

THE HIGH COURT

COMMERCIAL

[2021] IEHC 538

[2018 No. 1057 S.]

BETWEEN

MICROSOFT IRELAND OPERATIONS LIMITED

PLAINTIFF

AND

ARABIC COMPUTER SYSTEMS AND NATIONAL TECHNOLOGY GROUP

DEFENDANTS

JUDGMENT of Mr. Justice David Barniville delivered on the 29th day of July, 2021

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Introduction

1. This is my judgment on an application by the plaintiff, Microsoft Ireland Operations Ltd, for an order pursuant to O. 28, r. 1 and/or O. 28, r. 12 RSC permitting the plaintiff to deliver an amended statement of claim and for an order varying the directions made by the court on 13th November, 2020.

2. The defendants, Arabic Computer Systems (“ACS”) and National Technology Group (“NTG”), opposed the application on two related grounds. First, they contended that to permit the amendments would be to deprive the defendants of an opportunity to rely on a defence they would have under the Statute of Limitations, 1957 (as amended) (the “Statute”) and that they would, therefore, be unfairly prejudiced if the amendments were allowed. Second, they contended that the court should refuse to permit the proposed amendments on the grounds that it would be unjust to the defendants to do so as it would deprive the defendants of the opportunity they would have had on an application by the plaintiff under O. 11 RSC for leave to issue and serve the proceedings containing the matters the subject of the proposed amendment of contending that the plaintiff had not demonstrated the existence of a good cause of action under O 11, r. 5 RSC, as the claim the subject of the proposed amendments would be statute barred. It can readily be seen, therefore, that both objections are related and involve a consideration of the defendants’ contention that they would be unfairly prejudiced if the amendments were permitted as they would be deprived of the opportunity of relying on a defence which they say they have, or at least might have, under the Statute.

Summary of Decision

3. For reasons which I explain in this judgment, I have concluded that the plaintiff is entitled to the orders sought permitting it to deliver an amended statement of claim in the terms of the draft exhibited to the plaintiff’s grounding affidavit. I am satisfied that having considered the case as originally pleaded by the plaintiff, the nature of the amendments

sought to be made, the relevant legal principles applicable to amending pleadings, including those applicable where a defendant contends that the relevant amendment will deprive it of a defence which it has or might have under the Statute, and the application of those principles to the undisputed facts, the plaintiff has clearly established its entitlement to the orders sought. I am satisfied that it would be an appropriate exercise of the court's discretion under O. 28, r. 1 RSC and would be consistent with the applicable legal principles to make the orders sought by the plaintiff.

The Plaintiff's Claim

4. I should state at the outset that I have previously delivered a lengthy judgment in these proceedings on an application by the defendants for orders under O. 12, r. 26 RSC setting aside service of the proceedings on the defendants in the Kingdom of Saudi Arabia or, alternatively, discharging the order of the High Court (McDonald J) of 21st August, 2018, permitting service of the proceedings on them: *Microsoft Ireland Operations Ltd v Arabic Computer Systems and National Technology Group* [2020] IEHC 549 (judgment delivered on 30th October, 2020) (the "jurisdiction judgment"). In that judgment, I refused the defendants' application and concluded that the order made by the High Court (McDonald J.) on 21st August, 2018 permitting service of notice of proceeding on the defendants in the Kingdom of Saudi Arabia under O. 11. r. 1(e)(iii) RSC was properly made and that the defendants were not entitled to orders under O. 12, r. 26 RSC setting aside the service effected upon them on foot of that order or discharging the order itself. It appears that the defendants have appealed to the Court of Appeal from a part of the judgment concerning the law applicable to determining the proper authority of the person who signed some of the relevant agreements between the parties. However, the fact and extent of that appeal is not relevant for present purposes.

5. The plaintiff commenced the proceedings by a summary summons which was issued on 24th August, 2018. The claim in the proceedings is for judgment against both of the defendants in the sum of US\$31,539,677.95 (and/or the euro equivalent of that sum). As appears from the special indorsement of claim to the summary summons, the plaintiff expressly referred to two contracts in writing between the plaintiff and ACS. The first was a contract in writing dated 1st September, 2014, under which it is alleged the plaintiff permitted ACS to sell certain Microsoft products called “licensed offerings” in its territory for the period from 1st September, 2014 to 31st August, 2015. That contract was defined in the Summary Summons (and later in the Statement of Claim) as the “First Microsoft Channel Partner Agreement”. It was pleaded that that agreement was extended on 22nd July, 2015 to 31st January, 2016 and was amended and further extended on 1st February, 2016 to 31st August, 2016.

6. It was pleaded that the plaintiff entered into a further Microsoft Channel Partner Agreement with ACS on 1st September, 2016 (which was defined as the “Second Microsoft Channel Partner Agreement”) which permitted ACS to continue to sell the “licensed offerings”. The term of the Second Microsoft Channel Partner Agreement was extended to 31st August, 2017. Together, the First and Second Microsoft Channel Partner Agreements were referred to in the Summary Summons as the “Microsoft Channel Partner Agreements”. It was pleaded that they were governed by and to be interpreted in accordance with the laws of Ireland and that the parties had consented to the exclusive jurisdiction of, and venue in, the courts of Ireland for all disputes connected with those agreements.

7. The plaintiff also referred in the summary summons to a contract in writing dated 19th December, 2011 between the plaintiff and NTG (defined there as the “Guarantee Agreement”), under which NTG agreed to guarantee and indemnify the plaintiff in respect of the payment of certain debts due to plaintiff, including debts due to it by ACS. Reliance was

also placed on a provision in that agreement under which the Irish courts would have jurisdiction in relation to any dispute arising out of or in connection with the agreement. I should add that the Guarantee Agreement also contained a clause that it was to be governed by and construed and enforced in accordance with the laws of Ireland.

8. At para. 11 of the special indorsement of claim to the summary summons, the plaintiff pleaded that ACS purchased “licensed offerings” from the plaintiff pursuant to the Microsoft Channel Partner Agreements. Paragraph 11 continued:-

“Pursuant to invoices, issued on diverse dates between 31 December 2015 and 22 August 2017, payment was requested by the plaintiff from [ACS] in respect of the ‘licensed offerings’ aforesaid, particulars of which are set out at schedule 1 to this summary summons.”

9. Schedule 1 contained particulars of the invoices alleged to be outstanding by ACS to the plaintiff and due by NTG to the plaintiff on foot of the Guarantee Agreement. The total of those invoices came to US\$31,539,677.95. Included in the particulars at schedule 1 were the ten invoices which are relevant to the plaintiff’s amendment application. They are invoices which were sent to ACS during the term of the First Microsoft Channel Partner Agreement but which related to products the subject of purchase orders submitted by ACS prior to the commencement of the term of the First Microsoft Channel Partner Agreement on 1st September, 2014. In fact, those purchase invoices were submitted by ACS during the term of the immediately preceding Microsoft Channel Partner Agreement which was entered into between the plaintiff and ACS on 27th September, 2013 and was for the period from 1st September, 2013 to 31st August, 2014 (the “2013 Agreement”). I should note here that the defendants also apparently intend disputing the validity of the 2013 Agreement on the basis of an alleged lack of authority of the signatory to that agreement on behalf of ACS. Understandably, therefore, the defendants have made clear in approaching this amendment

application that they are proceeding on the assumption that that agreement binds ACS which they have made clear is likely to be an issue in the proceedings.

10. The plaintiff pleaded (at para. 12 of the special indorsement of claim to the summary summons) that ACS “*failed to pay sums due pursuant to the invoices aforesaid in the sum of US\$31,539,677.95, whether within the period specified in the said invoices, or at all*”. Those sums included the sums claimed by the plaintiff which were the subject of the ten invoices at issue.

11. The plaintiff referred to demands made for payment of the amount allegedly due and owing from ACS and from NTG (pursuant to the Guarantee Agreement) on 10th August, 2018 (paras. 13 and 14 of the special endorsement of claim). It then pleaded (at para. 15) that, notwithstanding those demands, the defendants have not paid that sum or any part of it, which sum is allegedly due and owing to the plaintiff.

12. In the prayer for relief, the plaintiff claimed judgment against ACS in that sum (and/or its euro equivalent) (para. 1 of the prayer). It claimed judgment against NTG in the same sum (and/or its euro equivalent) (para. 2 of the prayer).

13. It can be seen from this description of the matters pleaded in the summary summons that the plaintiff expressly referred and relied on the First and Second Microsoft Channel Partner Agreements, to the Guarantee Agreement, the invoices sent between 31st December, 2015 and 22nd August, 2017, the failure by ACS to pay the sums due pursuant to those invoices within the period specified in them or at all and the fact that the sum alleged to be outstanding was demanded but was not paid by ACS or by NTG as a result of which judgment in that amount was being sought against both defendants. It can also be seen that the list of invoices set out in the particulars at schedule 1 included the ten invoices relevant to the amendment application, which are dated between 31st December, 2015 and 30th September, 2016 and total around €15 million.

14. Following the defendants' unsuccessful application to set aside service of the proceedings or to discharge the order of the High Court permitting such service and following directions made by the court on 13th November, 2020, the plaintiff delivered its statement of claim on 27th November, 2020.

15. The claim was pleaded in the statement of claim in similar terms to the way in which it was pleaded in the summary summons. At the very outset of the statement of claim, it was pleaded that "*prior to the First Microsoft Channel Partner Agreement, ACS had distributed "licensed offerings" on behalf of Microsoft in Saudi Arabia since approximately 1999*" (para. 4). The plaintiff referred to the First and Second Microsoft Channel Partner Agreements and to the Guarantee Agreement and to the fact that those agreements were all governed by and to be interpreted in accordance with the laws of Ireland. It was pleaded that ACS ordered "licensed offerings" from the plaintiff during the term of the Microsoft Channel Partner Agreements and was provided with those offerings by the plaintiff (para. 15). Reference was then made to the fact that invoices demanding payment in respect of the "licensed offerings" were issued to ACS by and on behalf of the plaintiff in 2015, 2016 and 2017 in accordance with those agreements (para. 16). Reference was then made to a part payment which was allegedly received by the plaintiff from ACS in the sum of just over US\$7.9 million on or about 30th September, 2016, following which there was an alleged outstanding balance of just under US\$39 million which "*remained unpaid by ACS pursuant to the Microsoft Channel Partner Agreement (sic)*" (para. 17).

16. It was then pleaded that in an email exchange, ACS, through its agent, assured the plaintiff of payment, stating that it would "*be sure [to] settle the rest of dues soon*" (para. 17). Reference was also made to an alleged acknowledgement by ACS of the debt then allegedly due and owing to the plaintiff and to the fact that a "*payment plan*" would be shared with the plaintiff imminently (para. 19). Reference was then made to further demands

of payment by the plaintiff, to the service of a notice terminating the Second Microsoft Channel Partner Agreement, to the withdrawal of that notice of termination following representation from ACS and to a further demand for payment in the sum of more than US 33 million (paras. 20 and 21).

17. It was pleaded that the Second Microsoft Channel Partner Agreement expired on 31st August, 2017, that a demand was made of NTG pursuant to the Guarantee Agreement in the sum of more than US\$31 million and that no payment was received on foot of that demand (para. 23). It was pleaded that demands were made by the plaintiff on 3rd July, 2018 for payment from ACS and from NTG of more than US\$31 million *“being the sum then calculated to be due and owing to Microsoft pursuant to the Microsoft Channel Partner Agreements and the Guarantee Agreement”* (para. 24). It was stated that those letters of demand enclosed a schedule of outstanding invoices together with copies of the invoices. A further letter of demand sent by the plaintiff to ACS on 10th August, 2018 seeking payment of the total sum of US\$31,539,677.95 was referred to at para. 25. It was then pleaded as follows (at para. 26):-

“In breach of contract, ACS has failed and refused to make payment of monies due and owing to Microsoft under the Microsoft Channel Partner Agreements in the sum of US\$31,539,677.95. Particulars of calculation of the sum of US\$31,539,677.95 are contained at schedule 1, allowing for all just credits and allowances.”

18. Schedule 1 to the statement of claim was in identical terms to schedule 1 to the summary summons. The invoices listed in the schedule to the statement of claim included the ten invoices the subject of the amendment application which were sent during the period of the First Microsoft Channel Partner Agreement but in respect of “licensed offerings” ordered by ACS during the term of the 2013 Agreement.

19. The statement of claim then referred to a demand sent by the plaintiff to NTG on 10th August, 2018 under the Guarantee Agreement requesting payment of all sums due by ACS to the plaintiff (para. 27). It was then pleaded that in breach of contract, NTG did not pay the sum of US\$31,539,677.95 which it was said was due and owing by NTG to the plaintiff under the Guarantee Agreement (para. 28).

20. Paragraph 29 of the statement of claim contained an alternative plea as follows:-

“In the alternative, Microsoft has provided unpaid services at the request of ACS from which ACS has obtained a benefit in the sum of US\$31,539,677.95.”

The statement of claim concluded before the prayer for relief by stating (at para. 31) that the plaintiff was reserving the right to furnish further or amended particulars of its claim prior to the trial.

21. In the prayer for relief, the plaintiff claimed judgment against ACS and NTG in the sum of US\$31,539,677.95 and/or the euro equivalent of that sum (paras. 1 and 2 of the prayer, being the total of the invoices listed in the schedule); damages for breach of contract (para. 3); and, in the alternative, damages and/or restitution by way of *quantum meruit* (para. 4) together with costs and other relief.

22. It can be seen from the statement of claim that the plaintiff was advancing its claim on the basis that the sums claimed were due and owing on foot of the Microsoft Channel Partner Agreements and the Guarantee Agreement, that those sums were payable on foot of invoices sent in 2015, 2016 and 2017 in accordance with the Microsoft Channel Partner Agreements and that, in the alternative, the plaintiff had provided unpaid services at the request of ACS from which ACS obtained a benefit to the value of the sum claimed in the invoices being a sum of in excess of US\$31.5 million. The ten invoices the subject of the amendment application, which were sent in 2015 and 2016, were all listed in the list of invoices the

subject of the claim in schedule 1 to the statement of claim and clearly formed part of the claim made by the plaintiff from the commencement of the proceedings.

Relevant Procedural History and Evidence

23. Following service of the notice of the summary summons on the defendants in the Kingdom of Saudi Arabia on foot of the order of the High Court on 21st August, 2018, a conditional appearance was entered on behalf of both defendants on 12th October, 2018 for the purpose of contesting jurisdiction. The defendants then brought their motion challenging jurisdiction on 11th January, 2019. Several affidavits were exchanged for the purposes of that application.

24. In addition, a further affidavit was sworn on behalf of the plaintiff for the purpose of grounding its application to enter the proceedings in the Commercial List and for summary judgment. That affidavit was sworn by Jesus Del Pozo Moran on 5th December, 2018. At para. 55 of that affidavit, in that part of the application which grounded the plaintiff's application for summary judgment, Mr. Moran stated that ACS had ordered and was provided with "licensed offerings" pursuant to the Microsoft Channel Partner Agreements (which were defined earlier in that affidavit as being the first and second such agreements) during 2015, 2016 and 2017 and that, subsequently, invoices demanding payment in respect of those "licensed offerings" were issued on various dates between 31st December, 2015 and 22nd August, 2017. Mr. Moran exhibited a schedule listing the invoices together with copies of the invoices themselves (at tab 23 of exhibit booklet "JDPM1" to that affidavit). While it has subsequently emerged that Mr. Moran was mistaken in referring to the fact that ACS placed orders in respect of the ten invoices in question during the currency of or pursuant to the terms of the First and Second Microsoft Channel Partner Agreements, he was correct in stating that the invoices were issued between 31st December, 2015 and 22nd August, 2017. The schedule of invoices, and the copy invoices exhibited by Mr. Moran, included the ten

invoices relevant to the amendment application. Mr. Moran then stated (at para. 56 of that affidavit) that ACS failed to pay the sums due to the plaintiff pursuant to the invoices which totalled more than US\$31.5 million (and which total included the total of the ten invoices at issue in this application).

25. Mr. Moran also swore a number of affidavits in response to the affidavit sworn on behalf of the defendants for the purposes of the defendants' jurisdictional challenge. In the first of those affidavits, which he swore on 1st February, 2019, Mr. Moran referred to the history of the relationship between the plaintiff and ACS, to the orders placed by ACS in respect of "licensed offerings" and to the invoices sent by the plaintiff in respect of those offerings the subject of the proceedings. At para. 12 of that affidavit, Mr. Moran stated that since ACS commenced operations as a Microsoft reseller in or about 2000 it had contracted with the plaintiff and purchased "licensed offerings" from it only (save in certain exceptional circumstances). Mr. Moran referred to the contracts which governed the relationship between the plaintiff and ACS in the period from 1st October, 2007 to August, 2014 and exhibited copies of those contracts (tab 2 of exhibit "JDPM1" to that affidavit). Included within that exhibit was the 2013 Agreement.

26. At para. 13 of that affidavit, Mr. Moran explained that as an authorised reseller of Microsoft products in Saudi Arabia, ACS ordered "licensed offerings" from the plaintiff under the Microsoft Channel Partner Agreements (which term was not defined in the affidavit as referring solely to the first and the second such agreements). Mr. Moran went on to assert that ACS had failed to pay the plaintiff for "licensed offerings" supplied which had a contractual invoiced value of more than US\$31.5 million. He then referred to a schedule listing the invoices together with copies of the invoices which he exhibited at tab 3 of exhibit booklet "JDPM1" to that affidavit (para. 13). The schedule listing the invoices and the copy

invoices exhibited by Mr. Moran again included the ten invoices relevant to the amendment application.

27. At paras. 14 and 15 of that affidavit, Mr. Moran explained the ordering and invoicing process operated by the plaintiff and ACS. Each of the relevant “licensing offerings” the subject of the plaintiff’s claim was, Mr. Moran explained, ordered by ACS from the plaintiff. He further outlined that each one of the invoices corresponded to an order submitted by ACS to the plaintiff and that each order placed was subject to review by the plaintiff. If the order was approved by the plaintiff, the plaintiff executed the order and issued an invoice accordingly (para. 14). Mr. Moran explained (at para. 15) that the ordering process for “licensed offerings” was always between the plaintiff and ACS for the purpose of procuring and reselling such offerings pursuant to the Microsoft Channel Partner Agreements. More detail in relation to the ordering and invoicing procedure was provided in the course of the affidavit evidence on the amendment application to which I will turn shortly. However, it is significant that in the various affidavits which were sworn on its behalf for the purpose of its application for entry of the proceedings and for summary judgment and in its affidavit in response to the jurisdictional challenge, the plaintiff expressly listed the ten invoices at issue in the amendment application as being proof of its claim and exhibited copies of those invoices.

28. In the course of the jurisdiction judgment, I made express reference to Mr. Moran’s evidence concerning the historical contractual relationship between the plaintiff and ACS in the period from 2000 (para. 26 of the judgment). I drew attention to the fact that Mr. Moran had exhibited copies of Microsoft Channel Partner Agreements between the plaintiff and ACS for the period from October, 2007 to August, 2014, which was prior to the commencement of the period the subject of the First Microsoft Channel Partner Agreement. That was a reference to the evidence given by Mr. Moran at para. 12 of his affidavit of 1st

February, 2019 in which he exhibited the agreements predating the First Microsoft Channel Partner Agreement, including the 2013 Agreement.

29. I also referred in the course of the jurisdiction judgment to the invoices received by ACS from the plaintiff in the period between 2007 and 2017 in respect of “licensed offerings” and noted that some 4,671 invoices with a combined value of US\$696.2 million were sent during that period (para. 196 of the judgment). It is significant, therefore, that I acknowledged in that judgment not only that the plaintiff and ACS were parties to earlier agreements in respect of “licensed offerings” (which included the 2013 Agreement), but also the fact that invoices were sent by the plaintiff to ACS from the period between 2007 and 2017 in respect of the “licensed offerings” provided.

30. Following the delivery of the jurisdiction judgment, in which I refused the defendants’ application, I gave further directions in the proceedings on 13th November, 2020. The plaintiff indicated its intention to proceed to a plenary hearing rather than seeking summary judgment. The directions provided for the delivery of a statement of claim by the plaintiff and for further pleadings. As noted earlier, the plaintiff delivered its statement of claim on 27th November, 2020. The defendants sought particulars arising from the statement of claim on 23rd December, 2020. The plaintiff furnished replies to particulars on 28th January, 2021. With those replies, the plaintiff furnished another schedule of the invoices the subject of the claim together with a further copy of all of the invoices. The schedule and the copy invoices included the ten invoices relevant to the amendment application. It was pointed out in the replies that the invoices had previously been exhibited to the affidavit sworn by Mr. Moran on 17th August, 2018 for the purpose of grounding the plaintiff’s application for leave to issue and serve notice of the proceedings outside the jurisdiction and to Mr. Moran’s affidavit of 5th December, 2018. They were also exhibited to Mr. Moran’s affidavit of 1st February, 2019, as noted above.

Plaintiff's Amendment Application

31. In the course of considering the defendants' notice for particulars, the plaintiff ascertained that some of the invoices the subject of the plaintiff's claim arose from purchase orders submitted by ACS prior to the commencement of the term of the First Microsoft Channel Partner Agreement on 1st September, 2014.

32. In a letter dated 28th January, 2021 which enclosed the plaintiff's replies to particulars, Matheson, the plaintiff's solicitors, informed Hayes, the defendants' solicitors, that in the course of considering the defendants' notice of particulars, it had come to the plaintiff's attention that certain of the invoices forming part of the claim referred to purchase orders submitted by ACS prior to the commencement of the term of the First Microsoft Channel Partner Agreement. The invoices in question were listed in a table which was appended to the letter. The table listed the ten invoices. Matheson's letter stated that while those invoices were issued during the term of the First Microsoft Channel Partner Agreement, the purchase orders to which they referred predated that term and were submitted by ACS during the term of the preceding Channel Partner Agreement, namely, the 2013 Agreement. A copy of that agreement, which it was stated was in substantially the same form as the First Microsoft Channel Partner Agreement, was enclosed with the letter. It was noted that the 2013 Agreement contained identical applicable law and jurisdiction clauses, specifying Irish law and jurisdiction, to the First Microsoft Channel Partner Agreement and that each contract was signed by the same signatory on behalf of ACS, Syed Abdulaleem. The table attached to the letter listed the ten invoices (it did not include the dates of those invoices which were subsequently identified as being from between 31st December, 2015 and 30th September, 2016) and the relevant purchase orders for those invoices (which were from between 31st December, 2013 and 28th August, 2014). The letter referred to the plaintiff's intention to amend the statement of claim in order specifically to refer to the 2013 Agreement, sought the

defendants' solicitors' agreement to the delivery of an amended statement of claim and suggested variations to the directions timetable to make provision for further consequential steps.

33. In an affidavit sworn by Mr. Moran on 20th April, 2021 for the purpose of grounding the plaintiff's amendment application, Mr. Moran confirmed the details which were set out in Matheson's letter of 28th January, 2021. He explained (at para. 19) that the 2013 Agreement was not identified as being directly relevant due to the "*elapse of time between the purchase orders*" and "*the issuing of the subsequent corresponding invoices*" due to "*an oversight in preparing the proceedings*". He stated:-

"This was an error and I regret the inconvenience that has resulted from it"

(para. 19)

34. A proposed amended statement of claim was furnished by the plaintiff's solicitors to the defendants' solicitors on 1st February, 2021. The only amendments to the original statement of claim were:-

- (1) The plaintiff sought to include a new para. 4 to make express reference to the 2013 Agreement. The new paragraph was as follows:-

"By contract in writing dated 1 September 2013 (the '2013 Microsoft Channel Partner Agreement'), Microsoft entered into an agreement with ACS permitting it to sell Microsoft licensed offerings (the 'licensed offerings') in Saudi Arabia, as described in the Microsoft Channel Partner Agreement, from 1 September 2013 to 31 August 2014."

- (2) At para. 9, it was sought to include the words "*the 2013 Microsoft Channel Partner Agreement*" as one of the agreements on which the plaintiff intended to rely.

No further amendments were proposed to the original statement of claim. No new invoices were sought to be added. No new reliefs were sought. The total sum claimed was unchanged.

35. Having received the proposed amended statement of claim and Matheson's letter of 28th January, 2021, Hayes responded on 5th February, 2021. Their initial response was that they required an extension of time to deliver their defence and counterclaim. They sought confirmation of the plaintiff's agreement to an extension to 17th February, 2021 "*on the basis that we will consent to your late delivery of replies to particulars and amended statement of claim*".

36. Matheson replied on the same date confirming the plaintiff's agreement to the delivery of the defendants' defence and counterclaim on 17th February, 2021. However, the defendants did not deliver their defence and counterclaim on that date. Rather, on 26th February, 2021, Hayes wrote to Matheson withdrawing the defendants' consent to the amended statement of claim and making a number of points. First, they asserted that the plaintiff was not entitled to amend its statement of claim without seeking leave of the court under O. 28 RSC. Second, they asserted that, if the statement of claim was to be amended, the plaintiff might require leave of the court under O. 11 RSC to serve the amended proceedings on the defendants or be required to issue fresh proceedings. The defendants reserved their position in respect of both of those matters. Third, Hayes stated that they were considering the plaintiff's "*new claim*" under the 2013 Agreement and referred to para. 8a of that agreement and to the "*Program Guide*" referred to in that paragraph of which they required a copy.

37. Matheson replied on 2nd March, 2021 querying the withdrawal of the consent to the amended statement of claim previously provided, taking issue with the defendants' assertion that it was necessary for an application for leave to amend to be brought to the court, but stating that such an application would be brought if the defendants were insisting upon it.

They rejected the contention that leave of the court was required to serve amended proceedings or fresh proceedings on the defendants (outside the jurisdiction). In a response dated 4th March, 2021, Hayes maintained their position (a) that the plaintiff was not entitled to amend its statement of claim without seeking leave of the court and insisting that the appropriate motion be brought and (b) that if the statement of claim was to be amended, the plaintiff might require leave of the court to serve the amended proceedings (or fresh proceedings) on the defendants. Hayes made a further request for a copy of the “*Program Guide*” to which they had referred in previous correspondence. Hayes confirmed on 18th March, 2021 that the defendants were not in a position to deliver their defence and counterclaim as required under the directions made by the court until the plaintiff’s amendment application had been determined by the court.

38. On 9th April, 2021, Matheson replied that the plaintiff had been unable to locate a “*Program Guide*” for 2013. They stated, however, that ACS had access to all relevant “*Program Guides*” at the relevant time through a particular website “*explore.ms*”. They further stated that, as the defendants were aware, “*Program Guides*” were “*intended to be used as a reference for channel partners on routine matters such as how to place orders, how to pay invoices, etc.*”. They provided a copy of the 2012 “*Program Guide*” which they said was “*for the purposes of illustration*”. However, they did not accept that the “*Program Guide*” terms were essential or even materially relevant to the defendants’ attitude to the proposed amendments to the statement of claim. They further rejected the suggestion that the plaintiff was seeking to advance a “*new*” claim in the amended statement of claim and explained why that was so. They observed that the 2013 Agreement had previously been exhibited in the proceedings by Mr. Moran in his affidavit of 1st February, 2019.

39. At para. 28 of the affidavit which he swore on 20th April, 2021 for the purposes of grounding the plaintiff’s amendment application, Mr. Moran confirmed the contents of the

plaintiff's solicitors' letter of 9th April, 2021, confirmed that ACS had access to the 2013 "*Program Guide*" at the relevant time and that the 2012 version of the "*Program Guide*" was furnished to the defendants' solicitors "*for the purposes of illustration*".

40. The plaintiff issued its amendment application on 20th April, 2021. The application was grounded on Mr. Moran's affidavit of the same date. Having set out the chronology which I have just summarised, Mr. Moran explained that the 2013 Agreement was undoubtedly relevant to the plaintiff's claim in the proceedings "*as it formed the original contractual basis upon which ACS submitted purchase orders to Microsoft which resulted in the invoices*" listed at para. 15 of his affidavit (para. 29). He asserted that the proposed amendment to the statement of claim was necessary for the purpose of determining the questions in controversy between the parties. He stated:-

"The proposed amendment is designed to clarify the legal context in which certain purchase orders were submitted by ACS and in order to rectify an error in failing to specifically plead reliance upon the 2013 Microsoft Channel Partner Agreement."

(para. 30)

41. Mr. Moran asserted that in seeking to plead reliance upon the 2013 Agreement, the plaintiff was not introducing any new claim or cause of action but was referring to an agreement which was "*relevant to those claims which are already before the court*" (para. 31). He further asserted that the relevance of the 2013 Agreement "*arises by implication from the existing proceedings and it does not enlarge the case made in any material sense*" (para. 31).

42. Mr. Moran asserted that no unfair prejudice would be caused to the defendants as a result of the proposed amendment and that the amended statement of claim would, if permitted, define the issues before the court, prevent surprise at the trial and permit the issues to be determined by the court. He noted that the amendment was being proposed at a

relatively early stage in the proceedings and without any undue delay by the plaintiff. He further drew attention to the fact that the 2013 Agreement was previously exhibited to an earlier affidavit which he swore on 1st February, 2019 (as I pointed out earlier).

43. A replying affidavit was sworn on behalf of the defendants not by an officer or employee of either of the defendants but rather by Gillian Cotter, a solicitor in Hayes, the defendants' solicitors. Ms. Cotter stated (at para. 2 of her affidavit) that there was "*little to no factual dispute between the parties*" and that the principal purpose of her affidavit was to explain the legal basis on which the defendants intended to oppose the amendment application. The two legal bases have been summarised earlier and will be addressed in greater detail below.

44. The first was that, by permitting the plaintiff to amend its statement of claim, the court would (or potentially could) deprive the defendants of a limitation defence, assuming that the 2013 Agreement bound ACS, which Ms. Cotter said was something which was likely to be in issue in the proceedings (para. 3). She noted that the purchase orders referable to the ten invoices affected by the amendment application were raised between 31st December, 2013 and 28th August, 2014, more than six years ago. She asserted that the defendants' position was that "*any obligation on the part of ACS to make payment to Microsoft arose once the purchase orders issued, and that any cause of action on the part of Microsoft arose immediately (or within a reasonable period after the purchase orders issued)*" (para. 4). She observed (at para. 5) that the question as to when any payment obligation on the part of ACS arose was "*slightly complicated*" by the fact that the plaintiff could not locate a copy of the "*Program Guide*" which formed part of the 2013 Agreement. She then noted (at para. 6) that it would be a matter for submission at the hearing as to whether the defendants were correct in their contention as to when any cause of action arose and whether permitting the amendment would deprive them of a legitimate defence under the Statute. The defendants

were also reserving their position as to whether the plaintiff's claim under the 2013 Agreement could succeed at all if the relevant "*Program Guide*" could not be located.

45. The second objection articulated by Ms. Cotter was that the summary summons did not refer to the 2013 Agreement and no leave was granted by the court under O. 11 RSC in respect of the plaintiff's claim under that agreement. Ms. Cotter stated that the defendants' position was that the plaintiff should be required to apply for leave to serve the amended statement of claim on the defendants outside the jurisdiction.

46. Mr. Moran swore a second affidavit in response to Ms. Cotter's affidavit on 17th May, 2021. In addressing what Ms. Cotter had said about the defendants' first ground of objection based on the Statute and what she said as to when the defendants contend that the plaintiff's cause of action first arose, Mr. Moran stated that the invoices at issue clearly specified a "*payment due date*" in each case (para. 3). He asserted that the payment obligation of ACS arose on the "*payment due date(s)*" specified on each of the invoices and that that was the date on which the cause of action accrued in respect of each invoice. He set out in a table at para. 4 of his affidavit the "*payment due date*" in respect of each of the ten invoices relevant to the amendment application which covered the period from 29th February, 2016 to 29th November, 2016. The table very helpfully identified in respect of each of the ten invoices the relevant purchase number, the purchase order date (as referenced on the invoice), the term of the relevant agreement (as referenced on the purchase order), the invoice number, the invoice document date (as referenced on the invoice), the payment due date (as referenced on the invoice) and the billing period (as referenced on the invoice).

47. Mr. Moran disputed the assertion that the plaintiff's claim for payment against ACS in respect of any of the invoices was statute barred. He disputed the contention that the payment obligation of ACS arose on the date of the purchase orders and observed that no factual basis had been advanced by Ms. Cotter for that contention. Indeed, Ms. Cotter could not provide

any factual basis for such contention and none was provided by an officer or employee of ACS.

48. Mr. Moran explained the invoice and payment cycle in respect of orders placed by ACS with the plaintiff (para. 7). He explained that each purchase order submitted by ACS sought the supply of products as specified in the purchase order over the course of a three-year cycle. As regards the invoicing cycle in respect of each purchase order, he explained that the “*terms and conditions*” section of each purchase order stated as follows:-

“Unless otherwise indicated on the channel price sheet and in a signed customer amendment, Microsoft will invoice reseller in three equal annual instalments. The first instalment will be invoiced upon acceptance of the Enrolment, and thereafter on the anniversary of the Enrolment.”

Mr. Moran explained that once ACS submitted the purchase orders, Microsoft then invoiced ACS annually, in three yearly tranches, throughout the three-year course of supply in respect of each purchase order. He explained that the invoices relevant to the amendment application all relate to the third (and final) invoice annuity in respect of each purchase order and that that explained why the purchase orders relevant to the amendment application ranged from 31st December, 2013 to 28th August, 2014, while the corresponding invoice dates ranged from 31st December, 2015 to 30th September, 2016. I would observe here that none of this was disputed by the defendants and no further affidavit was sworn by the defendants in response to Mr. Moran’s second affidavit.

49. Mr. Moran asserted that nothing in the 2013 “*Program Guide*” altered the date of the defendants’ payment obligation (which was explained by Mr. Moran at para. 7 of his second affidavit) and he referred in that regard to the 2012 “*Program Guide*” which had been provided to the defendants.

50. Mr. Moran also referred to what he described as a number of part payments made by ACS to the plaintiff in September, 2016 and December, 2016 in the total amount of US\$14 million and to a payment of almost US\$2 million received by the plaintiff in July, 2017 on foot of a letter of credit which had been put in place by ACS with Banque Saudi Fransi to indemnify debts due and owing by ACS (para. 9). Mr. Moran also noted that it had not been suggested by Ms. Cotter in her affidavit that any part of the plaintiff's claim against NTG was statute barred and noted that the demand for payment under the Guarantee Agreement was made on behalf of the plaintiff on 10th August, 2018.

51. As regards the second objection raised by the defendants in Ms. Cotter's affidavit, Mr. Moran disputed the contention that an application for leave to serve the amended statement of claim on the defendants outside the jurisdiction was required and referred to the fact that the plaintiff had demonstrated the necessary jurisdictional gateway to justify the making of an order for service of the original proceedings outside the jurisdiction under O. 11 RSC based on the First and Second Microsoft Channel Partner Agreements and on the Guarantee Agreement. He contended that the addition of the 2013 Agreement did not alter the position. He reiterated that the plaintiff was not seeking to introduce any new claim or cause of action in seeking to refer to the 2013 Agreement in its proposed amended statement of claim and that the 2013 Agreement contained the same choice of jurisdiction and choice of law clauses as were contained in the subsequent contracts between the plaintiff and ACS and that it was signed by the same person as signed the First Microsoft Channel Partner Agreement, Mr. Abdulaleem (para. 13).

52. That is the evidence relevant to the plaintiff's amendment application. There is and can be no real factual dispute between the parties in light of the fact that the defendants have chosen not to dispute the factual assertions made by Mr. Moran on behalf of the plaintiff.

Defendants' Objections to Amendment Application

53. In summary, therefore, the defendants have advanced two objections to the plaintiff's amendment application.

54. First, the defendants maintain that if the court were to permit the plaintiff to deliver an amended statement of claim, the defendants would or could potentially be deprived of a defence under the Statute which they would otherwise have in respect of any claim based on the 2013 Agreement. On that basis, the defendants assert that they would be unfairly prejudiced if the court were to allow the amendments.

55. Second, and related to the first objection, the defendants maintain that the court should not allow the amendments sought in circumstances where the plaintiff has not put before the court the type of evidence which would usually be required on an application for leave to issue and serve proceedings outside the jurisdiction under O. 11 RSC. The main point relied upon by the defendants in respect of this ground is that, under O. 11, r. 5 RSC, an applicant for leave to issue and serve proceedings outside the jurisdiction must aver that it has a good cause of action. The defendants would have wished to argue, in the event that an application for such leave were brought, that the plaintiff had not established a good cause of action as the defendants say they have a good defence under the Statute to the plaintiff's amended claim.

56. In addressing the plaintiff's application and the objections raised by the defendants, I will first consider the legal principles governing amendment applications, including those where it is said that a defendant would be deprived of a defence which it might otherwise have under the Statute. I will then consider the two grounds of objection raised by the defendants by reference to those legal principles and, in the case of the second objection, by reference also to some other relevant legal principles.

Legal Principles Applicable to Amendment Applications

57. The starting point is O. 28, r. 1 RSC which provides as follows:-

“The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”

58. While the plaintiff also referred in its notice of motion to O. 28, r. 12 RSC, no submissions were directed by either the plaintiff or the defendants to the scope of that provision. Order 28, rule 12 RSC provides as follows:-

“The Court may at any time, and on such terms as to costs or otherwise as the Court may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.”

59. That provision was discussed by Biehler, McGrath and Egan McGrath “*Delany and McGrath on Civil Procedure*” (4th Ed.) (“*Delany and McGrath*”). At para. 6-64, the authors observe:-

*“A wider jurisdiction to correct errors including errors in the names of parties is conferred by Order 28, rule 12 which provides that the court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings with all necessary amendments made for the purpose of determining the real question or issue raised by or depending on the proceedings. In *O’Brien v. O’Reilly* [2017] IEHC 246 this rule was relied on by Herbert J. to amend the title of proceedings to correct an error in the name of the first defendant.”*

60. It is unnecessary for me to consider whether the plaintiff can establish an entitlement to amend its statement of claim under O. 28, r. 12 in circumstances where it has also sought

leave to do so under O. 28, r. 1. I would prefer to leave over to a case in which it is necessary to decide the issue as to whether O. 28, r. 12 applies to amendments of the sort which the plaintiff seeks to make here to the statement of claim which, arguably, seek more than merely to amend a defect or error in the proceedings. I propose, therefore, to consider that the plaintiff's amendment application solely by reference to O. 28, r. 1.

61. Before referring to the legal principles applicable to amendment applications under O. 28, r. 1, I should briefly address a point which was raised in correspondence, in the written submissions and briefly in the oral submissions at the hearing concerning the possible entitlement of the plaintiff to amend its statement of claim without leave of the court.

62. Under O. 28, r. 2, it is open to a plaintiff "*without any leave*" to amend its statement of claim "*once at any time before the expiration of the time limited for reply, and before replying*" or "*where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared*".

63. It is common case that the plaintiff could not avail of the second of the two possibilities referred to in O. 28, r. 2. More than four weeks has expired from the appearance entered on behalf of the defendants. Nor can the plaintiff at this point in the proceedings rely on the first of the possibilities referred to in O. 28, r. 2, as the time for the delivery of a reply by the plaintiff has not yet commenced since no defence has yet been delivered.

64. While the plaintiff might potentially have waited until the time for the delivery of a reply began to run and then amended its statement of claim without the need to seek leave of the court, it decided not to do so but rather to bring the present application. In my view, that was a reasonable and appropriate approach to take. It is obviously desirable that all of the issues in the case are brought forward at the earliest opportunity so that the parties and the court can know at the earliest possible stage what those issues are.

65. Even if it might have been possible for the plaintiff to have waited until a later stage of the proceedings to amend its statement of claim without seeking leave of the court (and I do not want to be taken as necessarily accepting that that is so), it would not have been consistent with the overriding obligation on the court under O. 63A, r. 5 to ensure “*the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings*”. It is much better to have the issue addressed and determined at this relatively early stage in the proceedings. As well as that, if the plaintiff were to have waited and then amended its statement of claim at a later stage in the proceedings in reliance on O. 28, r. 2, it would have been open to the defendants to apply to the court under O. 28, r. 4 to disallow the amendment. If such an application were made, the court would be faced with precisely the same issues as it is faced with on the present application but at a much later stage in the proceedings. It is far better to have the issues determined at this point. In any event, as the plaintiff did not push for an entitlement to amend without leave and, on the contrary, brought this amendment application, there is no need to consider further any possible entitlement the plaintiff might have had to amend without leave under O. 28, r. 2.

66. The legal principles applicable to amendment applications are well settled. The modern approach derives from the judgments of the Supreme Court in *Croke v. Waterford Crystal Ltd* [2005] 2 IR 383 (“*Croke*”) and *Moorehouse v. Governor of Wheatfield Prison* [2015] IESC 21 (“*Moorehouse*”). The general principles applicable to the amendment of pleadings were helpfully summarised by reference to the existing case law by Humphreys J. in *Habte v. Minister for Justice and Equality* [2019] IEHC 47 (“*Habte*”). Before setting out those principles, I should also refer to the summary of the general principles adopted by Birmingham J. in the High Court in *Rossmore Properties Ltd v. Electricity Supply Board* [2014] IEHC 159 (“*Rossmore*”), as they were recently approved of by the Court of Appeal in

Persona Digital Telephony Ltd v. Minister for Public Enterprise [2019] IECA 360

(“*Persona*”) (at para. 12).

67. In *Rossmore*, Birmingham J. summarised the principles as follows:-

- “1. *The parties enjoy complete freedom of pleading. This is a reference to the fact that in the ordinary course of events a plaintiff is at large as to how he pleads his or her case. Absent pleas that are scandalous or vexatious or the like, the plaintiff cannot be dictated to as to how to formulate and present his or her claim.*
2. *Order 28 of the Rules of the Superior Courts which is the rule that deals with amendments is intended to be applied liberally.*
3. *Amendments shall be made for the purposes of determining the real questions in controversy between the parties.*
4. *Amendments should not be permitted when doing so could cause real or actual prejudice to other parties.*
5. *Amendments should be allowed if all that is present is litigation prejudice which is capable of being dealt with by orders for costs or other directions by way of case management.*
6. *There is no rule that per se precludes radical amendments.*

7. *There is no rule against introduction of a new cause of action if it falls within the ambit of the original grievance.*” (per Birmingham J. at para. 19)

(emphasis added)

68. While most of those principles are applicable in the context of the plaintiff’s amendment application, perhaps the most relevant for present purposes is that set out at para. 7 in *Rossmore*.

69. In *Habte*, Humphreys J. provided a very helpful summary of the principles emerging from the case law which, to an extent, overlap with those set out and approved by Birmingham J. in *Rossmore*. I adopt for the purpose of this judgment the principles set out at paras. (i) to (xvi) in para. 32 of the judgment of Humphreys J. in *Habte*. I do not need to set out all of those principles but confirm that I have taken all of them into account. Rather, I will set out what appear to me to be the most relevant principles in light of the issues in controversy between the parties on the plaintiff’s amendment application. They are:-

“(x) *having to deal with a potentially winning point that was not originally included does not constitute irremediable prejudice...;*

(xii) *the fact that the proposed amendment introduces an entirely new cause of action or new ground, or even fundamentally alters the nature of the proceedings, or requires the addition of new parties, is not a bar to allowing the amendment...;*

(xiii) *the fact that the amendment involves a new relief, or challenges a different decision including one made after the institution of the original proceedings, is not a bar to allowing an amendment...;*

- (xiv) *if the proposed new claim is one that could otherwise be pursued by separate proceedings, the potential saving in costs and likelihood of a more just and convenient disposition of the issues by dealing with all related matters in the one set of proceedings is a factor in favour of allowing the amendment...;*
- (xv) *while amendments that do not substantially enlarge the proceedings, or merely particularise what is implicit, may be readily granted, the fact that the amendment substantially enlarges the proceedings is not a bar to allowing an amendment...;*” (case references omitted)

70. Unfair and irremediable prejudice to the party opposing the amendment will generally lead to the amendment being refused. The defendants have contended that they would be unfairly and irremediably prejudiced if the court were to allow the plaintiff to amend the statement of claim in the manner proposed. They rely on a very specific form of prejudice, namely, that the effect of the proposed amendment would be to deprive them of the benefit of the Statute. This type of claimed prejudice has been the subject of much consideration by the Irish courts.

71. The modern approach in this jurisdiction to the consideration of that type of claimed prejudice can first be seen in the decision of Keane J. in the High Court in *Krops v. The Irish Forestry Board Ltd* [1995] IR 113 (“*Krops*”). In that case, the plaintiff had issued proceedings arising out of the death of his wife in an accident where the car in which she was travelling was struck by a falling tree. The plenary summons and statement of claim alleged that the tree had fallen as a result of the negligence, breach of duty and breach of statutory duty of the defendants. The plaintiff sought to amend the statement of claim to include a claim for nuisance. It was accepted that the proposed amendment did not involve the pleading of any new facts. The amendment application was opposed by one of the defendants in

reliance on the decision of the English Court of Appeal in *Weldon v. Neal* (1887) 19 QBD 394 (“*Weldon*”). Keane J. in the High Court considered that case and noted that the plaintiff in *Weldon* was seeking not merely to add new causes of action to those already pleaded but to make fresh allegations of fact which had never been pleaded in circumstances where the limitation period had expired. Permission to amend was refused in *Weldon*. In light of subsequent amendments to the applicable rules of court in England and to the relevant English legislation, Keane J. concluded that the application before him had to be determined by reference to principle rather than authority. He stated:-

“...pleadings which initiate an action in this court carry with them from the time they are issued or delivered the potentiality of being amended by the court in the exercise of its general jurisdiction to allow a party to amend his indorsement or pleadings “in such manner and on such terms as may be just”. Where, as here, an amendment, if allowed, will not in any way prejudice or embarrass the defendant by new allegations of facts, no injustice is done to him by permitting the amendment. In that sense, it is true to say that the amendment does not in truth deprive him of a defence under the Statute of Limitations, 1957: since the proceedings were always capable of amendment in such manner as might be just and in order to allow the real question in controversy between the parties to be determined, it cannot be said that the defendant was at any stage in a position to rely on the Statute of Limitations, 1957.”

(per Keane J. at 121)

72. Keane J. continued:-

“Where, as here, the Plaintiff seeks to add a new cause of action arising out of – to borrow the words of the English rule – ‘the same facts or substantially the same facts’, there seems no reason why this Court, even in the absence of a corresponding rule in this jurisdiction, should be precluded from permitting such an amendment.”

(per Keane J. at 121)

73. The Supreme Court approved of the decision in *Krops* in *Croke* (per Geoghegan J. at pp. 397-398). Having referred to the statements of principle made by Keane J. in *Krops*,

Geoghegan J. in *Croke* stated:-

“The mere fact that if a new cause of action sought to be included in the statement of claim had been brought by separate action it would be statute barred does not prevent the amendment being granted.” (per Geoghegan J. at 398)

74. In *Mangan v. Murphy* [2006] IEHC 317 (“*Mangan*”), Clarke J. in the High Court had to consider the possible application of *Krops* in an application to amend a statement of claim.

The statement of claim pleaded that, as a result of an agreement, the first defendant was required to hold a percentage of the shareholding in the second defendant on trust for the plaintiffs so that all three would be beneficial owners of a one-third share in the second defendant. The plaintiffs sought to add a claim to the effect that it was also agreed on the same date that the three parties would, in the absence of any other agreement to the contrary, share equally, directly or indirectly, in any royalties that might be paid by the second defendant in respect of certain software development licences. Clarke J. refused to permit the amendment. Having referred to *Croke* and to a judgment which he had given in *Woori Bank & anor v. KDB Ireland* [2006] IEHC 156 (“*Woori Bank*”), Clarke J. then referred to *Krops*.

He said:-

“It is clear from Krops that an amendment can defeat the Statute, in that the new claim will be taken to have been commenced when the proceedings issued, and thus time will be taken to have ceased running, even in respect of the new claim, backdated to the date of the issuing of the original proceedings.” (p. 4)

75. Clarke J. distinguished the case before him from *Krops* on the basis the case before him did not involve “*the same facts or substantially the same facts*”. While there was a

sufficient connection between the background to both sets of issues (the claim as originally pleaded and the proposed additional claim) to render it convenient in principle for both claims to be heard together, he stated that the *“facts relevant to the issues which arise under both causes of action are... discrete and different”* (pp. 5-6). He noted that in *Woori Bank*, he had taken the view that it was not appropriate for the court to attempt to resolve arguable issues under the Statute at an interlocutory hearing such as an amendment application. He continued:-

“It is, therefore, clear that there is a possibility that allowing the amendment would cause prejudice to the defendants by excluding them from reliance upon the Statute of Limitations in circumstances which go much beyond those in which such a course was permitted in Krops.” (p. 6)

76. For that reason, Clarke J. refused the plaintiff’s application to amend the statement of claim but made provision for the possibility of fresh proceedings being issued by the plaintiffs to include the new cause of action to be linked with the existing proceedings. It is significant that in that case Clarke J. concluded that the amendment should be refused on the basis that the new cause of action did not arise out of *“the same facts or substantially the same facts”* but, rather, the facts relevant to the new cause of action and the old cause of action were *“discrete and different”*.

77. The defendants place some reliance in opposing the amendment application on the judgment of the Supreme Court in *Smyth v. Tunney* [2009] 3 IR 322 (*“Smyth”*). That involved a claim for damages for defamation and for various other causes of action arising out of telephone calls allegedly made by the defendants to English police authorities making allegations against the plaintiff. A statement of claim setting out those claims was delivered by the plaintiff. The plaintiff sought to amend the statement of claim by including claims arising from similar telephone calls allegedly made to the Revenue Commissioners and the

Phoenix magazine. The plaintiff obtained liberty to deliver an amended statement of claim in the High Court but that order was reversed by the Supreme Court. In his judgment for the Supreme Court, Finnegan J. observed that the plaintiff was seeking to plead new facts and on foot of those new facts to recover damages on the basis of the original causes of action pleaded as well as two additional causes of action (para. 25, p. 332). Having referred to the leading cases, such as *Krops* and *Croke*, Finnegan J. summarised the law in relation to amendments to proceedings and then sought to apply the principles he summarised to the application before the court.

78. At para. 29, Finnegan J. stated:-

“In summary the law as to amendment now is that an amendment will be allowed if it is necessary for the purposes of determining the real issues in controversy between the parties. The addition of a new cause of action by amendment will be permitted notwithstanding that by the date of amendment the Statute of Limitations had run if the facts pleaded are sufficient to support the new cause of action. Facts may be added by amendment if they serve only to clarify the original claim but not if they are new facts. Simple errors such as an error in date or an error as to location which do not prejudice the defendant and enable the real questions in controversy between the parties to be determined will be permitted.” (para. 29, p. 334)

79. Finnegan J. then applied those principles to the amendments at issue in that case. At para. 30, he stated:-

“The amendment sought here by way of the addition of causes of action does not satisfy these requirements. In order to sustain the new causes of action additional facts are required to be pleaded and indeed the notice of motion sought amendment of the statement of claim by the addition of the necessary pleadings of fact. These amendments should be disallowed. Similarly the amendment of the statement of claim

by pleading additional facts relating to additional publication to the Revenue Commissioners and Phoenix magazine should be disallowed. The Statute of Limitations may well have run and the defendants would be prejudiced by the amendments sought as to additional publication.” (para. 30, p. 334)

80. *Delany and McGrath* summarise the position with respect to the principles to be applied when a party opposes an amendment on the basis that it would be unfairly prejudiced by being deprived of a defence under the Statute. The authors state at para 5-237 as follows:-

“In summary, the position would seem to be that it is not fatal to an application to amend that the cause of action sought to be introduced would be statute barred if pursued in separate proceedings. Given the potential for pleadings to be amended, no genuine prejudice or unfairness to the defendant will be considered to arise if the new cause of action is one which arises out of the same, or substantially the same, set of facts. However, an application for leave will be refused on the basis that it would be unfair to a defendant to deprive him of a defence under the Statute if the cause of action is entirely new and is not based on facts already pleaded.”

(para. 5-237, p. 294)

81. Reference was also made by the parties at the hearing of the amendment application to the judgment of the Court of Appeal (Donnelly J.) in *Persona*. In that case, the Court of Appeal refused to allow certain amendments to the statement of claim which would amount to a claim of “*ordinary irregularities*” in the process of the evaluation of applications for a digital mobile communications system licence as the court was satisfied that that would amount to a new claim to which the Statute would apply and that no useful purpose would be served by permitting the amendment. The court did, however, permit amendments insofar as they provided particulars of the “*corrupting of the process*” as they were necessary for the purpose of determining the real questions of controversy in the litigation.

82. At para. 44 of her judgment for the Court of Appeal, Donnelly J. noted that the plaintiffs were relying on the approach in *Rossmore* that “*unless it is obvious that a claim is statute barred so that no useful purpose would be served in permitting the amendment, then the appropriate course of action is to permit the amendment while making it clear that the defendant is entitled to rely upon the Statute of Limitations*”. The plaintiff submitted in the present case that *Rossmore* is not in fact authority for that proposition. However, the defendants contended, and the plaintiff did not disagree, that O. 28, r. 1 does provide scope for the court to allow an amendment on terms, including on terms that the effect of the amendment takes place from the date the order permitting the amendment is made rather than from the date of the commencement of the proceedings (which, as the authorities make clear, is the normal position). The plaintiff and the defendants pointed to the words of O. 28, r. 1 that the court can allow amendments “*on such terms as may be just*”. The defendants submitted that, if the court were uncertain of the position, it could permit the plaintiff to amend the statement of claim but direct that the amendments take effect from the date the court permits the amendments. Alternatively, they submitted that the court could permit the plaintiff to amend the statement but expressly leave over to the trial judge the issue as to whether the matters the subject of the amendment gave rise to claims which were statute barred. While accepting that the words of O. 28, r. 1 suggested that the court did have a discretion with respect to the terms on which amendments may be permitted, the plaintiff strongly objected to the court taking either of the courses put forward by the defendants. As we shall see in a moment, the plaintiff contended that the defendants had not even established an arguable case that the matters the subject of the amendments were statute barred.

83. The final case to which it is necessary to refer is the judgment of Simons J. in *Stafford v. Rice* [2021] IEHC 235 (“*Stafford*”). Having referred to many of the leading cases on the amendment of pleadings, and having helpfully summarised the particular issues which arise

when a defendant seeks to oppose an amendment application on the basis that it would be deprived of a defence it might otherwise have under the Statute, Simons J. proceeded to analyse that objection by reference to the particular facts of the case before him. He noted that while there was no prohibition on allowing an amendment in such a situation, a court “*will exercise restraint where it is alleged that a defendant would be prejudiced in this way*” (para. 18). However, he went on to state:-

“Crucially, no such issue arises in respect of the Statute of Limitations in the present case. The proposed amendments do not give rise to the type of mischief with which the Supreme Court were concerned in Smyth v. Tunney. This is because, on the Defendants’ own analysis, the breach of contract claim was already statute-barred by the time the within proceedings were instituted in November 2013. The Defendants contend that any obligation on their part to deliver deeds of assurance would have arisen in 2006, when the lands were partitioned and taken into separate folios. The six year limitation period would have expired prior to the institution of these proceedings. Thus, again on the Defendants’ own analysis, there is no benefit to the Plaintiff in pegging the date of the contractual claim to the date of the initiation of these proceedings in November 2013.” (para. 19)

84. A similar point was made by analogy by the plaintiff in the present case in response to the defendants’ objection which I address below. Simons J. continued:-

“(I hasten to add that this judgment makes no finding on the question of whether the contractual claim is actually statute-barred. This is a matter for the trial judge. For present purposes, the point is that the Defendants’ position is not prejudiced by the amendments in that their arguments on the Statute of Limitation are the same irrespective of whether the contractual claim is advanced in these proceedings or in fresh proceedings with a later date of institution).” (para. 20)

85. Simons J. held that the case before him was distinguishable from *Smyth* on two grounds. First, he held that the proposed amendments do not cause any prejudice to the defendants in terms of the Statute (for reasons just outlined). Second, he held that, in any event, the proposed amendments did not involve the introduction of “‘new’ facts in the strict sense”. He held that the amendments arose out of “substantially the same facts” as those already pleaded in the statement of claim (per Keane J. in *Krops*) or fell within the “ambit of the original grievance” (per Birmingham J. in *Rossmore*). Simons J. held that the breach of contract claim was predicated on a contract for sale of the lands, that the existence of the contract was pleaded in the initial statement of claim and the new claim was rooted in that contract and that it arose out of facts already pleaded. He also distinguished the case from *Mangan* and concluded that, unlike the position in *Mangan*, it was not arguable that an issue arose under the Statute.

86. Those are the relevant cases and principles applicable to the first objection raised by the defendants.

The Defendants’ First Ground of Objection

87. I am satisfied that the first ground of objection raised by the defendants to the amendment application must be rejected. I have reached that conclusion for the following reasons.

(a) No New Cause of Action/Same or Substantially Same Facts

88. First, I agree with the Plaintiff that the amendments sought to be made to the statement of claim by the plaintiff do not introduce any new cause of action. If the amendments are allowed, the plaintiff will still be seeking judgment in precisely the same amount as it sought in the original statement of claim on foot of the invoices referred to in the summary summons and in the statement of claim, including the ten invoices relevant to the amendment application. The plaintiff sought judgment in the amount set out in the summary

summons and in the statement of claim in an amount which included the sums referred to in those ten invoices and based its claim in those pleadings, in part, on the fact that “licensed offerings” had been supplied to ACS on foot of orders placed which were the subject of those invoices.

89. Even if it could be said that the plaintiff does seek to introduce a new cause of action in respect of those invoices, namely, a cause of action for breach of contract, being the 2013 Agreement, it would be an additional cause of action in respect of the same ten invoices already relied upon by the plaintiff in its original pleadings. Even on the assumption that the amendments sought by the plaintiffs do introduce a new or additional cause of action with respect to the ten invoices, the amendments clearly arise, in my view and exercising the appropriate judicial restraint, from “*the same facts or substantially the same facts*” as were pleaded in the summary summons and in the original statement of claim (to use the phrase adopted by Keane J. in *Krops* and by several of the other courts in the judgments discussed earlier, including Clarke J. in *Mangan* and Simons J. in *Stafford* as well as by the authors of *Delany and McGrath*); they also “*fall within the ambit of the original grievance*” (to use the phrase adopted by Birmingham J. in *Rossmore* and by Simons J. in *Stafford*); and the facts already pleaded in the statement of claim are, in my view, “*sufficient to support the new cause of action*” and “*serve only to clarify the original claim*” (to use the terms adopted by Finnegan J. in *Smyth*). The facts, such as they are, as are sought to be included in the amended statement of claim and the facts included in the statement of claim originally delivered are in no sense “*discrete and different*” (to use the phrase adopted by Clarke J. in *Mangan*).

90. The invoices giving the total sum claimed of US\$31,539,677.95 in the summary summons for which judgment was sought against both defendants included the ten invoices relevant to the amendment application. Those ten invoices were specifically listed in the

particulars at schedule 1 to the summary summons. The ten invoices were specifically referred to and exhibited to several of the affidavits sworn by Mr. Moran on behalf of the plaintiff including (a) Mr. Moran's affidavit sworn on 17th August, 2018 grounding the plaintiff's application for liberty to issue and serve notice of the proceedings on the defendants outside the jurisdiction; (b) Mr. Moran's affidavit sworn on 5th December, 2018 for the purpose of grounding the plaintiff's application to enter the proceedings in the Commercial List and for summary judgment; and (c) Mr. Moran's affidavit sworn on 1st February, 2019 in response to the defendants' application to set aside service of the proceedings.

91. As well as that, the 2013 Agreement was among the agreements between the plaintiff and ACS referred to and exhibited by Mr. Moran to his affidavit sworn in connection with the defendants' jurisdiction application which were referred to at para. 26 of my judgment on that application.

92. In the event that the amendments sought by the plaintiff are permitted by the court, the plaintiff will be seeking judgment for precisely the same sum in the summary summons and original statement of claim on foot of precisely the same invoices (including the ten invoices relevant to the amendment application). No additional sum is sought to be claimed on foot of the amendments and no additional invoice is sought to be added to the particulars pleaded in schedule 1 to the summary summons and in schedule 1 to the statement of claim. Insofar as the plaintiff relies as one of its causes of action on an alleged breach of contract by the defendants, the plaintiff is not proposing to change or alter its claim in respect of the contracts pleaded but rather seeks to add reference to the 2013 Agreement which does not fundamentally change the case as pleaded by the plaintiff.

93. In light of these significant factors, I am satisfied that, even if the claim involves a new cause of action by specifically relying on the 2013 Agreement, it is an additional cause

of action based on the same invoices in respect of which the plaintiff has sought judgment from the very outset of the case. The amendments should nonetheless be permitted as they arise essentially out of the “*same facts or substantially the same facts*” and fall within the “*ambit of the original grievance*”.

(b) Not Arguable that Statute Barred

94. Second, I do not accept that the defendants have established an arguable case that the plaintiff’s claim in respect of the ten relevant invoices is statute barred on the basis that those invoices were issued within the term of the First Microsoft Channel Partner Agreement but on foot of purchase orders submitted by ACS during the currency of the 2013 Agreement. A review of the contractual material put before the court by the plaintiff which was not contested by the defendants has persuaded me that the defendants’ claim that it has a good or even arguable defence under the Statute of which it will be deprived if the amendments were permitted is incorrect and is not even arguable for the purposes of my consideration of the plaintiff’s amendment application.

95. It is necessary to refer to some of the relevant contractual material here. At clause 6b of the 2013 Agreement, under the heading “**Ordering**”, the parties agreed as follows:-

“Company [i.e. ACS] will submit orders to Microsoft [i.e. the plaintiff] on a regular basis. Company should review the ‘Program Guide’ for complete information about the ordering process. The ‘Program Guide’ outlines how to order ‘licensed offerings’ from Microsoft. Microsoft can only provide ‘licensed offerings’ to customers within specific geographic regions. As a result, Company must sign an Agreement with the appropriate Microsoft entity for the Territory in which Company’s Customers are located.”

96. Clause 8 of the 2013 Agreement dealt with “**Reporting and payment**”. It stated, “each ‘Program Guide’ specifies the reporting and payment requirements for the “licensed

offerings". The term "*Program Guide*", which appears in clause 6b and clause 8, is itself defined in clause 2 as meaning:-

"the information about specific licensing programs that is available on the Channel Partner website. The 'Program Guide' may include several handbooks, including an operations academy handbook."

97. Clause 8b provided under the heading "***Payment Due Date***", as follows:-

"Payments are due on the date and in the currency stated in the applicable 'Program Guide'. If Company does not receive an invoice within ten (10) days after placing its order, it must promptly notify Microsoft, and Microsoft will promptly send a new invoice. Company must manage its own credit risk. Company's payment to Microsoft is not dependent on receipt of payments from Customers even in the case of Customer insolvency."

98. I noted earlier that Mr. Moran explained that the 2013 Agreement was in substantially the same form as the First Microsoft Channel Partner Agreement. He also explained that the plaintiff was not in the position to locate a copy of the 2013 "*Program Guide*" but stated that ACS had access to it on a particular website at the time. A copy of the 2012 version of the "*Program Guide*" was provided to the defendants "*for the purposes of illustration*". Since no witness on behalf of the defendants (apart from Ms. Cotter, the defendants' solicitor) swore an affidavit in response to the amendment application, I am entitled to proceed on the basis that the 2012 "*Program Guide*" is illustrative of the relevant terms and conditions of the 2013 "*Program Guide*" and that there are no significant differences between the two documents.

99. Clause 7 of the 2012 "*Program Guide*" (which I accept is illustrative of the position under the 2013 "*Program Guide*") dealt with "***Payment and Credit Terms***". Clause 7.1 dealt with "***Payment Terms***". The relevant part provided as follows:-

“Payments are due with a value date on or before the due date of Microsoft’s invoice unless otherwise agreed in writing by Microsoft.

An overview of the standard payment terms by region/country is attached to this Guide as Schedule A. If Company does not receive an invoice within ten (10) days after placing its order, it must promptly notify Microsoft, and Microsoft will promptly send a new invoice. For confirmation of the Company’s payment terms, the Company will be notified in writing. Company must manage its own credit risk. Company’s payment is not dependent on receipt of payments from Customers even in the case of Customer insolvency...”

Schedule A (contained in an appendix to the 2012 “*Program Guide*”) provided that the standard payment terms for the relevant licensing programme “*unless otherwise agreed upon in writing*” was, in the case of the Middle East and Africa “*Net 60 days calendar days*”.

100. As I observed earlier, Mr. Moran, at para. 7 of his second affidavit sworn for the purpose of this amendment application, explained in some detail the invoice and payment cycle relevant to the invoices at issue here. This evidence was not considered by any witness on behalf of the defendants. Each purchase order submitted by ACS sought the supply of products specified in the purchase order over the course of a three-year cycle. Copies of the relevant purchase orders and invoices were exhibited by Mr. Moran. Each relevant purchase order was placed by Mr. Moran behind each relevant invoice in the exhibit. Each purchase order specified the “*term of agreement*” as being three years and under the “*summary*” referred to a total deal value over three years and total annual payments for years 1, 2 and 3 of those years. Each purchase order then contained the following:-

“Unless otherwise indicated on the Channel Price Sheet and in a signed customer amendment, Microsoft will invoice Reseller in three equal annual instalments. The

first instalment will be invoiced upon acceptance of the Enrolment and thereafter on the anniversary of the Enrolment.”

101. Each of the ten invoices relevant to this application referred to the purchase order date, the date of the invoice and the “*payment due date*” calculated on the basis of the net 60 calendar day period referred to in Schedule A in the Appendix to the 2012 “*Program Guide*”. It will be recalled that clause 7.1 of the 2012 “*Program Guide*” (which I accept on the evidence is illustrative of the position applicable during the currency of the 2013 Agreement) provided that payments were due “*on or before the due date of Microsoft’s invoice unless otherwise agreed in writing by Microsoft*”. There is no evidence of any agreement to the contrary between the parties. Mr. Moran’s uncontested evidence (at para. 7 of his second affidavit) is that consistent with the detail contained in the purchase orders and in the invoices themselves, once ACS submitted the purchase order, the plaintiff invoiced ACS annually in three yearly tranches throughout the three-year course of supply in respect of each purchase order and that the invoices relevant to the amendment application all relate to the third (and final) invoicing period in respect of each of the purchase orders.

102. Against that factual background, the defendants sought to argue that the obligation on the part of ACS to make payment to the plaintiff arose once the purchase order issued and that any cause of action in favour of the plaintiff arose “*immediately (or within a reasonable period after the purchase orders issued)*”. It relied in support of that argument on the terms of clause 8a of the 2013 Agreement and, in particular, on the reference to the fact that payments were due on the date and in the currency stated in the applicable “*Program Guide*” and that if ACS did not receive an invoice within ten days after placing its order, it had to promptly notify the plaintiff and Microsoft would promptly send a new invoice. It relied on similar wording in the 2012 “*Program Guide*” (subject to its complaint that the 2013

“*Program Guide*” was not provided). The defendants contended, therefore, that payment fell due as soon as, or very soon after, the product was ordered.

103. I do not accept that the defendants have raised an arguable case for the purpose of this amendment application as to when the obligation to pay arose and as to when the cause of action accrued. The defendants’ argument ignores or significantly understates the provisions of clause 8a of the 2013 Agreement and clause 7.1 of the 2012 “*Program Guide*” (which I accept is illustrative of the position under the 2013 Agreement). Clause 8a incorporates the provisions of the relevant “*Program Guide*”. Clause 7.1 of the “*Program Guide*” makes clear that the payments are due on the due date on the invoice unless otherwise agreed in writing. The purchase orders all make clear the terms of the relevant agreement in respect of the “licensed offering” ordered by ACS, the total annual payments required to be made for each year of that three-year period and the fact that the plaintiff would invoice ACS in three equal annual instalments, the first being invoiced on the acceptance of the enrolment and, thereafter, on the anniversary of that date. The invoices themselves contain reference to the date of the purchase order and the date of the invoice itself as well as a “*payment due date*”. The “*payment due date*” in respect of each invoice relevant to the application is within six years of the date of the commencement of the proceedings.

104. In light of those clear provisions of the contractual documentation, it seems to me that the defendants’ attempt to rely on parts of clause 8a of the 2013 Agreement and on clause 7.1 of the “*Program Guide*” concerning invoices is misplaced. In any event, on the defendants’ case, if ACS did not receive an invoice within ten days of placing its order, it had to “*promptly notify*” the plaintiff and the plaintiff would then “*promptly send a new invoice*”. There is no evidence from the defendants that ACS ever did so and, in light of the clear provisions to which I have referred, I do not see how the defendants could rely on any failure by the plaintiff to issue an invoice within ten days in light of the evidence set out by Mr.

Moran and the clear terms of the 2013 Agreement, the 2012 “*Program Guide*”, the purchase orders and the invoices themselves.

105. In those circumstances, I do not accept that the defendants have raised any arguable case on the Statute. That conclusion is copperfastened by the fact that all of the ten invoices relevant to the amendment application were included in the plaintiff’s claim from the date of the commencement of the proceedings in August 2018. Leaving aside altogether the fact that the position of the second defendant, NTG, was not addressed at all by the defendants in their submissions, I am, in any event, satisfied that the defendants would not be unfairly prejudiced if the amendments were to be permitted.

(c) No Unfair Prejudice Due to Amendments

106. Third, if I am wrong in my conclusion that the defendants’ contention that they would or could be deprived of a defence under the Statute is not arguable on the basis that the plaintiff’s claim in respect of the ten invoices relevant to the amendment application is not arguable, there is another reason why the defendants would not, in any event, be unfairly prejudiced if the court were to allow the amendments sought by the plaintiff. That reason is that if, contrary to the view I have reached, the defendants’ contention based on the Statute is arguable and if there is an arguable case that the plaintiff’s cause of action arose at or very shortly after the purchase orders were submitted by the defendants, that was an argument which was open to the defendants to make prior to the amendment as the ten invoices were referred to and were the subject of the plaintiff’s claim in the summary summons and in the original statement of claim. The defendants did not make the point before now.

107. I agree with the plaintiff that somewhat by way of analogy with the approach taken by Simons J. in *Stafford*, the defendants cannot say that they are unfairly prejudiced as a result of the amendments when the amendments do not introduce any new purchase orders or invoices into the plaintiff’s claim. The purchase orders and invoices are precisely the same after the

amendment as they were before the amendment. The total amount claimed is the same. The relevant provisions of the First Microsoft Channel Partner Agreement are also the same as those in the 2013 Agreement on which the defendants seek to rely in opposition to the amendment application. I do not agree, therefore, that any unfair prejudice arises for the defendants by virtue of the amendments sought by the plaintiff.

(d) Qualification or Saver

108. Finally, I have given consideration as to whether I should adopt one of the alternative courses of action suggested by the defendants. The alternatives proposed were that I could allow the amendments but direct that the amendments take effect as of the date of the order permitting them or, alternatively, I could allow the amendments and expressly leave over to the trial judge the question as to when the cause of action was deemed to commence.

109. Without expressly deciding that I have jurisdiction to attach such terms to an order permitting an amendment, although I am tentatively of the view that I do having regard to the wide terms in which O. 28, r. 1 is expressed (“*on such terms as may be just*”), I do not believe that I should make any special direction in this case in light of the view I have expressed that the defendants’ contention based on the Statute is, for the purpose of this amendment application, at least, not arguable. I am not inclined, therefore, to introduce any qualification or saver into the order permitting the amendment.

The Defendants’ Second Ground of Objection

110. The second ground of objection to the plaintiff’s amendment application advanced by the defendants is related to the first. It was put in various ways in Ms. Cotter’s replying affidavit and in the defendants’ written submissions. It was refined considerably in the concise and helpful submissions advanced on behalf of the defendants at the hearing.

111. The point essentially made in Ms. Cotter’s affidavit and in the defendants’ written submissions was that the plaintiffs did not seek and obtain leave to serve out of the

jurisdiction any claim advanced “*under*” the 2013 Agreement. Ms. Cotter asserted that the plaintiff should be required to apply for leave to serve the proposed amended statement of claim on the defendants outside the jurisdiction. In their written submissions, the defendants contended that, where a party wishes to add a new claim or to plead new facts which would, if pleaded when the proceedings were commenced, have required the leave of the court under O. 11 to permit service abroad, it would be improper to allow a party to circumvent the requirements of O. 11 by way of an application for an amendment brought after the proceedings were issued and after the initial application for leave was granted. Reliance was placed in the defendants’ written submissions on an English decision, *Beck v. Value Capital Ltd* [1975] 1 W.L.R. 6 (“*Beck*”) in support of that contention. The defendants also contended that the plaintiff had not sought any relief under O. 11 in respect of the proposed amended statement of claim and had not adduced the type of evidence which would usually be required on an application for leave to issue and serve proceedings outside the jurisdiction. In particular, it was submitted that the plaintiff’s evidence on the amendment application did not address the matters required to be addressed under O. 11, r. 2 (concerning the comparative cost and convenience of proceedings in Ireland when compared with the place of residence of the defendants) or under O. 11, r. 5 (concerning the requirement of the deponent of an affidavit sworn in connection with an application for leave to serve out of the jurisdiction to state his or her belief that the plaintiff has a good cause of action). The defendants submitted that, based on the evidence put forward by the plaintiffs in the amendment application, the court “*would probably have refused [the plaintiff] leave to issue and serve proceedings outside the jurisdiction on the basis that the requirements of Order 11 have not been satisfied*”. (para. 36 of the defendants’ written submissions)

112. This objection was refined considerably in the course of the defendants’ submissions at the hearing. As refined the objection was that, based on the decision in *Beck*, the

defendants would be prejudiced in that, if the plaintiff had applied for leave to serve the amended claim outside the jurisdiction, the plaintiff would have had to state that it had a good cause of action in respect of that claim and the defendants would have been entitled to object to that and to argue that the plaintiff did not have a good cause of action on the basis that the defendants would have a good defence under the Statute. Since the plaintiff did not apply for such leave, the defendants did not have the opportunity of making that case and that unfairly prejudices the defendants. It can be seen, therefore, that the second ground of objection is very closely related to the first and is predicated on the defendants having a good defence or at least an arguable defence under the Statute in respect of the matters sought to be raised in the proposed amended statement of claim.

113. The plaintiff had a number of points to make in response to that objection. First, the plaintiff asserted that the court has already considered extensively the question of jurisdiction in the course of the jurisdiction judgment in which it was found that the plaintiff had demonstrated the necessary jurisdictional gateway for leave to issue and serve the proceedings out of the jurisdiction under O. 11, r. 1(e)(iii). When determining the defendants' objection to jurisdiction, the court had before it not only the First and Second Microsoft Channel Partner Agreements but also the earlier agreements, including the 2013 Agreement which contained precisely the same terms as to choice of law and jurisdiction as in the two subsequent agreements.

114. Second, the plaintiff pointed out that O. 11 provides for service out of the jurisdiction of an originating summons, in this case, the summary summons issued by the plaintiff and not subsequent pleadings such as the statement of claim or the amended statement of claim.

115. Third, having regard to the fact that the court has already covered this territory in the jurisdiction judgment, and having regard to what Clarke J. said in *IBRC v. Quinn* [2016] 3 IR 197 ("*IBRC*") as to the "*low bar*" which must be established by the plaintiff to obtain an

order permitting service outside the jurisdiction, it would be a meaningless exercise to require a further application to be brought on the same basis on foot of the matters sought to be included in the proposed amended statement of claim.

116. Fourth, the plaintiff disagreed with the interpretation and effect of the *Beck* case. The plaintiff relied on the decision of the UK Supreme Court in *NML Capital Ltd v. Republic of Argentina* [2011] 3 WLR 273 (“*NML*”) in support of its submission on this point.

117. I am also satisfied that this second ground of objection advanced by the defendants should not be sustained. I agree with the submissions advanced by the plaintiff, as I have summarised them above. Insofar as the central plank of this objection is the defendants’ belief that they have or at least may have a good defence under the Statute in respect of the matters sought to be introduced in the proposed amended statement of claim, I have already set out my views on that question for the purposes of this amendment application. Like Simons J. in *Stafford*, it is my view, for the purposes of this amendment application, that it is not arguable that an issue arises under the Statute in respect of the matters sought to be introduced in the proposed amended statement of claim. The removal of that central plank removes any support for this ground of objection.

118. As well as that, I accept that O. 11 applies to service out of the jurisdiction of an originating document and not subsequent pleadings such as a statement of claim or an amended statement of claim. The plaintiff did obtain leave to issue and serve the originating document, the summary summons, on the defendants outside the jurisdiction. The defendants’ application to set aside that order and the service effected on foot of it was unsuccessful.

119. Further, the ten invoices relevant to the amendment application were included in the sum claimed in the summary summons and listed in the particulars in the schedule to the summons. The 2013 Agreement was in the material put in evidence before the court on the

defendants' jurisdiction challenge and was, as noted earlier, referred to in the context of the prior agreements between the parties before the First and Second Microsoft Channel Partner Agreements. There is no dispute about the fact that the 2013 Agreement contains precisely the same choice of law and jurisdiction clauses as the First and Second Microsoft Channel Partner Agreements. Whether or not the proposed insertion of a reference to the 2013 Agreement in the amended statement of claim raises a new cause of action (or not), having regard to the territory covered in the jurisdiction challenge which included in the relevant invoices and the earlier agreements, including the 2013 Agreement, it would, in my view, be an entirely meaningless exercise to require the plaintiff to adduce the same evidence as it put before the court on the application previously made by it for leave to issue and serve the summary summons on the defendants outside the jurisdiction. I have addressed the burden which was on the plaintiff to establish one of the jurisdictional gateways under O. 11, in the jurisdiction judgment and it is unnecessary to repeat here what I said in that judgment.

120. Finally, I agree with the plaintiff that the decision in *Beck* does not afford a good basis for this ground of objection advanced by the defendants.

121. In *Beck*, an issue arose as to the interaction between the court's discretion to allow an amendment of a writ under a provision of the then English rules roughly equivalent to O. 28, r. 1 and its discretion to allow service out of the jurisdiction under the English equivalent of O. 11. Goulding J. stated:-

"It seems to me manifestly unfair to a foreign defendant, and it would often enable a plaintiff to circumvent the court's discretion under [O. 11 RSC], by the familiar device of throwing a sprat to catch a mackerel. I do not know that it is necessary to formulate the contrary proposition in quite the way that I have just stated it. It is enough to say that the discretion to allow an amendment under [the relevant English rule] will not be exercised if an injustice to the opposite party will result, and that it is

in general unjust to amend a writ served under [O. 11] by adding something which the court would probably have refused to sanction under [O. 11]...”

(per Goulding J. at p. 15)

122. The court then proceeded to look at the proposed amended claim through the lens of O. 11 and concluded that it fell within the scope of one or more of the subparagraphs of O. 11, r. 1 but only on “*narrow and highly technical grounds*”. The court held that the claim would not be allowed to be made as it would be within the letter but not within the spirit of the rule for various reasons, including a lack of connection with England and the fact that the agreements at issue were expressly stated to be governed by Bahamian law. What the court there was saying was, first, that the discretion to amend would not be exercised if an injustice would be caused to the opposing party. That is the approach also taken in this jurisdiction. The court then said that it would, in general, be unjust to permit the amendment of a writ which was served outside the jurisdiction under O. 11 by adding something in respect of which the court would have refused to grant leave under O. 11. In my view, neither point can avail the defendants here. There is no injustice to the defendants in that I do not accept that they have raised an arguable defence under the Statute for the purposes of this application. Nor would the court have refused an application for leave to issue out of the jurisdiction were the matters sought to be included in the proposed amended statement of claim included in the summary summons at the outset.

123. The decision of the UK Supreme Court in *NML* also undermines this aspect of the second ground of objection advanced by the defendants. That was a complex case involving issues of international law and state immunity. However, one of the points dealt with in the case is relevant. In *NML*, the UK Supreme Court disapproved of the decision of the English Court of Appeal in *Parker v. Schuller* (1901) 17 T.L.R. 299 (“*Parker*”) in which the English Court of Appeal had refused to permit the plaintiff to amend its writ where leave had been

granted to serve the writ outside the jurisdiction and where the defendant sought to discharge the order for the purpose of relying on a different cause of action to that relied on at the *ex parte* stage. The UK Supreme Court preferred the approach taken by the English Court of Appeal in the earlier case of *Holland v. Leslie* [1894] 2 QB 450 (“*Holland*”) where the court could see no reason why an amendment should not be made in the case of proceedings which were served outside the jurisdiction. In his judgment in the UK Supreme Court, Lord Phillips PSC noted that a number of courts followed the approach of Lord Esher MR in *Holland* to the effect that there was “*in principle, no objection to amending a pleading which has been served out of the jurisdiction unless the effect will be to add a claim in respect of which leave could not, or would not, have been given to serve out...*” (per Lord Phillips at para. 77, p. 297). Lord Phillips continued:-

“While most of these cases involved proceedings which had progressed beyond the initial leave stage, I can see no reason for adopting a less generous approach to amendment at the earlier stage. While amending to add a cause of action is not the same as amending to substitute one, in either case the amendment involves subjecting the overseas party to a claim other than the one that he entered an appearance to meet, and similar principles should apply in each case.”

(per Lord Phillips at para. 77, p. 297)

124. Lord Phillips concluded that the ruling in *Parker* should no longer be applied. He stated:-

“The same approach should be taken to an application to amend a pleading that has been served out of the jurisdiction as is adopted to any other application to amend a pleading.” (para. 78, p. 297)

125. I agree. Adopting that approach here leads one back to a consideration of the general principles concerning amendments which I addressed in the context of the first objection

raised by the defendants. In my view, there is nothing in the second ground of objection advanced by the defendants and I reject it.

Conclusions

126. In conclusion, I have considered the two grounds of objection advanced by the defendants in response to the plaintiff's amendment application. I have decided that neither ground of objection should be sustained. In doing so, I have concluded that, for the purposes of this amendment application, and bearing in mind the requirement to exercise judicial restraint, the defendants' contention that a claim based on the matters sought to be inserted in the proposed amended statement of claim would, or might, be statute barred is just not arguable. I have concluded, therefore, that the defendants would not be unfairly prejudiced if I were to permit the plaintiff to amend the statement of claim in the manner proposed. I am satisfied that it is appropriate to do so without making any special provision or direction as to the time or circumstances in which such an amendment should come into effect. In my view, it is appropriate for the normal rule or practice that the amendment takes effect from the date of the commencement of the proceedings to apply. I believe that it is appropriate for me to adopt that course of action in light of the particular facts of this case and that there is no reason for me to depart from the normal approach. Having regard to my conclusions in relation to the first ground of objection raised by the defendants, the central plank of the second ground of objection falls away. However, for various additional reasons, I have concluded that the second ground of objection should also be rejected.

127. I will, therefore, make an order giving the plaintiff liberty to deliver an amended statement of claim in the terms of the draft amended statement of claim exhibited at tab 7 of the booklet comprising exhibit "JDPM1" to the affidavit sworn by Mr. Moran on behalf of the plaintiff on 20th April, 2021. I will also vary the directions made by the court on 13th

November, 2020 to make provision for the delivery of the amended statement of claim and for the delivery of further pleadings by the defendants. I will discuss with counsel the precise further directions to be made.