims in excess of the monetary jurisdiction of the Circuit Court.

119. The application to amend the counterclaim will be refused for these reasons. These appeals will be listed in early course to hear submissions on orders for costs.