THE COURT OF APPEAL

UNAPPROVED

Court of Appeal Record Number: 2020/270

High Court Record Number: 2018/1057 S

Neutral Citation Number [2023] IECA 225

Whelan J.
Faherty J.
Haughton J.

BETWEEN/

MICROSOFT IRELAND OPERATIONS LIMITED

PLAINTIFF/RESPONDENT

AND

ARABIC COMPUTER SYSTEMS

FIRST NAMED DEFENDANT/APPELLANT

AND

NATIONAL TECHNOLOGY GROUP

SECOND NAMED DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Robert Haughton delivered on the 22nd day of September 2023

1. The following appeal arises out of the judgment of Barniville J. delivered on 20 October 2020 and concerns a single ground of appeal raising a net issue of private international law that does not seem to have been previously decided in this jurisdiction, although it has been the subject of many English decisions and much academic commentary.

2. The trial judge concluded that questions of apparent or ostensible authority, and related issues such as estoppel and ratification, arising in relation to the formation of international contracts should be determined by reference to the putative law of the agreements at issue, which in light of express choice of law clauses in each of three agreements at issue was Irish law, as distinct from the law of the country of incorporation of the defendant/appellant companies being the law of the Kingdom of Saudi Arabia, as contended for by the appellants.

3. Before addressing the appeal it is appropriate to record the outcome of a preliminary matter that arose at the hearing before this court, and for that purpose it is necessary to refer to what occurred in the High Court.

4. The trial judge's conclusion on the issue under appeal was reached as part of his reasoning for refusing an application by defendants/appellants under O. 12, r.26 RSC seeking to set aside service of the proceedings on the defendants in Saudi Arabia, or alternatively, discharging the order of the High Court (McDonald J.) granted *ex parte* on 21 August, 2018 permitting service on them outside the jurisdiction pursuant to O.11, r.1(e)(iii) RSC on the basis that the action was to enforce a contract "(iii) by its terms or by implication to be governed by Irish Law…". However the trial judge's conclusion on the issue does not form part of his order as such.

5. The appellants had contended in the High Court that the persons who signed the agreements between Microsoft Ireland Operations Limited ("Microsoft Ireland") on the one side and Arabic Computer Systems ("ACS") and National Technology Group ("NTG"), both companies incorporated in Saudi Arabia (NTG being the parent of ACS), on the other side, were not authorised so to do, and that as a consequence the contracts were null and void. They further

contended that ACS did not contract with Microsoft Ireland, but maintained that its contractual arrangements were with Microsoft Arabia, a Microsoft Ireland subsidiary registered under the laws of Saudi Arabia. Microsoft Ireland responded that if the signatories did not have actual authority, they did have apparent or ostensible authority to sign on behalf of ACS and NTG, and further the agreements were thereafter ratified.

6. In the High Court the parties agreed that the test under O.11, r.1(e) RSC required the applicant for service outside the jurisdiction to show a *"good arguable case",* but the defendants contended that this test required Microsoft Ireland to show that it had *"the better of the argument".* A significant part of the judgment was concerned with the trial judge's rejection of that contention, and he concluded:

> "117…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 the case is contested by the defendant…"

That aspect of the High Court judgment has not been appealed.

7. The trial judge then proceeded to consider what law should govern the issue of apparent/ostensible authority of an agent to enter into a contract with a third party on behalf of its principal where that contract contains a choice of law clause, and also what law should govern the issue of ratification raised by Microsoft Ireland. He decided that Irish law as the choice of law in the contracts was the law by reference to which these issues should be decided, and I will refer later in this judgment to his reasoning.

8. The trial judge then applied Irish law to the facts and concluded, in para.199, that Microsoft Ireland had established *"a good arguable case"* (he also held that in any event in his view it had *"the better of the argument"*) that the three agreements at issue were valid and enforceable

and had been signed on behalf of ACS by persons with apparent or ostensible authority to do so, adding –

> "…I am also satisfied that Microsoft Ireland has put forward sufficient evidence on affidavit and has advance 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 trial."

In paras. 201 and 202 the trial judge expressed the view that Microsoft Ireland had also demonstrated on the affidavit evidence a *"good arguable case"*, and indeed *"the better of the argument",* that the agreements were ratified by ACS and binding on the defendants.

9. At the commencement of the hearing of this appeal the court queried whether it should hear the appeal given that the Notice of Appeal did not seek to set aside the order High Court or remove the proceedings from the jurisdiction of the Irish High Court, and expressed the concern that it would be open at the trial of the action for the appellants to argue *de novo* that the law of the seat of incorporation should be applied to determine the issues of ostensible authority and/or ratification.

10. Mr. Lewis S.C., counsel for the appellants, agreed that they were no longer challenging jurisdiction, but urged the court to hear and decide the appeal as it would bring clarity on whether the appellants should lead evidence of Saudi Arabian law on the issues of ostensible authority and ratification. Counsel was concerned that, if not decided in this court, the issue would lead to a situation where the trial judge might exclude such evidence which in itself could result in an appeal of the entire substantive hearing. He also urged that it was a pure question of law that appeared to have been decided by Barniville J., much in the same way as a preliminary issue, and that if the appeal were heard and determined it would be difficult to see what benefit there would be to the parties relitigating the same point again. He submitted (Transcript, p.14 line 15-20) –

"It seems to me, Judge, in reality, that it would be very difficult for either party at the trial of the action to advocate for a position and to attempt to lead evidence for a position that contradicted a determines that this court might give tin relation to the applicable law on ostensible authority. It would seem a very brave position for counsel to adopt, to stand up and say there was discrete question of law appealed to the Court of Appeal [and determined]….but I'm insisting on litigating that point again…."

11. Mr. McCullough S.C., counsel for Microsoft Ireland, expressed the view that Barniville J. in his judgment had actually decided the legal issue as to whether the putative law of the agreements should apply to the issue of ostensible authority, and not just to the level of *"good arguable case"* – it was in the application of the law as he found it to be that he went on hold that Microsoft Ireland had *"a good arguable case"/"the better of the argument"*. He agreed with the practical point raised by Mr. Lewis, that the trial judge was unlikely to disagree with the decision of Barniville J. on the legal point. He also agreed with Mr. Lewis that that it would be *"brave"* of either party to try to raise the legal issue again if it had been decided by this court.

12. In his reply submission on the preliminary point Mr. Lewis went so far as to say (Transcript p.22 line 18-26) –

"…So if this court was to say Judge Barniville was right, we wouldn't be attempting to run Saudi law because the question would have been, we think, definitively determined the Court of Appeal, but on the other hand, if the Court found in our favour, obviously we would, but if there was no appeal we would certainly be attempting to litigate the point again because if we didn't litigate it again it wouldn't be amenable to appeal.".

13. Having considered these submissions the court decided to hear and determine the appeal, albeit that, unusually, the outcome would not have any effect on the High Court order and the decision on the issue was not mentioned in the order. It did appear to the court that the issue under

appeal was definitively decided by Barniville J. in his comprehensive judgment, after full argument, and as a preliminary legal issue that had to be determined in order for him to proceed to determine whether, on the affidavit evidence, Microsoft Ireland had a *"good arguable case"* on ostensible authority and/or ratification. It was also accepted that in deciding this appeal this court would bring desirable clarity on the issue before the action proceeds to trial. Further, and without expressing any definitive view on whether the issue could be raised again in the High Court, I am satisfied that deciding this appeal will have the practical benefit that the legal issue is very unlikely to trouble the trial judge, and by extension is equally unlikely to be the subject of, or of itself give rise to, any further appeal after the trial of the action. It was therefore appropriate to embark on and decide this appeal.

14. Because the appeal is peculiarly limited to a single legal issue, the determination of which either way will not affect the order made in the High Court or the jurisdiction of that court to hear the substantive action, it has not been necessary to address the facts in any great detail, or apply the law as found by this court to the facts.

Further Relevant background

15. In the Summary Summons issued in August 2018 Microsoft Ireland seeks judgment against both defendants in a sum of $31,539,677.95 on foot of invoices issued between 31 December 2015 and 22 August 2017 under two written agreements, called Microsoft Channel Partner Agreements, which it pleads were entered into with ACS on 1 September 2014 and 1 September 2016 (the "First Agreement" and "Second Agreement" respectively). The claim against the NTG is on foot of an agreement in writing dated 19 December 2019 whereby, it is pleaded, NTG agreed to guarantee payment of debts due by ACS to Microsoft Ireland ("the Guarantee").

16. While the affidavit evidence is more fully set out in the High Court judgment, and it is not necessary to do so again here, a flavour of the background and opposing positions in the dispute emerges from the affidavits. The affidavit of Mr. Al -Ballaa sworn on behalf of the appellants

on the 13th day of January 2019 shows that ACS and its parent NTG are both companies incorporated in Saudi Arabia. Microsoft Ireland is an Irish registered company. By the order of McDonald J. made on 21 October 2018 Microsoft Ireland was granted leave under O.11, r.1(e) to issue and serve these proceedings on the appellants outside the jurisdiction.

17. ACS is involved in the marketing and sale of software and cloud computing products, including, on behalf of Microsoft Ireland, in Saudi Arabia. NTG is an information and communication technology company which is the majority shareholder in ACS. The commercial arrangements between ACS had developed on an ad-hoc contract-by-contract basis, but in essence ACS asserts that its contractual arrangements were with Microsoft Arabia Co. Ltd, a subsidiary of Microsoft Ireland registered in Saudi Arabia, and not with Microsoft Ireland. At para 12, Mr. Al-Ballaa states:

> "12… I was under the impression during this period that our only (or our principal) counterparty was Microsoft Saudi Arabia (whose full corporate title is Microsoft Arabia Co. Ltd). Microsoft Ireland's role in the business was limited to providing some fairly insignificant back-office support to Microsoft Arabia – principally treasury, and credit control.

…

> 15. The manner in which contracts were usually concluded with ACS also strongly suggests that the contractual counterparty was Microsoft Saudi Arabia and not the plaintiff in these proceedings. For instance, in the case of prospective Government contracts Microsoft Saudi Arabia would send ACS (and other Microsoft Partners) the initial pricing structure for the products. Negotiations concerning the available discounts would usually follow with ACS then tendering for the contract directly with the customer based on the price it has agreed to pay Microsoft Arabia. If successful in the tender, ACS was then required to sign a Final Channel Price Sheet

(CPS) which included the main terms and conditions of the deal (duration, price, instalments etc.)

16. Nowhere on those Final Channel Price Sheets – which were plainly intended to be contractually binding – is there a reference to the Microsoft Ireland entity…

17. I am advised by my lawyers that the identity of ACS's contractual counterparty is relevant in at least two respects. First, it provides ACS with a full substantive answer to the claim being made by Microsoft Ireland in the action. Second, and more significantly in the present context, it means that Microsoft Ireland cannot invoke the jurisdiction of the Irish Courts because the purchase contracts (CPSs) were entered into in Saudi Arabia with, as ACS understood it, Microsoft Arabia and were required to be performed in Saudi Arabia."

18. Mr. Al-Ballaa avers at para. 20 that the First Agreement is void because an Amended Memorandum of Association "stipulated that a company would be managed by a Board of Directors composed of three directors: *[named]*. The Board of Director's powers include *"the right to conclude all contracts and agreements to which the company is a party inside and outside the Kingdom…"*. He further avers at para. 21 that "the individual who purported to sign the First Alleged Agreement on behalf of ACS, Syed Abdulaleem, was not authorised by me or by any of the other Directors – still less by a properly composed Board – to execute the First Alleged Agreement". Similar averments are made in respect of Mr. Mohamed Mounir who purported to sign the Second Alleged Agreement. Similar averments are then made in respect of the Guarantee, purportedly signed by Ibrahim Al Zeer, who was not a director of either ACS or NTG. It is therefore claimed that ACS is not bound by the First and Second Agreement and NTG is not bound by the Guarantee Agreement.

19. In a replying affidavit sworn on 4 February 2018 by Mr. Jesus Del Pozo Moran, a Senior Credit Manager in the treasury section of Microsoft Ireland, averred:

"10. The First Microsoft Channel Partner Agreement is governed by, and to be interpreted in accordance with, the laws of Ireland. Pursuant to that contract, [Microsoft Ireland] and ACS have consented to the exclusive jurisdiction of, and venue in, the Irish Courts for all disputes connected to the First Microsoft Channel Partner Agreement...

11. Pursuant to the 'applicable law' provision specified on page 2 of the Second Microsoft Channel Partner Agreement…is also governed by, and to be interpreted in accordance with the laws of Ireland. As appears from that contract, the parties have consented to the exclusive jurisdiction of, and venue in, the Irish Courts for all disputes connected to the Second Microsoft Channel Partner Agreement."

20. The relevant clause in the First Agreement reads:

"21. **Applicable Law; Attorneys' Fees.** This Agreement is governed by and interpreted in accordance with the laws of Ireland. 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. If either party begins litigation in connection with this Agreement, the substantially prevailing party will be entitled to recover its reasonable attorneys' fees, costs and other expenses. The 1980 United Nations Convention on Contracts for the International Sale of Goods does not govern this Agreement."

An identically worded clause appears on page 2 of the Second Agreement. In the Guarantee Agreement there is a simpler clause that reads:

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

21. Mr. Moran further avers that the appellants never took issue with Ireland being the choice of jurisdiction:

> "18. Prior to the initiation and service of these proceedings, ACS did not, at any time, challenge the agreed choice of jurisdiction of Ireland and did not dissent from the agreement that the Microsoft Channel Partner Agreements are governed by the laws of Ireland. Further, at no time prior to the initiation and service of these proceedings did ACS dispute the fact that the monies in question were due and owing to [Microsoft Ireland]. On the contrary, as appears from my previous affidavits in these proceedings, ACS assured [Microsoft Ireland] of its intention to pay and suggested that the issue was one of cash flow only.
>
> …
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> 20. At no time prior to the issuance of these proceedings did NTG question the validity of the choice of jurisdiction clause in the Guarantee agreement, which is Ireland. Nor has it ever contested the facts that the relations between the parties under that contract are governed by the laws of Ireland".

22. Mr. Moran also lays out the case for ratification of the First and Second Agreements, deposing as follows:

> "13. As an authorised reseller of Microsoft products in Saudi Arabia, ACS ordered what are described as Licensed Offerings from MOL under the Microsoft Channel Partner Agreements. As more particularly described in my previous affidavits in these proceedings, ACS has failed and refused to pay MIOL for Licensed Offerings having a contractual invoiced value of USD$31,539,677.95. I beg to refer to a schedule listing those invoices, together with copies of each invoice in question, which appear at Tab 3 of exhibit booklet JDPM1. As specified on each of the invoices, payment is to be made to MIOL.

14. Each of the Licensed Offerings comprising the debt of USD$31,539,677.95 was ordered by ACS from MIOL. Each one of the invoices corresponds to an order submitted by ACS to MIOL. For all sales of Licensed Offerings within the MEA region, channel partners submit orders to MOL for approval. Each order is subject to review by MIOL and if the order is approved by MOL, MIOL executes the order and issues an invoice accordingly. I beg to refer to Tab 4 of exhibit booklet JDPM1 which includes an example of an order signed by ACS and MIOL in relation to a licence order submitted by ACS for the provision of licences to its end-customer, National Commercial Bank (Saudi Arabia).

15. The ordering process for Licensed Offerings has always been between MIOL and ACS for the purpose of procuring and reselling Licensed Offerings pursuant to the Microsoft Channel Partner Agreements. For example, to illustrate the last batch of invoices which refer to Licensed Offerings ordered by ACS and which were discharged in full by ACS (in September 2016), I beg to refer to two screenshots from MIOL's bank account demonstrating payments received from ACS (in the sum of $7.9 million), together with an email from ACS confirming the specific invoices for which these payments made, which are included at Tab 5 of exhibit booklet JDPM1. In accordance with the invoices listed in the email from ACS exhibited at Tab 6, ACS paid the sums specified to MIOL as requested on foot of purchase orders which were, in turn, submitted by ACS to MIOL for the provision of Licensed Offerings. I say and believe that this illustrates beyond doubt or credible argument that ACS accepted, acknowledged and ratified the effect of the Microsoft Channel Partner Agreements and further accepted that MIOL has, at all times, been its relevant contractual counterparty."

The High Court judgment

23. Having determined the standard to be met by *"good arguable case"* the trial judge turned to address the issue of what law should be applied to determining the issues of actual authority, and then ostensible authority and ratification. As the argument in this court covered much of the same ground it is appropriate to refer to the judgment in some detail.

24. The trial judge refers first, at para. 121, to the fact that ACS and NTG contended, and Microsoft Ireland did not dispute, that the question of *actual authority* of the signatories to the three agreements and their capacity to bind ACS/NTG must be determined by reference to law of the place of incorporation of those companies, namely Saudi Arabia, and he quotes with approval *Dicey, Morris and Collins on the Conflict of Laws* (15th Ed.) (2012) ("*Dicey"*), where rule 175(2) states:

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

The trial judge noted that this principle was accepted by Walsh J. (with whom Hederman J. agreed) in *Kutchera v. Buckingham International Holdings Limited* [1988] 1 IR 61. The trial judge was therefore satisfied that whether the signatories had actual authority, or were expressly authorised to enter into the three agreements on behalf of ACS and/or NTG, fell to be determined by Saudi Arabian law.

25. As to ostensible authority/ratification, the trial judge acknowledged that this was more controversial and that there was no Irish authority on point, but that the English cases strongly suggested that these issues should be decided by reference to Irish law as the putative proper law of the agreements. He then considered the caselaw.

26. The starting point was the decision of the English Court of Appeal in *Compania Navéra Micro S.A. v Shipley International, Inc ("The Parouth")* [1982] 2 Lloyd's Rep. [351]. There the Court of Appeal upheld the original leave granted to serve proceedings out of the jurisdiction. 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 term 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.

27. Ackner L.J. referred to the 10th edition of *Dicey* where the principle was stated as follows:

> "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)

Ackner L.J. noted that this had not been drawn to the attention of the judge below. He also noted that it was now accepted – although it had not been accepted in the court below – that if the case was heard then the probabilities were the putative proper law, namely English law, would be applied to resolve the issue. He concluded that the arbitration clause had the important result of making the proper law of the dispute probably English law, and stated that what made it 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.

28. While Barniville J. accepted that certain concessions were made on behalf of the defendants in the appeal in *Parouth* he nevertheless regarded it as authority for the proposition advanced by Microsoft Ireland since each of the three agreements at issue contained an express provision choosing Irish law which was thus the putative proper law of the contracts.

29. Barniville J. found that a similar conclusion was reached by the Court of Appeal in *Brittania Steamship Insurance Association Ltd v Ausonia Assicurazioni SpA [1984] 2 Lloyd's Rep.98 ("Brittania Steamship")* where it held that the court below had correctly exercised its discretion to order service outside the jurisdiction. There the dispute was between the plaintiff

shipowners' protecting and indemnity associations and the defendants who were an Italian insurance company, as to whether or not two contracts of reinsurance relied on by the plaintiffs were validly made and therefore binding. Both contracts, if valid, were, by their terms or implication, governed by English law, although there was no express choice of English law. The resolution of the issue depended upon 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 – as Barniville J. commented, similar issues to those raised in the present case.

30. It was not disputed that the proper or putative law of the contracts was English law, and that the apparent or ostensible authority of an agent and the question of ratification fell to be decided by reference to English law. In refusing to set aside service outside the jurisdiction, 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.

31. Barniville J. quoted the following *dicta* reported at p.100 from the judgment of Ackner L.J. :

> " 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, is English law, 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"."

32. Barniville J. noted that in the present case there was no acceptance that the proper law or putative law of the agreements was Irish law or that ostensible authority and ratification are to be governed by Irish law, but he commented:

> "131…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."

Ultimately while he found the case provided some support to Microsoft Ireland "it is not a particularly strong authority either way."

33. The trial judge then referred to Steel J. in *Rimpacific Navigation Inc v. Daehan Shipbuilding Co Limited* [2009] EWHC 2941 (Comm) where the court rejected a challenge to jurisdiction where reliance was place on contracts which contained an express English choice of law clause, and where the argument was that the person who signed the contracts at issue had no actual authority to do so. In so doing Steel J. relied on the speech of Ackner J. in *Brittania Shipping*, a passage from *Dicey* (12th Ed.) and *Merrill Lynch Captial Services Inc. v. Municipality of Piraeus* [1997] C.L.C. 1214 where Cresswell J. stated, at p.1231:

> "Questions of ostensible authority, ratification and estoppel are governed by English law as the putative proper law."[1]

34. The trial judge then turned to *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 ("*Habas Sinai*"), where he considered the issue was "extensively considered" in the English High Court. *Habas Sinai* concerned a challenge to the

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[1] Of note, although not mentioned by Barniville J., is that Steel J. also quoted with approval a passage at p.1851 from the then latest edition of *Dicey* (14th Ed.) which sought to give a rationale for the putative proper law rule that it "…responds to the requirements of commercial intercourse" and "…third parties must be a able to assume, at least where A[gent] has no actual authority from P[rincipal], that A's authority covers everything which would be covered by the authority of an agent appointed under the law applicable to the contract made between the agent and the third party…". This passage appears also in the 15th Ed., (although the rule itself is slightly differently worded), and will be discussed later in this judgment.

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, but a hand amended arbitration clause provided for London arbitration, and the implication of this was that the law of the seat of arbitration, English law, was the governing law. The claimant argued that the court should not have had regard to the arbitration clause 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 on behalf of the principal. Hamblen J. rejected this in a series of conclusions that were the subject of much debate before this court and will be addressed more fully later in this judgment.

35. The trial judge at para. 135 comments on those conclusions that he considered most relevant:

> "135. 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"".

36. The trial judge noted that Hamblen J. referred to *Merrill Lynch* and *Rimpacific* as authoritative, and that the claimant's arguments were inconsistent with the conflicts of law rule as found by the Court of Appeal in *The Parouth* which had been followed in *The Atlantic Emperor* [1989] 1 Lloyd's Rep. 548. He also noted the acceptance by the claimant in *Habas Sinai* that the law governing the issue of ostensible authority to bind the claimant would also govern any issues of ratification of that authority. The trial judge at para. 138 expressed his view that *Habas Sinai* provided strong support for the position advanced by Microsoft Ireland.

37. The trial judge then considered the decision of the English High Court (Andrew Smith J.) in *PEC Limited v Asia Golden Rice Company* [2014] EWHC 1583 ("PEC") where 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 arbitration agreement, and who signed alleged written confirmation, had authority to enter same. The question of ostensible authority arose. The claimant referred to the relevant conflicts of law rule as now worded in the 15th Ed. of *Dicey:*

> "**Rule 244** - (1) The issue whether the agent is able to bind the principal to a contract with a third party, or a term of that contract, is governed by the law which would govern that contract, or term, if the agent's authority were established."

On that basis English law would be the governing law, but 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 then argued that Indian law should govern the issue, as it 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.

38. Andrew Smith J. had sympathy with the submission that the general principle stated in *Dicey* would not be applied if "*it resulted in distinct unfairness or there were other strong reasons for*

modifying it" (para.75), and gave as an example of where this might arise as an agent choosing a law unconnected with the contract simply to clothe himself with authority. However he was not persuaded that this was a case where there should be departure from the rule, holding that the parties had impliedly chosen that their dealings were to be governed by English law by agreeing to English arbitration.

Barniville J. commented:

> "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…it would nonetheless by unfair to apply that principle in this case."

39. The trial judge then addressed references in certain textbooks where, while the proper putative law approach of the English courts to determining these issues was accepted, some of the authors questioned the correctness of that approach. He noted that while *Dicey* (15th Ed.) (para.33-447) raised questions the author's comments were not followed by Hamblen J. in *Habas Sinai.*

40. Barniville J. referred to *Agreements on Jurisdiction and Choice of Law* (2008) Briggs[2] (para.2.32) which highlights the conundrum that faces the courts when choosing the law by

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[2] Andrew Briggs Q.C., Professor of Private International Law, Oxford University. In the academic debate over the correctness of the putative proper law approach Professor Briggs argues for the application of the *lex fori* to issues concerning whether there was consensus between the parties in the formation of the contract. Professor Briggs was part of the editorial team of the Dicey, Morris & Collins (15th Ed.), although the editor responsible for Chapter 33, which contains *Dicey*'s Rule 244 (considered by Andrew Smith J. in PEC) and commentary, rests with Professor Andrew Dickinson, University of Sydney and Visiting Fellow of the British Institute of International and Comparative Law.

reference to which issues relating to validity are to be decided when one person argues that no contract came into existence in the first place. It is convenient to quote the relevant extract here slightly more fully than did the trial judge :

> "It is notorious that the identification of a choice of law rule to assess such arguments 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 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. The common law solution had a fundamental flaw. The Rome Convention, on the other hand, opted for a solution in two parts: to use the law which the contract would have been governed by if it were taken to be valid, but to allow the objecting party to rely on his own law to show that, by reference to it, he had not consented and was therefore not bound. The advantage of this is that the two questions my, together avoid the accusation of taking sides between parties who are opposed on the very point in dispute. The Rome Convention is superior to the common law in using pragmatism to avoid the whirlpools of theory.".

41. As the trial judge explained the Rome Convention, now Rome 1, is implemented here in Regulation (EC) No. 593/2008 on the law applicable to contractual obligations. It has limited scope, so does not apply here. Where it does apply, such as to employment contracts, Art.8.1 provides for the existence and validity of the contract or any term to be determined by "the law which would govern it under this Convention if the contract or term were valid". Art.8.2 then provides that –

> "2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph."

The trial judge quoted a further passage from *Briggs* (para.3.64, pp. 94-95) in which the author referred to the putative proper law approach as being "generally accepted" in English law, and stated "[P]roblems of contractual formation are notorious for throwing up puzzles which test logic to destruction…" and proceeded to give examples. The trial judge considered that, notwithstanding his criticism, Professor Briggs accepted that the putative proper law approach was "the solution adopted by the English Courts".

42. The trial judge then referred to the *European Private International Law of Obligations* (4th ed.)(2014), where, *Plender and Wilderspin* stated:-

> "…[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 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 principal 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."

43. At para.149 the trial judge states:-

"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."

44. Finally the trial judge referred to *Stone on Private International Law in the European Union* (4th Ed.) (2018) where the author refers to the English caselaw and the choice of the putative proper law approach, and observes that different solutions are adopted elsewhere, including in the Hague Convention of 14th March, 1978 on the law applicable to agency. At para. 15.28 the author 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". In para.15.29 the author concludes 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. The trial judge added –

> "It was noted that that suggestion had some support in the dicta of Andrew Smith J. in PEC."

45. The trial judge then stated his conclusions on the issue of apparent/ostensible authority at paras. 152 -154:

> "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. Which ever 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 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."

46. It is clear from these passages that the trial judge was also applying his reasoning and conclusions in respect of choice of law to issues of ostensible/apparent authority to issues of ratification or whether a defendant is estopped from denying the validity of agreements.

The Notice of Appeal

47. The sole ground of appeal is that the trial judge erred in concluding that -

"…in determining questions of apparent or ostensible authority, or of ratification, the Court should apply the putative law of the disputed contract (here, Irish Law) as distinct from the law of country of incorporation of the company whose agent's acts are under consideration (here, Saudi Arabian Law)".

The arguments in outline

48. The appellants' core position before this court, as it was in the High Court, was that the choice of the putative or proper law of the disputed contract, while supported by several English authorities, is circular and illogical, and is not supported by certain English academic writers. The appellants posed the rhetorical question, 'can what they assert is the unauthorised and

legally ineffective act of entering into a contract governed by Irish Law, make Irish law applicable in analysing questions of ostensible authority and ratification?' Mr. Lewis argued that this question has never been definitively answered in this jurisdiction, and that because of the illogicality of the rule - (a) this court should depart from the English authorities, and (b) it should hold instead that the law of the country of incorporation of a company should govern questions of ostensible authority and ratification.

49. As in the High Court, it was submitted that the court should depart from the decision in *The Parouth* and reject the adoption there by the Court of Appeal of Rule 146 in the then current edition (10th) of *Dicey* which provided that –

> "The formation of a contract is governed by the law which would be the proper law of the contract if the contract was validly concluded."

- that is to say, the so-called putative law approach. It was submitted that this rule is "fundamentally wrongheaded" being based on an illogical premise because it seeks to prove the existence of a contract by relying on the terms of that contract. It was submitted that it is a rule the reason for which has never been properly interrogated, and which appears to have been adopted as a rule of convenience, and because it permits certainty notwithstanding that it gives rise to potential unfairness. It was submitted that the alternative advocated by the appellants entails certainty but also has the advantage that it is connected to the country where the company which the claimant seeks to be contractually bound by ostensible authority and act of its agent is incorporated.

50. In response Counsel for Microsoft Ireland relied on the putative proper law principle as being well-established in the English common law, and acknowledged as such by academic writers, even those who level some criticism at it. While it might not be perfect, the same could be said for the alternatives, and it had the merit of certainty. Counsel argued that the provenance and

rationale for the rule was considered in the English cases, particularly *Habas Sinai,* and that the trial judge gave careful consideration to the relevant caselaw and academic writings. Counsel argued that the judgment of Andrew Smith J. in *PEC* supported the trial judge adopting an approach that *"would enable a court in exceptional circumstances not to apply that law where it would be particularly unfair to the principal."* Counsel also argued that the appellants had not adduced any authority for the alternative propounded by them, namely that these issues should be determined by reference to the law of the seat of incorporation of the principal companies.

The arguments discussed

51. Counsel for the appellants repeated criticism of the decision in *The Parouth* and in particular relied on the fact that the defendant in that case had conceded that there was a good arguable case that the contract, including the arbitration clause at issue, was binding, and that the probability was that English law as the putative proper law of the contract would be applied to resolve the issue of whether there was a binding contract.

52. I don't think Mr. Lewis' criticism is entirely fair. The defendant, a Florida company, denied concluding a charterparty (which contained a clause providing for arbitration in London) for the plaintiff's Panamanian vessel, and alleged it was made by Dutch brokers who were not acting for them or alternatively did not have authority to conclude it. Counsel for the defendant (Mr. Longmore) argued that as the issue was whether there was a contract at all it would be wrong to allow the arbitration clause to weigh in the plaintiff's favour, and argued, as here, that the defendant should have been sued where it could be served – Florida. Indeed Bingham J., the judge who had set aside the original order for service outside the jurisdiction, commented that *"...None of the links is very potent and there is no English link"*, and in granting leave to appeal commented on *"an oddity in the case, namely that the link with the jurisdiction was*

actually the centre of the dispute". This 'oddity', which is essentially the same point described by Mr. Lewis in the present appeal as illogical, was therefore a central part of the argument before the Court of Appeal, and is engaged with in the judgments. Ackner L.J. had clearly read the detailed discussion of the principle of the putative proper law of the contract in *Dicey* (10th Ed.) and he notes that the author dealt with *"the academic and philosophical criticism that can be made".* Walker L.J. also commented on the principle in his short judgment, stating –

> "…But I do not see how the [arbitration] clause can be omitted from consideration in the first place when deciding what to do under O.11, *and then taking it into consideration later, when the question is whether or not a contract had been concluded relying on English law*.

Indeed the fact that the very issue would have to be decided later makes the degree of proof of the facts higher[3]." [Emphasis added]

53. Mr. Lewis argued that in the cases which followed *The Parouth* it was conceded that the putative proper law of the contract applied in determining whether the contract itself was valid. So, in *Britannia Steamship* the defendant accepted that the putative proper law of the contract applied to questions of apparent authority and ratification. That is correct, and it is notable that the court (Ackner and Browne-Wilkinson L.JJ) did not even advert to *The Parouth,* decided just two years earlier.

54. However, Mr. McCullough brought the court to a passage in the judgment of Browne-Wilkinston L.J. at p. 102 of some significance:

> "The decision in the Case of *Coast Lines Ltd v Hudig & Veder Chartering N.V.* [1972] 1 Lloyd's Rep. 53; [1972] 2 Q.B. 34 indicated that if, by forcing a plaintiff to proceed in Courts outside England the plaintiff will be deprived of the advantage of the proper law of the

[3] Walker L.J. was here referring to the degree of proof required to obtain leave to serve outside the jurisdiction.

contract being applied, that is a matter which the Court can properly take into account. If Italian law is as it is said to be, Italian law differs from what is the generally accepted rule of international law, which gives effect to ostensible authority and ratification if the proper law of the contract so provides. Justice would seem to require that the plaintiffs should proceed in this country where those principles are applicable."

55. It was not suggested by Mr. Lewis that the Irish law principles of ostensible or apparent authority and of ratification of contracts do not accord with generally accepted rules of international law. In contrast, while emphasising that there are principles on ostensible authority to be found in the law of Saudi Arabia, he accepted these "were much looser, and the court might in fact have regard to many more issues or circumstances and deal with each case on a case-by-case basis" (Transcript p.38-39). This illustrates something of significance. If there is no doubt but that the putative proper law of the contract if applied to questions of ostensible authority and ratification will accord with generally accepted rules of international law, then that is a further reason for adopting it to decide these issues. Conversely, if it does not so accord, then there is an argument that 'exceptional circumstances' as envisaged by Andrew Smith J. in *PEC* may justify a different choice of law by reference to which those issues may be determined.

56. Mr. Lewis then referred to *Marc Rich & Co. AG v Societá Italiana Impianti* [1989] ECC 198 (Queens Bench Division – Hirst J.) where counsel for the defendant accepted the principle established in *The Parouth*, but sought to distinguish it. Similarly *Rimpacific* was a decision that proceeded on the basis that it was for English law as the proper law of the contract to determine the issue of ostensible authority, following the authority of *Britannia Steamship*, and the test in the 14th Edition of *Dicey*.

57. Mr. Lewis very properly referred us to another example – the recent decision of the UK Supreme Court in *Enka Insaat Ve Sanayi A.S. v OOO "Insurance Company Chubb"* [2020] UKSC 38 - where the joined judgment of Hamblen and Leggatt L.JJ. (with whom Kerr LJ. concurred) restated the principle –

> "31. Where an English court has to decide whether a contract which is said to be governed by a foreign system of law is valid, the court applies the 'putative applicable law', in other words the law which would govern the contract if it were validly concluded."

58. Central to Mr. Lewis' submissions were his criticisms of the judgment of Hamblen J. (as he then was) in *Habas Sinai,* the one authority in which he was prepared to concede there was an attempt to engage with the putative proper law principle. It is clear from the judgment of the trial judge in the present appeal, that he was influenced by the decision in *Habas Sinai*, so it is appropriate to consider it in some more detail.

59. The facts arose from a dispute between a Turkish plaintiff and Hong Kong defendant concerning an agreement to sell and purchase steel. The defendant commenced arbitration in London, and Habas denied the arbitration agreement, although not the substantive agreement itself. The arbitral tribunal concluded that it had substantive jurisdiction, and that Habas' agents had ostensible authority to conclude the disputed agreement. Habas challenged the arbitrator's jurisdiction on the grounds that the agents who concluded the arbitration agreement did not have actual or ostensible authority to do so on its behalf, and that there was no binding consensus on the terms of the London arbitration agreement. At para. 103 Hamblen J. found that there was no express choice of law in the matrix contract, and that there was clear authority that the applicable law would therefore be that of the country of the seat of arbitration. However Habas argued that in considering the law applicable to the arbitration agreement the law should disregard the choice of London arbitration, because the agreement to arbitrate in London, as

opposed to in Turkey, had been made in excess of the actual authority of its agents. Hamblen J. identified Habas' arguments as follows: -

"105. In support of its argument Habas relies in particular on the following:

(1) *Dicey, Morris & Collins* (15th ed) at 33-447 where the editors state as follows:

> '… it may be thought unlikely that P could be bound and entitled by virtue of a law which governed the contract with the third party only because A, in excess of his actual authority, agreed to its selection as the applicable law. The problem is similar to that raised by the question of capacity and can be resolved in a similar way. Where the agent exceeds his authority in choosing the law to govern his contract with the third party, P should only be regarded as entitled or bound if he would be so under the law applicable in the absence of choice.'

Habas submits that if this is the correct approach to agreement to a choice of law clause, the same approach should be adopted to agreement to a clause that has the effect of determining the system of law with which the contract has its closest connection.

(2) The English law conflicts of law approach to questions of capacity as referred to above by way of analogy by the editors of *Dicey, Morris & Collins.* That is summarised at 32-176 as follows:

> 'If one applied without modification the normal definition of the governing law to the questions of capacity, one would arrive at the result that a minor could, by agreeing to the choice of a system of law as the law of the contract, confer contractual capacity upon himself. For this purpose, it is submitted, the criterion

should be the connection of the contract with a given system of law, i.e. the system of law with which the contract is most closely connected."

(3) Article 8(2) of the Rome Convention (now reproduced in identical terms in Article 10(2) of the Rome 1 Regulation (EC No 593/2008)) which recognises an exception to application of the putative applicable law to determine the validity of the contract under Article 8(1) in the following circumstances:

'2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.'

Habas submits that this has the effect of disapplying the application of the putative applicable law where it is commercially unreasonable to apply it, that English common law should adopt a similar approach and that it would be unreasonable to apply the putative proper law in this case for the reasons given under (1).

106. In my judgment there are a number of difficulties with Habas' novel argument."

60. Hamblen J. then identified ten problems with the arguments raised, and these were the subject of varying degrees of criticism by Mr. Lewis. As to the first, Hamblen J. stated –

"107. First, the approach suggested by *Dicey, Morris & Collins* only applies to the agreement to a choice of law clause. Habas' argument goes far further than that. It applies to the agreement to any clause which determines or affects implied choice or the system law with which the contract has its closest connection. This potentially applies to a wide range of clauses and indeed parts of clauses. Its ambit is far reaching and its boundaries uncertain."

Mr. Lewis submitted that the same difficulty does not arise on the facts of this appeal, as the appellants are contesting whether contracts came into existence at all – not merely the validity of a choice of law clause, or other clauses in the agreements. He submitted that, based on the analysis in *Dicey, Morris and Collins*, the choice of law clauses in the First Agreement and the Second Agreement and the Guarantee could, or should, be disapplied.

61. As to his second reason, Hamblen J. stated: -

> "108. Secondly, there is no logical or principled link between the issue of authority and the issue of the law with which a contract has its closest connection. Determining the latter question involves a consideration of the terms of the contract as made, rather than the authority with which it was made."

Mr. Lewis expressed difficulty with understanding this reason, which he suggested did not have any great force. He argued that in determining the issue of *actual authority* you apply the law of Saudi Arabia because it is the seat of incorporation of the entity, and the rules that govern the company must be considered in the context of Saudi Arabian law. That proposition does not appear to be controversial. However Mr. Lewis submitted that, that being the case, there was nothing illogical about going on to apply Saudi Arabian law again when considering "the closely related question of ostensible authority".

62. In reply Mr. McCullough argued that Hamblen J.'s second reason made perfect sense. He did not dispute the principle that *actual authority* falls to be determined by reference to the law of the seat of the place of incorporation of the relevant entity. However he saw no logic in extending this to *ostensible authority*, which concerns the authority of an agent as it appears to the contracting third party, and is not related to the place of establishment of the principal.

63. I prefer Mr. McCullough's reasoning, which goes to the heart of this appeal in which the appellants not only have to persuade the court that the putative proper law principle should not be applied, but also that the sounder or more logical principle is to apply the law of the seat of incorporation of the appellants. I will return to why this is so later in this judgment.

64. The third objection of Hamblen J. was as follows: -

> "109. Thirdly, it 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. Further, there is no obvious reason why the principle should be limited to issues of validity arising out of lack of actual authority."

Mr. Lewis argued that while the common law doctrine existed as a matter of English common law, it had never become part of the Irish common law, and therefore the third objection was not a good basis for following the putative proper law principle in this jurisdiction.

65. That observation is true as far as it goes. The issue has not been previously decided in the Irish courts, and the doctrine will not become part of the Irish common law unless this court affirms the decision of the court below. However that does not mean that the Irish courts should not be prepared to adopt *well established* principles of English common law that have withstood the test of time, and particularly where there is good, but not necessarily perfect, reason to do so. This is particularly so in light of broad similarities in contract and company law, shared language, geographical proximity, and the importance of bilateral trade between Ireland and the UK.

66. Hamblen J. continued: -

> "110. Fourthly, it involves English law according special treatment to actual authority for conflicts of laws purposes. But as a matter of English law actual authority is not a

stronger or more effectual form of authority than ostensible authority. As between the principal and the third party there is no difference between actual and ostensible authority."

Mr. Lewis expressed difficulty in understanding this objection, but in any case submitted that neither actual authority nor ostensible authority should be afforded any special treatment, and that both should be dealt with by reference to the law of the seat of the entity.

67. In reply Mr. McCullough relied on this objection which he submitted was a particularly compelling argument. He submitted that there was no good reason why actual authority should be afforded a status superior to ostensible authority. On the contrary, issues of ostensible authority would typically emerge when actual authority was found not to exist, and it was therefore illogical to suggest that the law governing the place of actual authority – the seat of incorporation - should be determinative.

68. As to Hamblen J.'s fifth objection: -

"111. Fifthly, it 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, and for reasons outside the knowledge and control of the third party and contrary to the representations made to him as to that authority."

69. Mr. Lewis submitted that this objection ignored the fact that in other jurisdictions, including in Saudi Arabia, there are principles of law governing ostensible authority, even if the principles adopted in that jurisdiction are "much looser". It would be wrong to apply the putative proper law principle simply because otherwise it would deny a contracting party the opportunity of relying upon principles of ostensible authority under English law.

70. Mr. McCullough in reply submitted that the facts of the present appeal vividly illustrate the fifth objection. It was not disputed that Mr. Abdul Aleem and Mr. Mounir signed the agreements at a time when they were employed in senior positions in ACS, resulting in valuable commercial services being provided over an extended period of time. He argued that ACS had deliberately chosen not to explain on affidavit how such commercially significant agreements came to be repeatedly executed by unauthorised persons. This, he submitted, led the trial judge to accept that Microsoft Ireland had the *"better of the argument on issues on apparent and on ostensible authority"*. He submitted that to simply apply the law of Saudi Arabia in the present case would be to eliminate any potential consideration of these obviously relevant considerations.

71. In my view, especially when viewed against the backdrop just referred to above, Hamblen J's fifth objection is well-made and is a strong reason for preferring the putative proper law principle in favour of the law of the seat of incorporation of the principal which might otherwise deny validity to many commercial contracts.

72. Hamblen J.'s sixth objection reads: -

> "112. Sixthly, it presupposes that there is a question of validity which needs to be considered prior to any determination of the applicable law. But, logically, the first question that should be asked is what is the applicable law of the putative agreement. All other questions then follow. The alternative approach involves an element of bootstrapping."

73. While Mr. McCullough relied on the sixth objection as being correct, Mr. Lewis submitted that it was simply wrong and that the question that has to be first asked is 'what law do you apply?'. He argued that it is both circular and unsatisfactory to look to the very thing that is in dispute in order to find out what law is to apply. He therefore submitted that it was necessary to look

outside of the disputed contract, and that that could be done without any prejudice to either party by looking at the law of the seat of incorporation of the company.

74. While I agree that it does not seem satisfactory to take into account the terms of the contract the very validity of which is in dispute, the problem is that there is not necessarily any greater logic in deciding the issue of ostensible authority by reference to the law of country of the seat of the principal company. That country may have nothing to do with the putative contract, or the centre of operations of the principal or its agent or the third party, and almost by definition will not be the country in respect of which there is a choice of law clause in the putative contract.

75. Hamblen J.'s seventh objection reads: -

> "113. Seventhly, the 'problem' identified by the editors of *Dicey, Morris & Collins* is not mentioned by the leading textbook on agency, *Bowstead & Reynolds on Agency* (19th ed). It states that whether an agent has ostensible authority is a matter for the law of the putative contract, and that law 'also governs apparent authority to subject a contract, whether directly or indirectly, to a particular system of law.' – at para. 12-016."

76. Mr. Lewis respectfully submitted that this was not a good answer to interrogating the validity of the putative proper law principle, observing that there are other learned academic commentaries on private international law which also do not challenge that principle.

77. Hamblen J. then stated –

> "114. Eighthly, there is no authority which supports Habas' argument, or for that matter the more limited argument put forward by *Dicey, Morris & Collins*."

Mr. Lewis submitted that, as there is no authority in this jurisdiction dealing with the issue, the absence of authorities supporting Habas' argument was not of any real consequence. He submitted that this court had a 'blank slate' upon which to determine the issue, and that it would be inappropriate, given the problems with the putative proper law principle, to simply follow it blindly, as he suggested the courts in England had done. Mr. Lewis brought the court to an Australian federal law decision, and certain academic commentaries, which attacked the frailty of the putative proper law principle, and I will turn to these shortly.

78. Hamblen J. proceeded: -

> "115. Ninthly, there are 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 …"

Hamblen J. then quotes several authorities from and after 1997, ending with the *Rimpacific Navigation Inc.* case reported in 2010. He then proceeded –

> "116. Finally and importantly, there are authoritative decisions in which arguments similar to that advanced by Habas have been rejected. In [*The Parouth*] it was argued that where the very issue between the parties was whether a contract was made it would be wrong to allow the English arbitration clause to be a factor pointing towards English law and that it should be treated neutrally. This argument was rejected by the Court of Appeal who 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."

Hamblen J. in the next paragraph refers to *Marc Rich & Co. AG v Societá Italiana Impianti* [1989] 1 Lloyd's Rep 548 in which "*The Parouth* was followed".

79. In response to this Mr. Lewis repeated his argument that in *"The Parouth"* there was no dispute between the parties in the Court of Appeal but that the putative proper law principle applied, and accordingly it was not interrogated at all in that decision, or in *Brittania Steamship* or the caselaw that followed those decisions.

80. Not surprisingly Mr. McCullough submitted that Hamblen J.'s eighth, ninth and tenth objections were crucial, and that established authority showed that the rule was long accepted, and that there was no authority for the proposition – that the law of the seat of incorporation should apply – advocated by the appellants.

81. Mr. Lewis also addressed the judgment of Andrew Smith J. in *PEC,* a decision which the trial judge found to be persuasive and representative of the approach which should be adopted under Irish law. Mr. Lewis argued that the decision in *PEC* did not confront the problem of illogicality or circularity, and that the claimant had accepted without demur that the default starting point was that questions of ostensible authority and ratification fell to be determined by the putative law of the disputed contract. Mr. Lewis accepted that the Andrew Smith J. did recognise the existence of a narrow jurisdiction to depart from that rule where its application would result in distinct unfairness, or if there was another sufficiently strong reason to depart from it, although on the facts there was nothing unfair about applying the default rule. As Mr. Lewis recognised, it was that modified version of the putative law approach which the trial judge adopted, at para. 153 of his judgment, as representing the correct approach under Irish law.

82. Mr. McCullough in his submissions commended the approach as distilled by the trial judge at para. 153 of his judgment. He submitted that it had the dual advantage of providing for clarity and certainty while, at the same, time, allowing for the possibility that a litigant exposed to

particular unfairness as a result of the rule may argue for its disapplication in exceptional circumstances.

83. Mr. Lewis then relied on *Trina Solar (US) v Jasmin Solar Pty Limited* [2017] FCAFC 6, a decision of the Federal Court of Australia in Queensland, to persuade the court not to follow the putative proper law principle. Trina, a U.S.A. company, agreed to supply solar panels to the Jasmin, a Queensland company that had contracted to supply panels to over 2000 customers. A Supply Agreement was drawn up between Trina and JRC Services LLC ("JRC"), a U.S.A. intermediary entity related to Jasmin, under which JRC was buyer and Jasmin was named as a guarantor although not an actual party. The Supply Agreement contained clauses providing for dispute resolution by the American Arbitration Association in New York, and stipulating New York State law to govern the validity and construction of the contract. Trina claimed that a sequence of exchanges took place that resulted in the Supply Agreement coming into force. Trina supplied panels and demanded payment which was not forthcoming, and it submitted the dispute to arbitration in New York. Jasmin unsuccessfully applied to the arbitrator to be let out, and did not thereafter participate in the arbitration. Trina obtained an arbitral award for $1.8 million jointly and severally against Jasmin and JRC.

84. Jasmin then commenced proceedings in Queensland against Trina and a related company Trina Solar Australia Pty Ltd, claiming contraventions of Australian Consumer Law for misrepresentation and misleading or deceptive conduct, with Trina US as the alleged principal contravener. Jasmin sought leave to serve the proceedings on Trina outside the jurisdiction. Discretionary leave to serve outside the jurisdiction was granted despite objection by Trina on the basis that to allow service would be an exercise in futility by reason that the proceedings against it would be stayed under s.7(2) of the International Arbitration Act, 1974 which required the Australian court to give effect to the arbitration clause.

85. The appellate court unanimously rejected Trina's appeal. In his judgment Beach J. stated:

"126. Trina US contended that Jasmin was a party to the arbitration agreement constituted by cl 11.1 of the Supply Agreement. His Honour identified cl 11.1 as the "arbitration agreement" for the purposes of s 7(2) of the IA Act. The question was whether Jasmin was a party thereto.

127. For present purposes, I will put to one side s 7(2) of the IA Act and consider the question of what law applied to determine the question of whether Jasmin was a party to the arbitration agreement, applying common law choice of law principles. His Honour identified the answer to that question as being the law of the forum.

128. Like his Honour, I consider there to be a distinction between two types of scenarios: (a) the choice of law to determine whether there is a consensus ad idem between the parties; and (b) the choice of law to apply where one is dealing with the validity and interpretation of the contract, mode of performance and consequences of breach. As to the second scenario, it is not in doubt that the law to apply is that which the parties have chosen or purported to choose, alternatively the law which would be the putative proper law in the absence of express choice. As to the first scenario, I consider that the appropriate choice of law is the law of the forum.

129. First, questions concerning whether the parties have reached consensus ad idem are different to questions of validity. The latter concept assumes that an agreement has been made and looks at issues as to whether the same is, inter alia, enforceable, voidable or void.

130. Second, it is counter-intuitive to suggest that the choice of law to assess consensus ad idem should be that set out in an agreement that an entity says it is not a party to because there was no consensus ad idem. That would be to assume what was to be proved. As his Honour described it: "a party cannot pick itself up by the bootstraps

provision when there has been no determination that it binds the other party" (see at [7]).

131. Third, and by analogy, it is counter-intuitive to apply a putative proper law, i.e. the proper law of the contract that the parties would have chosen if there had been a consensus ad idem, where one entity says that there has been no consensus ad idem.

132. Fourth, no relevant distinction is to be made between, on the one hand, asking whether person X has manifested consent to agree with person Y (i.e. displayed a consensus ad idem with person Y) and, on the other hand, asking whether person X has manifested consent to agree with persons Y and Z, where persons Y and Z had previously agreed with each other. In the present case, X is Jasmin, Y is Trina US and Z is JRC.

133. In essence, the primary judge applied the *lex fori*. In my opinion, this was consistent with the preponderance of precedent in Australia.

134. In *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 (Oceanic), Brennan J. (at 225) and Gaudron J. (at 260 and 261) both stated (obiter) that the issue of consensus ad idem was to be governed by the *lex fori*. Contrastingly, Deane J. (at 255) stated that "[t]*he question whether those transactions and actions resulted in a binding contract between the parties must, in my view, be determined by reference to the law of New South Wales — the locus contractus*". But arguably this statement in the context of Oceanic may be seen as consistent with the position adopted by Brennan and Gaudron JJ. that the *lex fori* applies to questions of consensus. But irrespective of whether Deane J's statement can be reconciled with the observations of Brennan and Gaudron JJ., I see no good reason not to follow their obiter observations."

86. Mr. Lewis relied on these passages as "coherent and persuasive" support for his criticism of the putative proper law approach, while making it clear that he was not suggesting that the *lex fori* was the alternative law to be applied. To state the obvious this would not suit the appellants as to apply the *lex fori* would result in the application of Irish law to the issue of ostensible authority.

87. Mr. McCullough in reply pointed out that Greenwood J. unambiguously recognised the putative proper law approach in the English common law, quoting the line of authorities beginning with *The Parouth*, and stating at para. 44:

> "I accept that these authorities suggest that when the question arises of whether an agreement was made by the parties, the English Courts are likely to apply the putative proper law of the contract to determine that question."

88. Mr. McCullough accepted, as Beach J. stated in para.129, that questions concerning whether the parties have reached *consensus at idem* are different to questions of validity where it is assumed that an agreement has been made, and that, *per* Beach J. in para.130, it may be "counterintuitive" to suggest that the choice of law to assess *consensus ad idem* should be that set out in the agreement that an entity says it is not a party to because there was no consensus. However he submitted that *Trina* provided no support for the appellants' contention that the law of the seat of incorporation should govern questions of ostensible authority in the present appeal.

89. While the two judgments in *Trina* debate the common law doctrine of applying the putative proper law, and an alternative of applying the law with the 'closest connection' to the contract', what the court ultimately decided should apply was Australian law as the *lex fori,* and there is no debate in the judgments about the seat of incorporation of the principal as a fourth alternative. I agree with Mr. McCullough that *Trina* does not provide any support for the proposition that

the law of Saudi Arabian as the seat of incorporation should govern the issues of ostensible authority and ratification.

90. Mr. Lewis referred the court to the two other academic commentaries which were considered by the trial judge, and which point up the paradox of the putative proper law principle and discussing alternatives. The first was the passage from Briggs, *Agreements on Jurisdiction and Choice of Law* (2018, OUP) which I have set out earlier in para.40.

The second was the passage from Plender and Wilderspin, *The Law of European Private International Law of Obligations* (4th Ed., 2014, Sweet and Maxwell), which I have set out in para.42.

91. However, while relying on these commentaries as supporting criticism of the putative proper law approach, Mr. Lewis was forced to concede that the law of the seat of incorporation of the principal is not discussed or considered by these academic writers as an alternative to the putative proper law principle. As Mr. McCullough submitted, the appellants were unable to adduce any authority in favour of the rule advocated for by Mr. Lewis.

92. Thus there is a lively debate as to whether the English common law putative law approach should be supplanted by one that seeks to apply the 'closest connection', or alternatively the *lex fori*, to determine issues of ostensible authority or ratification where the existence of a contract is disputed. However the appellants were unable to refer to any caselaw or academic argument supporting the proposition that the law of the seat of the principal company should apply to such issues.

93. In his reply submissions Mr. McCullough placed some reliance on the decision of the Supreme Court in *Re Flightlease* (*Ireland) Limited (in voluntary liquidation)* [2012] 1 I.R. 722 to support

an argument that the rules of private international law rely for their effectiveness upon the need for predictability, and that this should be a dominant consideration.

94. In that case, Swissair brought proceedings in Switzerland in the course of its liquidation for the recovery of money that it alleged had been unlawfully transferred to an Irish company, Flightlease. It then sought to be registered as a creditor of Flightlease in this jurisdiction. However, its application was refused. The applicant liquidators the brought an application under section 280 of the Companies Acts 1963 seeking an order permitting them to distribute the assets of Flightlease. The issue before the Court was whether the claim sought to be maintained by Swissair ought properly be characterised under Irish law as a claim in the liquidation or as a claim *in personam.*

95. The High Court, and the Supreme Court on appeal, were asked not to apply the established rule of English private international law provided for at Rule 36 in *Dicey* (14th Edition) but to instead follow an emerging test accepted in the jurisprudence of Canada which asked whether the foreign jurisdiction has a real and substantial connection with the claim. Under Dicey's Rule 36, a judgment of the Swiss Court would not be recognised, whereas under a real and substantial connection test, the judgment would be recognised and enforced.

96. The Supreme Court acknowledged that the proposed "real and substantial connection test" undoubtedly had significant inherent merit, but nonetheless refused to apply that test despite acknowledging the defects in the existing test under Dicey's Rule 36. In reaching this conclusion, O'Donnell J. quoted with apparent approval from the academic commentary of Blom & Edinger at para. 88 of the report as follows:

> "As the Supreme Court itself said in Tolofson, the underlying principles of private international law are order and fairness, but order comes first. When it comes to questions of jurisdiction, in the contexts of both domestic and foreign judgments, it is often more

important that the system should give a predictable answer than it should give an ideal answer. Predictable answers are what the "real and substantial connection" test are least good at."

97. For this reason, O'Donnell J. concluded at para. 90 as follows:

"Accordingly, I have reluctantly concluded that notwithstanding the defects of the approach currently embodied in Rule 36 in *Dicey, Morris & Colins* on Conflicts of Laws, it is at least predictable. The real and substantial connection test has not received sufficient support in other jurisdictions, is itself so inherently uncertain, and would require such significant alteration of the grounds for refusal of enforcement, that its adoption would not produce any measurable improvement in Irish law, even if it could be achieved by judicial decision alone, which I doubt. Any change in this area, while desirable, would in any event probably require detailed legislation, preferably on a multilateral basis. Accordingly, for these reasons I too would dismiss the appeal."

98. Mr. McCullough submitted that it was not sufficient for the appellants to identify an approach which they believed was fairer, or better, but that they needed to demonstrate a compelling reason to depart from the putative proper law approach in circumstances where it had become an established part of the English common law. He submitted that they had offered no credible or compelling reason to depart from the established rule.

Decision

99. It is worth reflecting further on why rules are required in the area of conflict of laws, and why international commerce requires the predictability referred to by O'Donnell J. in *Flightlease.* In *The Parouth* the performance of the contract was to take place in Germany (shippers, and intended cargo), Mexico (cargo destination), Belgium (freight payment – in American dollars).

The relative complexity of the contractual relations then (1981) is probably reflective of much modern trans-national commerce. Because of this complexity, when a dispute arises, there is need to have recourse to a definite court of law or arbitration to resolve the issue. The parties will generally want their contractual relations to be recorded in writing or other permanent medium, and will often use charterparty or other contract terms reflective of international norms. Ultimately they will want certainty as to where, by what process, and under what law, disputes are to be resolved. As O'Donnell J. (as he then was) said in *Flightlease,* "the underlying principles of private international law are order and fairness, but order comes first", and this led to his reluctant conclusion that the approach embodied in Rule 36 of *Dicey,* which he considered "discordant with the policy underlying recognition and enforcement of foreign judgments, but also with every day practice" (para.80), was nonetheless a "rule which is known and therefore predictable" (para 77). He considered that the alternative of a 'real and substantial connection test' offered by Swissair "offers substantially more in terms of inherent merit, and pays a much heavier price in terms of uncertainty and unpredictability."

100. Of course in an era of information technology the process of negotiation, the reaching of consensus, and the recording of contractual terms, will more often than not be done 'remotely' and by electronic/satellite communication, and this will also apply to the signatures or other forms of acceptance/verification of key contractual documents/terms. Increasingly the choice of law, or choice of forum, for dispute resolution, may have little connection with the subject matter of the contract or the dispute. In an age of fast IT, and with remote court or arbitral hearings becoming commonplace, factors such as political and economic stability, high speed and reliable internet, reliable banking, a legal system perceived to be settled and based on the Rule of Law, particular expertise, ease of enforceability, avoidance of certain regimes – are likely to be more important considerations for major international commerce, than geographical convenience.

101. To return to the heart of the matter, Mr. Lewis contends that it is more logical to extend the principle that applies to determining *actual authority*, or the scope of that authority, to questions of ostensible authority and ratification. Both parties agree that whether there is *actual authority* falls to be determined largely on the content and construction of the company constitution and the application of local law, and it is therefore appropriate and logical that the law of the country of incorporation be determinative. This accords with the second limb of Rule 244 in *Dicey* (15th Ed.) (para.33R-432) to the effect that the existence and *scope of an agent's actual authority* falls to be determined having regard to the law applicable to the relationship between the principal and agent. That remains so regardless of whether the place of incorporation has any other connection, or close connection, with the dispute between the third party and the principal. But is that a logical reason for extending the law of that place to determining other issues, such as ostensible authority, where the constitution of the company is of secondary relevance and, as Mr. McCullough contends, the outward acts or representations of the company are what matter?

102. *Ostensible authority* arises where a person represents that another has authority to act on his/her behalf; he/she is bound by that person's acts if any third party deals with him/her as an agent in reliance on that representation even though he/she had no actual authority. As Lord Denning MR explained in *Hely -Hutchinson v Brayhead Ltd* [1968] 1 Q.B. 549, at p.583:

> "Ostensible or apparent authority is the authority of an agent as it *appears* to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance,

when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his *ostensible* authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation."

103. This emphasises that it is how the agent is perceived from outside that will be central to the issue of ostensible authority. In the context of international trading core to this issue is the perception of the first country supply company (T) of the agent (A) of the company (P) incorporated in a second jurisdiction, and T's perception of the apparent extent of that A's authority. While there may well be evidence relevant to the issue of ostensible authority emanating from P's seat of incorporation, there is no logic that dictates that the law of that second jurisdiction should govern the issue of ostensible authority. Indeed conceivably the evidence relating to ostensible authority may come from a number of other jurisdictions such that the only connection to the second jurisdiction may be the fact of P's incorporation.

104. This analysis is lent support by *Dicey* (15th Ed.), notwithstanding that the editors do level some criticism at the rule. At para. 33 R-432 *Dicey* reformulates the primary rule as to the law that should govern the issue of ostensible authority thus:

> **"Rule 244** - (1) The issue whether the agent is able to bind the principal to a contract with a third party, or a term of that contract, is governed by the law which would govern that contract, or term, if the agent's authority were established."
>
> A difference should be noted as between this wording and the previous text (former Rule 228), which used the words –
>
>> "…governed by the law applicable to the contract concluded between the agent and the third parties"

and this is explained in an extract to which I will refer shortly.

105. The obvious point to make is that *Dicey* retains the putative proper law principle, even though it is subjected to criticism. The reasoning for Rule 244 is set out in paras. 33.436-438, and excluding the footnotes (which refer to many of the cases already considered in this judgment as authority for the propositions stated) the first relevant part states:

> "**Clause (1) of the Rule.** Where A lacks actual authority from P, it seems right, in principle, that the law applicable to the contract which A has concluded (or purported to conclude with T should determine whether P is bound (or entitled. In effect in this situation, one is asking whether A had apparent or ostensible authority to bind P. Hence, if P in one country appoints A to act for him as regards certain matters, e.g. the sale and purchase of goods, in a specified or unspecified number of countries, A must be taken to have the authority to do any of the acts which an agent of his class may do under the law of the country with reference to the laws of which he contracts. This responds to the requirements of commercial intercourse. As between P and A, the scope of A's authority to bind P and to confer rights upon him is necessarily determined by the law which governs their relationship, but third parties must be able to assume, at least where A has no actual authority from P, that A's authority covers everything which would be covered by the authority of an agent appointed under the law applicable to the contract made between the agent and the third party."

106. As in previous editions the authors identify the rule as "responding to the requirements of commercial intercourse.", and state that "third parties must be able to assume, at least where [the agent] has no actual authority from [the Principal], that [the agent's] authority covers everything which would be covered by the authority of an agent appointed under the law applicable to the contract made between the agent and the third party".

107. These are significant statements, and ones that deserve to be accorded due weight. Given that Ireland is an open economy heavily dependent on international trade (in which the UK happens to be a significant trading partner), both inward and outward, it must also respond to the

requirements of commercial intercourse, and in my view this is a good reason for adopting a similar approach to that suggested in *Dicey's* Rule 244.

108. Having referred to the change in wording to Rule 244, the authors then state:

> "Secondly, the formulation of the former Rule 228 was open to objection on the ground that it appeared to assume the existence of a contract as a result of the interaction between agent and third party, which (in many cases) will be precisely the question which the court is called upon to determine. The new formulation refers instead, therefore, to "the law which would govern the contract... if the agent's authority were established".
>
> Thus it is for the law governing the contract that the agent, A, has concluded (or purported to conclude) with the third party, T, to determine whether and to what extent A has is able to create privity of contract between T and his own principal P, in a case in which A did not disclose the fact that he was acting as an agent, or, as in *Maspons v Mildred*, did not disclose the identity of his principal. Again, the extent to which A must be deemed to be authorised by P to enter into a contract to sell property on his behalf or enter into other contracts, i.e. the definition of A's ostensible authority, is a matter for the law applicable to the contract which A seeks to conclude with T, as are the consequences of lack of authority and the effect of later ratification. So is the question whether the agent's actual authority has been revoked, whether it is revocable at all, and also, it is submitted, whether it is automatically revoked by the principal's death, bankruptcy or mental disorder, or whether it has expired by lapse of time."

109. Firstly it should be noted that the authors include "the effect of later ratification" as an issue that falls to be determined by reference to the law applicable to the contract. In his submissions Mr. Lewis did not articulate any separate reason why the issue of ratification should be decided by reference to the law of Saudi Arabia other than to say that for reasons of certainty and consistency issues of ratification should "follow ostensible authority". Mr. McCullough stated

that it appeared from researching their submissions that issues of ratification are treated in the same way as issues of ostensible authority in established principles of private international law, and that this was probably because issues of ratification tend to be closely bound up with issues of ostensible authority.

110. This does appear to be so, and perhaps is best explained by being consistent with regarding ratification as a form of estoppel preventing a contracting party from denying the existence of the contract. *Courtney: The Law of Companies (4th Ed.) (2016)* at para. 7.022 states –

> "The doctrine of apparent or ostensible authority may be seen as a form of estoppel which prevent the company from denying an agent's ostensible authority, which the company represented the agent as having."

Seen in this way, both ostensible authority and ratification are concerned with representations which tie the principal into contractual obligations that it is estopped from denying, and it is therefore logical to apply the same governing law to both issues. In that the trial judge did just that I believe he was correct.

111. Secondly, while mentioning the same objection as Mr. Lewis, namely that the putative proper law principle assumes the existence of a valid contract which is precisely the question the court is called upon to answer, the authors nevertheless continue to retain Rule 244 in its modified form.

112. Mr. Lewis relied on a further passage from *Dicey* (15th Ed.) at para. 33-447:

> "Secondly, if the law applicable to the principal-third party contract is determined for the purposes of clause (1) of this Rule, it may be thought unlikely that P could be bound and entitled by virtue of a law which would govern the contract concluded by A only because A, in excess of his actual authority, agreed to its selection as the applicable law. The problem is similar to that raised by the question of contractual capacity and, if it were to arise could be resolved in a similar way. On this view, where the agent exceeds his authority in choosing

the law to govern his contract with the third party, P should only be regarded as entitled or bound if he would be so under the law applicable in the absence of choice. This particular problem, however, may be more apparent than real in modern conditions. The recognition in Art.3(1) of the Rome I Regulation, and in other systems of the conflict of laws, that the parties are free to choose the law applicable to their contract supports the view that, at least in the absence of clear words to the contrary, the authority of an agent authorised to conclude contracts in an international setting extends to the terms of a choice of law or equivalent provision."

113. In this extract the editors suggest answers, or at least a partial answer, to this problem, which they considered "more apparent than real in modern conditions." While there is no denying that the problem exists, it is resolved by applying the law applicable in the absence of choice, which I take to be the proper law of the contract. The problem is not such to persuade the editors to jettison Rule 244.

114. The passages from *Briggs*, and *Plender and Wilderspin*, opened by Mr. Lewis also point up the conceptual problem with the putative proper law principle, but they are very revealing because they accept that there is no easy solution, and they highlight the prospect that an across-the-board application of any one of a number of possible alternative rules is likely to be unsatisfactory and may work injustice. Thus while *Plender and Wilderspin* canvass the law of the country in which the agent has acted, they acknowledge that this may be unfair to the principal, just as they point out that the putative proper law principle may be "inequitable" if the law chosen by the contract has no objective connection to the dispute or the principal.

115. It is surely beyond doubt that there is no perfect formula for choosing the law by reference to which an Irish court should determine issues of ostensible authority or ratification involving (alleged) contracts with an international dimension. It is simply not possible to identify one approach that is so logical and reasoned that it should be applied before all others. There is no

universally accepted principle of private international law that is applicable, and none that can be adopted that will be necessarily produce a just result in all situations. It is likely that every alternative will, if applied rigidly, give rise to injustice in given circumstances. This is because of the complexity and variety in international commerce, and it is a risk that is probably exacerbated by the use of modern information technology which makes it more likely that any one rule will in certain circumstances result in a choice of law for determining these issues that has little real connection to the factual matrix.

116. O'Donnell J. (as he then was) in *Flightlease* reflected more generally on the Rules set out in *Dicey,* stating:

> "[77]… However the existence of known rules is important particularly in the area of conflicts of laws. It was a formidable intellectual achievement on the part of A V Dicey to synthesise the late Victorian jurisprudence in the relatively unfamiliar area of private international law and to produce something approximating to a code. The subsequent revisions by a number of distinguished editors and contributors have added considerably to the value of the text and given it a deserved eminence in a field where the writings of academic authors has particular benefit. But I wonder if the format has not contributed to a creeping fossilisation of the law and a loss of some of the traditional flexibility of the common law. For example, a consequence of the result which has been arrived at in this case, is that, without legislative change (which seems unlikely), the common law of Ireland on an important issue of the conflicts of law, is determined by the views not of modern Irish judges, but rather of those of Victorian England.
>
> No matter how thoughtful and impressive some of those individual judgments (and the commentary upon them) may be, it is asking a lot that the outlook of the British empire at its height, with its justifiable pride in its own legal system, and perhaps less justifiable suspicion of others, should provide enduring rules which are well adapted to the

circumstances of a world in which international travel is commonplace, and global trade an essential feature of modern economies."

117. Doubtless this expresses sentiments that Mr. Lewis would wish this court to act on, but the difficulty for the appellants is that no logic, precedent, or academic commentary supports the alternative that he propounds. This is not a battle between the putative proper law approach on one side and 'the law of closest connection' or *lex fori* alternatives, and consequently those alternatives have not been argued on this appeal.

118. It is however worth noting that a battle of alternatives was fought recently in a cross-border dispute before the Singapore Court of Appeal in *Lew v Nargolwala* [2021] SGCA(I) 1 in which there was argument over the law by reference to which the issue of whether there was a binding and enforceable contract was to be determined. Lord Mance sitting as an international judge delivered the judgment of the court, which adopted a novel choice of law, selecting the law most closely connected with the parties' pre-contractual negotiations. Having referred at some length to the writings of Professor Briggs advocating a *lex fori* approach, at para. 70 the judgment questions –

> "…the appropriateness of a rule which would automatically assign the determination of the issue of whether a binding and enforceable contract has been made to the law of the forum. If the "attainment of uniform solutions [i]s the chief purpose of private international law" (Ernst Rabel, *The Conflict of Laws: A Comparative Study* vol 1 (The University of Michigan Press, 2nd Ed, 1958) at p.87), the selection of the *lex fori* would fail to achieve that purpose."

Lord Mance proceeded to approve a three-stage step approach to identifying the most appropriate law:

> "71. With this purpose in mind, common law rules of private international law aim, in an internationalist spirit, to identify the most appropriate law to govern any particular issue. The identification of this law normally involves another three-stage process

(though this should not be seen as a rigid straitjacket): (i) characterisation of the relevant issue – whether it be as an issue of contract, tort, unjust enrichment, revenue, public law, crime, marriage, divorce, civil procedure or any other of the manifold possibilities; (ii) selection of the rule of conflict of laws which lays down a connecting factor for that issue; and (iii) identification of the system of law which is tied by that connecting factor to that issue (see also *JIO Minerals* at [76]). Sometimes, of course, as in relation to matters of pure procedure, that process leads to the court of the forum identifying its own law as the appropriate law. That is because procedure governs conduct of a case and the case is being conducted procedurally before it. (Nevertheless, care needs to be – and, as illustrated by some debatable decisions on matters like onus of proof and limitation, may not always have been – taken to ensure that too large an ambit is not given to what is for this purpose appropriately regarded as "procedural".)"

119. Noting in para.76 that common law courts are familiar with the exercise of identifying the law with the objectively closest connection to a concluded contract, Lord Mance proceeded –

"76.…We consider this approach well capable of general application in circumstances where the issue is whether any contract has been concluded at all. The court can and should then adopt a three-stage approach analogous to that applicable where there is no dispute about the existence of the contract, focusing necessarily on the circumstances of the transaction or relationship alleged to have given rise to a concluded contract.

77. The only caveat that might be made relates to a possibility raised in *Dicey, Morris and Collins* at para 32-113 of an extreme case in which the application of the putative proper law might give rise to grave injustice. As we have noted in [71] above, private international law rules are a means to achieve justice, not a straitjacket. *Dicey, Morris and Collins* gives the example of negotiations between A in England and B in State

X, where the putative proper law is the law of State X under which silence in response to an offer amounts to consent (*Dicey, Morris and Collins* at paras 32-113 and 32-114, pointing to Art 10(2) of the European Union's Rome I Regulation (EC) No 593/2008 of 17 June 2008, as covering such a case). If a caveat needs to be made for such a case (about which we express no opinion), it is we think a very small caveat, very rarely applicable. Its effect (in the example given) would moreover be that no contract at all came into existence under any law, not that the lex fori applied. Understandably, this extreme possibility was not, and could not on the facts of this case have been, canvassed or relied upon before us."

120. There may be much to be said for the reasoning behind this novel approach, but it was not the subject of argument before us, and the decision in *Lew v. Nargolwala* was not opened to the court. Until another case presents where wider arguments are aired, this court can only decide for the moment the narrower issue of whether the putative proper law approach, encapsulated by *Dicey's* Rule 244, or alternatively the law of the seat of incorporation, should apply to determination of the issues of ostensible authority and ratification arising in these proceedings.

121. As the trial judge observed, the court must chose some solution. For the reasons given in this judgment I have come to the conclusion that the putative proper law approach, while not perfect or entirely logical, has much to recommend it. In summary, firstly it recognises the importance to a third party contractor, such as Microsoft Ireland, dealing with agents, of being able to assume that the agents have authority that covers everything that would be covered by the authority of an agent appointed under the law applicable to the contract made between the agent and third party. It gives due recognition to the importance of the perception of the third party of the agent's authority, and, as *Dicey* says, "responds to the requirements of commercial intercourse". This is particularly so in global commerce.

122. Secondly, it provides the certainty and uniformity that is desirable in a rule of private international law that seeks to identify the law by reference to which issues of ostensible authority and ratification are to be determined.

123. Thirdly, it is well established in English jurisprudence, and has withstood the test of time, a direct challenge in *Habas Sinai,* and academic criticism.

124. Fourthly in a case where, as here, there is an express choice of law in the Agreements and Guarantee, the rule recognises the choice of law of the third party and agent in the contract documents.

125. Fifthly, no logic, precedent or academic commentary supports the appellants' alternative proposition that the law of the seat of incorporation of the appellants should apply to the issues of ostensible authority and ratification.

126. It follows that Irish law – the law expressly chosen in the Agreements and the Guarantee and therefore the putative proper law – is the law by reference to which the issues of ostensible authority and ratification arising in these proceedings should be determined.

127. I find more difficult the further question whether the Irish courts should be prepared to modify this approach where it would result in "distinct unfairness or …[for] other strong reason", *per* Andrew Smith J. in *PEC,* where he suggested "[A]n obvious example might be if an agent chose a law unconnected with the contract simply to clothe himself with authority".

128. That was said *obiter* but was adopted by Barniville J. in para. 153 where it will be recalled he said:

> "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 of 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."

129. The trial judge went on to consider whether applying Irish law to the required standard in determining whether Microsoft Ireland had demonstrated a *"good arguable case"* on ostensible authority and ratification would create any unfairness for ACS/NTG. He decided that it would not, but it must be emphasised that this was only in the context of deciding that the order made for service of the proceedings in Saudi Arabia was properly made and should not be set aside.

130. Like the trial judge I find the potential for there to be exceptions to the rule attractive, and, as I stated earlier, if the rigid application of a rule gives rise to injustice in particular circumstances it may be appropriate to disapply it. This also resonates with O'Donnell J.'s musing that the rules in *Dicey* may "contribute to a creeping fossilisation of the law and loss of some of the traditional flexibility of the common law". It is also reflected in para. 77 of the judgment of Lord Mance in *Lew v. Nargolwala* where he discusses a caveat for "an extreme case in which the application of the putative proper law might give rise to grave injustice."

131. However the difficulty with this is obvious – it immediately gives rise to uncertainty. There is no longer a predictable rule that applies on all occasions to issues of ostensible authority and ratification. It becomes a rule with exceptions which may build incrementally, with the inevitable consequence that parties seeking to avoid the consequences of the application of the rule will try to establish that they come within an exception. The example of unfairness identified by Andrew Smith J. – a choice of law by an agent so as to clothe that agent with authority, being a choice that could not have been anticipated by the principal - might well be an exceptional circumstance, but there may be other legal principles that would cause a court to strike down such a mischievous clause, such as fraud or considerations of public policy.

132. I do not consider that this further question is raised in the Notice of Appeal, or that it is otherwise necessary for this court on this appeal to decide the question. It is better that it should be left over to be decided in a case where on the facts it may be possible to argue for disapplication of the rule for unfairness or exceptional circumstances, or where the same facts allow a party to argue that some modified version of the rule (such as that adopted in *Lew v. Nargolwala)* or some other alternative to the putative proper law principle should be preferred.

133. I would therefore dismiss this appeal.

134. As this judgment is being delivered electronically it is appropriate to indicate what costs order I would propose. As the appellants have been entirely unsuccessful I would propose that Microsoft Ireland do recover their costs of the appeal from ACS and NTG jointly and severally, such costs to adjudicated by a legal costs accountant in default of agreement. If the appellants wish to seek a different costs order they should so notify the Office of the Court of Appeal by email within 21 days of the electronic delivery of this judgment, and the matter will be scheduled for a short hearing.

Whelan and Faherty JJ. have read this judgment and are in agreement with same and the orders proposed to be made.