Neutral Citation Number: [2025] EWCA Civ 371

Case No: CA-2024-000384

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Mr Justice Bright
[2024] EWHC 148 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 April 2025

Before :

LORD JUSTICE NEWEY
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE NUGEE

- -

Between :

SKATTEFORVALTNINGEN	**Claimant/ Respondent**
- and -	
MCML LTD (previously known as ED&F MAN CAPITAL MARKETS LTD)	**Defendant/ Appellant**

- -
- -

Ali Malek KC and Adam Temple (instructed by **Rosenblatt**) for the **Appellant**

Charles Graham KC, Michael d'Arcy and KV Krishnaprasad (instructed by **Pinsent Masons LLP**) for the **Respondent**

Hearing dates: 17 and 18 December 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 4 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. In this appeal from the Commercial Court the question is whether the proceedings should have been struck out, either on the ground that the claims are barred by issue estoppel or on the ground of abuse of process.

2. The Claimant and Respondent, Skatteforvaltningen, is the Danish Tax and Customs Administration (**"SKAT"**). In previous proceedings issued in 2018 in the Commercial Court (**"the 2018 proceedings"**) SKAT sued a large number of defendants. The claims were quite complex but the essential allegation is not difficult to state, namely that SKAT had been induced by misrepresentations made by the various defendants to pay out large sums of money by way, ostensibly, of refund of Danish Withholding Tax (**"WHT"**) to those who in fact had no entitlement to them. In the case of some defendants the misrepresentations were said to have been made fraudulently; in the case of others, including the current Appellant (then called ED&F Man Capital Markets Ltd), fraud was not alleged and the claim was based on misrepresentations having been made negligently. The Appellant has now changed its name to MCML Ltd but I will refer to it as **"EDFM"**.

3. These claims were case managed by Andrew Baker J. On the hearing of a preliminary issue he struck them all out as inadmissible on the basis that they were precluded by the well-known principle that the English Court will not entertain a claim by a foreign state to collect its own tax. I will refer to this as **"the foreign revenue rule"**.

4. SKAT appealed that ruling to this Court, the main ground of appeal being that the foreign revenue rule did not apply. But for reasons that remain somewhat obscure, this was only pursued against other defendants and not against EDFM. The appeal was allowed on this ground with the effect that SKAT's other claims were able to go forward to trial; and on further appeal to the Supreme Court this was upheld. But because the appeal had not been pursued in relation to the negligence claims against EDFM (save in respect of a subsidiary point on which the appeal failed), SKAT accepts that those claims stand dismissed and that it cannot now pursue them.

5. In December 2022 SKAT issued a second claim in the Commercial Court against EDFM. That is the current claim (**"the current proceedings"**). It is similar to the previous claim in that it is based on SKAT having been induced by misrepresentations made by EDFM to pay refunds of WHT to those not entitled to them, but the misrepresentations are now said to have been made fraudulently, and the details of the misrepresentations relied on are different.

6. EDFM applied to strike out the current proceedings on the basis that SKAT was barred by issue estoppel from pursuing the claims, or that it would constitute so-called *Henderson v Henderson* abuse for it to do so (*Henderson v Henderson* (1843) 3 Hare 100).

7. The application was heard by Bright J. In a judgment handed down on 2 February 2024 at [2024] EWHC 148 (Comm) he dismissed it on the basis that there was neither any relevant issue estoppel nor any abuse of process.

8. EDFM appeals with the permission of Andrews LJ.

9. We have had wide-ranging submissions from both Mr Ali Malek KC and Mr Adam Temple for EDFM, and from both Mr Charles Graham KC and Mr KV Krishnaprasad (appearing also with Mr Michael d'Arcy) for SKAT.

10. For the reasons that appear below I would myself allow the appeal on the ground of issue estoppel save for a very small number of claims which are based on transactions not pleaded in the 2018 proceedings; but would dismiss the appeal so far as based on abuse of process. Newey and Popplewell LJJ agree with me on abuse of process, but on issue estoppel they would allow the appeal in relation to all the claims.

Facts

11. WHT is a tax imposed in Denmark on dividends paid by Danish companies to their shareholders. It is not necessary for the purposes of this judgment to give any detailed account of it; explanations can be found in the judgments in the Commercial Court, this Court and the Supreme Court respectively on the application of the foreign revenue rule to the claims in the 2018 proceedings, namely those of Andrew Baker J (*Skatteforvaltningen v Solo Capital Partners LLP* [2021] EWHC 974 (Comm), [2021] 1 WLR 4237), Sir Julian Flaux C (*Skatteforvaltningen v Solo Capital Partners LLP* [2022] EWCA Civ 234, [2022] QB 772), and Lord Lloyd-Jones JSC (*Skatteforvaltningen v Solo Capital Partners LLP* [2023] UKSC 40, [2024] AC 539). The whole question of the precise operation of WHT is also considered in much greater detail in a judgment of Andrew Baker J on further preliminary issues in the 2018 proceedings (the so-called "Validity Trial"): *Skatteforvaltningen v Solo Capital Partners LLP* [2023] EWHC 590 (Comm).

12. For present purposes I can summarise the position as follows (this describes the position in the relevant period, namely August 2012 to July 2015 and is taken from the last-mentioned judgment):

    (1) Danish law imposed a tax on dividends paid by a Danish company (a species of income tax). This tax operated on a withholding basis. On declaring a dividend a Danish company was obliged to pay 27% of the dividend to SKAT by way of WHT, and the balance (73%) to VP Securities (the Danish Central Securities Depository) for distribution to shareholders.

    (2) Payment of the 27% WHT discharged the Danish tax liability of all those liable to Danish income tax on the dividends. But some non-Danish shareholders were entitled under double taxation treaties not to be taxed, or not at the full rate of 27%, on dividend income. In particular tax-exempt US pension plans were entitled under the Denmark-US double taxation treaty not to be taxed on Danish dividends.

    (3) That entitlement was given effect to by such a shareholder having a right under Danish law to be refunded by SKAT the WHT that had been deducted from its dividends. From July 2012 that right was found in s. 69B(1) of the Danish Withholding Tax Act which provided that if a person had received dividends of which tax at source had been withheld which exceeded the final tax under a double taxation treaty the amount had to be repaid within 6 months from the

receipt by SKAT of a claim for repayment.

13. Both the 2018 and current proceedings concern claims for repayments under s. 69B(1) presented to SKAT and paid between August 2012 and July 2015 (the vast majority from March 2014) that SKAT says it was not obliged to honour. SKAT says that it was wrongfully induced to pay those claims by misleading statements made or implied by the reclaim forms and supporting documents presented to it.

14. We were shown an example of a document produced by EDFM. This is on EDFM's notepaper and headed "Tax Voucher" and I will refer to such documents as **"Tax Vouchers"**. It reads:

> "We, ED&F Man Capital Markets Ltd, based at [a London address] and registered in the United Kingdom – confirm, DW Construction Inc Retirement Plan – [a Utah address], was holding the below security over the dividend date.
>
> | | |
> |---|---|
> | Security Description: | TDC A/S |
> | … | |
> | Ex Date: | 07th March 2014 |
> | Record Date: | 11th March 2014 |
> | Pay Date: | 12th March 2014 |
> | Quantity: | 3,300,000 Shares |
> | Gross Div Rate: | DKK 2.20 |
> | Amount Received: | DKK 5,299,800.00 |
> | WHT Suffered: | DKK 1,9760,200.00 |
> | WHT %: | 27% |
>
> ED&F Man Capital Markets Limited has no beneficial interest in the holding and will not be reclaiming the tax. The dividends specified on this credit advice were paid net of withholding tax to DW Construction Inc Retirement Plan. If you have any further concerns or issues please do not hesitate to contact us."

TDC A/S is the name of the Danish company declaring the dividend (in fact TDC Group A/S); DKK is a reference to Danish Krone; and I explain the significance of Ex Date, Record Date and Pay Date below (see paragraphs 42 and 43 below). The voucher is signed by an authorised signatory, the Head of Securities Operations. EDFM did not itself submit Tax Vouchers like this to SKAT, but it produced them and they were submitted to SKAT by reclaim agents on behalf of EDFM's clients.

15. In May 2018 SKAT issued a claim form in the Commercial Court seeking damages against numerous defendants. The essence of the claims was that between August 2012

and July 2015 SKAT had received applications for the refund of WHT, principally from English based agents ostensibly on behalf of US pension funds and other foreign entities, and had paid out the substantial sums requested on the basis of express and implied representations that the foreign entity was the beneficial owner of shares in a Danish company, had beneficially received dividends net of WHT, and was entitled to a refund under the applicable double tax treaty. Such representations were said to be false, and many of the defendants were said to have known them to be false or to have had no genuine belief in their truth; they were sued in deceit and conspiracy. Other defendants however were not said to have been fraudulent but to have made negligent misrepresentations; they were sued in negligence. (There were also claims in restitution for unjust enrichment, and parallel claims in Danish law.)

16. SKAT later issued further claim forms which were consolidated. By the time that SKAT's Particulars of Claim were served in September 2018 over 100 defendants had been sued, over 75 of whom were said to have been fraudulent and the rest not; the total amount said to have been paid out by SKAT was over DKK 12.67 bn (c. £1.5 bn).

17. EDFM was the 69th Defendant named in the first claim form. No allegations of fraud were made against it. The essence of the claim against it was that it had negligently made false statements in 420 Tax Vouchers which were relied on in support of applications for WHT refunds, as a result of which SKAT had paid out some DKK 582m (amounting to less than 5% of the total sums claimed). In its Amended Defence served in September 2019 EDFM admitted in Annex E that 80 of the 420 Tax Vouchers were inaccurate in that the applicant for a refund had not in fact received dividends from the relevant Danish company, or suffered WHT, in the amounts set out in the Voucher, or in many cases at all.

18. The final form of SKAT's claim against EDFM was found in its Re-Re-Amended Particulars of Claim. These alleged that SKAT had paid out some DKK 582m on the basis of 420 misleading Tax Vouchers negligently provided by EDFM on behalf of 36 US or Canadian pension plans. The express representations which EDFM was said to have made in each Tax Voucher were (a) that the relevant pension plan held the specified number of shares in the named Danish company on the Reference Date (the date the dividend is declared); (b) that a specific dividend had been received for the account of the named pension plan on the identified Pay Date and in the specified Amount Received; (c) that such dividend had been received net of a specific amount of tax that had been withheld by the named Danish company and which had been suffered by the named pension plan; and (d) that EDFM did not have a beneficial interest in the relevant Danish shareholding and was not reclaiming any WHT. There were also said to be implied representations (a) that the relevant pension plan was the beneficial owner of the specified number of shares, and the beneficial owner of the amount received by way of dividend net of WHT; and (b) that the Tax Voucher was an honest and accurate statement of the facts set out in it.

19. These representations were said to have been false, and made negligently. In the case of the 80 Annex E Tax Vouchers, SKAT relied on the admission that they contained false information. In the case of the other Tax Vouchers, SKAT's case was that the relevant pension plan was not the beneficial owner of the shares and had not received any dividend as beneficial owner, EDFM being the true beneficial owner of any shares held or dividend received.

20. On that basis SKAT claimed, after giving credit for certain sums already recovered, some DKK 574m as damages for negligence (in English law or alternatively Danish law).

Judgment of Andrew Baker J on the applicability of the foreign revenue rule

21. Andrew Baker J was appointed designated judge for what he described in one of his judgments as "this mammoth litigation". At a CMC in July 2020 he ordered the sequential hearing of certain preliminary issues for the reasons given in a judgment dated 16 July 2020 at [2020] EWHC 2022 (Comm). The first preliminary issue was in these terms:

> "**The 'Revenue Rule'**
>
> Are any of SKAT's claims, as alleged, inadmissible in this court under the rule of law stated, e.g., as *Dicey Rule 3* (*Dicey, Morris & Collins on the Conflict of Laws*, 15th Ed., para 15R-019). If so, which claims are inadmissible and why?"

22. This preliminary issue was heard by him in March 2021, and he handed down judgment on 27 April 2021 at [2021] EWHC 974 (Comm). The judgment contains a lengthy and detailed analysis, but for present purposes I can summarise its reasoning relatively briefly.

23. The foreign revenue rule was stated in the then edition of *Dicey* as Rule 3 as follows:

> "English courts have no jurisdiction to entertain an action:
>
> (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state; or
>
> (2) founded upon an act of state."

24. Andrew Baker J considered a number of authorities. In the course of doing so, he said this (at [30]-[32]):

> "30 SKAT reminds the court often that it claims to be the victim of fraud, not only of negligent or unblameworthy conduct. Not so, as regards the ED&F Man Applications, where fraud or dishonesty is not alleged at all. But in any event, in my view, the fact that in some of its causes of action against some of the defendants SKAT alleges fraud or dishonesty by those defendants, or by others in circumstances that are said to result in a liability on the part of those defendants, does not assist SKAT on the characterisation issue raised by Dicey Rule 3.
>
> 31 Thus, for example, the issue of characterisation when comparing this case to *Government of India v Taylor* [1955] AC 491 itself, was encapsulated in a submission by SKAT that a claim to recover money incorrectly paid out by a tax authority, ostensibly by way of tax refund, on the faith of misrepresentations, is not properly to be characterised as the imposition of a tax or a claim otherwise arising under a foreign revenue law, alternatively is not properly so

> characterised if the payee of the ostensible refund had not originally paid the tax ostensibly refunded. The defendants contend to the contrary. The point now is that the formulation of the rival contentions, and thus the question of characterisation, has no reference to the nature or degree of any fault required for liability upon any given cause of action relied on by SKAT under the system of law that in general governs it.
>
> 32 A plea to the character of the wrongful act, by reference to the nature or degree of fault involved in it, or to any consequent lack of sympathy the court might be invited to have for the defendant pursued abroad by the sovereign claimant, or sympathy for the claimant, has never been admitted as relevant."

25. At [75] Andrew Baker J drew from his review of the authorities a number of principles. These included that a claim was not admissible if in substance it was a claim directly or indirectly to enforce the Kingdom of Denmark's sovereign right to tax dividends declared by Danish companies; and that the substance of the claim was not determined by the private law cause(s) of action pleaded, but by the central interest, in bringing the claim, of the sovereign by whom, or in whose interests, it was brought.

26. At [93] he said that it did not make any difference that SKAT was not suing to recoup the WHT refunds from the applicants for such refunds themselves; the application of Dicey Rule 3 should be determined by how such claims to recoup from the applicants would stand under the rule. At [94] he said that such claims would, applying the principles he had identified in [75], fall within Dicey Rule 3 because the case was properly to be characterised as an attempt by SKAT to vindicate its right to retain Danish dividend tax and hence indirectly to enforce Denmark's underlying sovereign right to tax Danish company dividends. He elaborated that point and at [107] summarised the position as follows:

> "107 The mechanism of alleged wrongdoing, then, may be the making of WHT refund applications conveying misinformation. But the central interest of SKAT in bringing the claim, and the right that in substance SKAT seeks to enforce by what are, in point of form, private law claims, is SKAT's interest and right in collecting what was due to it by way of dividend tax for the tax years in question. Dicey Rule 3, a mandatory rule of English law as lex fori, has the effect that there is no cause of action for a fraud on a foreign revenue, and I agree with the defendants' submission that at its highest SKAT here claims to have been the victim of such a fraud. It cannot sensibly say in relation to the claims pursued here that it was the victim of a fraud such as might be committed against a private individual or corporate entity. A fortiori, there is no cause of action for negligently causing loss to a foreign revenue."

27. At [118]-[120] he expressed his conclusion as follows:

> "118 For the reasons set out above, my conclusion is that all of SKAT's claims are, in substance, claims seeking to enforce here the Kingdom of Denmark's sovereign right to tax dividends declared by Danish companies, and the WHT and WHT refund systems established

> by the WHT Act, the Danish tax statute by which that right is given specific content. The central interest of SKAT, and of the Kingdom of Denmark in whose interests the claim is brought (if it is meaningful to distinguish between SKAT and the Danish state), in bringing all these claims, is to vindicate that sovereign right and have it enforced indirectly here.
>
> 119 Though SKAT has framed its claims as private law causes of action, what those claims seek, in substance, is payment to SKAT of amounts of dividend tax it failed to take in the tax years in question, it not being right to distinguish when characterising substance for the purpose of Dicey Rule 3 between dividend tax never paid and dividend tax conditionally collected as WHT but paid away by SKAT by way of WHT refunds. SKAT's claim against the WHT refund applicants for the WHT refund to be returned is, in substance, a claim to tax. Such claims are not admissible in this court. Or again – if this is saying anything different – the central interest in SKAT bringing its claims here is to vindicate its right to pay WHT refunds only where applicable revenue law eligibility conditions are satisfied, in other words its right to keep, as tax, 27% of Danish company dividends except where those conditions are satisfied.
>
> 120 In that way, considering substance rather than form, SKAT's claims seek indirectly to enforce here Danish revenue law. Unless the Brussels-Lugano regime mandates a different outcome for SKAT's claims against Brussels-Lugano defendants, all of SKAT's claims fall to be dismissed by operation of Dicey Rule 3."

28. He then considered the effect of the Brussels-Lugano regime, concluding that SKAT's proceedings were to be characterised as a "civil and commercial matter" rather than a "revenue matter", but that this did not affect the application of Dicey Rule 3 which was an overriding rule of law. He therefore held that all of SKAT's claims fell to be dismissed (at [177]).

29. Effect was given to his judgment by an Order dated 27 April 2021. This contained a number of recitals, including a recital setting out the preliminary issue in the same terms as I have set out at paragraph 21 above, but the substantive order was very brief, simply providing that:

> "the Claimant's claims in the Consolidated Proceedings are dismissed."

Appeal to the Court of Appeal

30. SKAT appealed to this Court on two grounds. Ground 1 was that Andrew Baker J was wrong to conclude that the proceedings fell within the proper scope of Dicey Rule 3; Ground 2 that he was wrong that Dicey Rule 3 remained applicable notwithstanding that the claims were "civil and commercial matters". The defendants by Respondent's notice contended that the decision should be upheld on the alternative basis that the claims were a "revenue … matter".

31. Ground 2 was pursued against all defendants, including EDFM. But this was not the

case with Ground 1. When seeking permission to appeal from Andrew Baker J, SKAT had advanced Ground 1 against all defendants including EDFM (albeit only in relation to Annex E trades where SKAT alleged that the applicant for a refund never owned shares in, or received dividends from, a Danish company). But Andrew Baker J refused permission on this ground, and when the application was renewed before this Court, SKAT only sought to pursue it against the other defendants and not EDFM. We were shown a transcript of Day 2 of the appeal (26 January 2022) which shows that this caused the Court (Sir Julian Flaux C, and Phillips and Stuart-Smith LJJ) some puzzlement, and counsel for SKAT (Mr Michael Fealy QC) was asked why Ground 1 was not pursued against EDFM. His explanation was that SKAT had taken what he called "the pragmatic approach" of focusing the appeal on what it regarded as the most important issue in the case, namely a fraud claim against the respondents to Ground 1, making the point that the claim against EDFM was only about 5% of the total value of the claim. He also accepted, in answer to a question from Stuart-Smith LJ, that it inevitably followed from the position that SKAT had taken on Ground 1 that the Court was bound to treat the EDFM transactions as falling within Dicey Rule 3 for the purposes of the appeal.

32. The appeal was heard from 25 to 27 January 2022 and the Court handed down judgment on 25 February 2022 at [2022] EWCA Civ 234 allowing the appeal on Ground 1. The essential reasoning is found in the judgment of Sir Julian Flaux C (with whom Phillips and Stuart-Smith LJJ agreed) at [127]-[128] as follows:

> "127 It is also clear from a number of authorities that, in determining whether a claim is inadmissible by virtue of Dicey Rule 3, the court must examine the substance of the claim to see whether it is really a claim to recover foreign revenue. In the present case, the claim against the alleged fraud defendants is one which is predicated upon the Solo etc Applicants not having been shareholders in the relevant Danish companies, not having been entitled to or having received dividends and therefore never having been liable to pay income tax on dividends. The basis of the claim is that, by fraudulent misrepresentations, the alleged fraud defendants induced SKAT to believe that the Solo etc Applicants had been shareholders who had received dividends and were thus liable to pay income tax which was withheld at 27%, but who were entitled to receive a refund. However, no tax was ever in fact due from the Solo etc Applicants. Whatever tax was due on the dividends of the relevant Danish companies was paid by legitimate shareholders. It follows that, although SKAT was induced by the fraud to believe that what it was refunding to the Solo etc Applicants was that portion of withholding tax which was not due because of the operation of a DTA, in reality the "refunds" were not of tax at all, but were abstraction of SKAT's funds in the same way as if the alleged fraud defendants had broken into the safe in SKAT's office and stolen the money.
>
> 128 In my judgment, this claim against the SKAT defendants is not a claim to unpaid tax or a claim to recover tax at all. It is a claim to recover monies which had been abstracted from SKAT's general funds by fraud."

33. At [145] he said this about the claim against EDFM:

> "145 However, because SKAT has not pursued Ground 1 against ED&F Man, this court does not need to determine whether the same analysis as the one I have adopted in respect of a claim founded on fraudulent misrepresentation would apply to a claim founded on negligent misrepresentation or mistake. Without deciding the point since we do not have to (and it would be invidious to do so given the concession SKAT makes against ED&F Man), it does seem to me that where the claim is against a defendant who has obtained a refund by misrepresentation, even if not fraudulent, to which it was not entitled because it was never a shareholder, never received a dividend and was never a taxpayer, there is much to be said for the conclusion, which seems to have found favour with the New York state courts in *Rosenthal* (1962) 232 NYS 2d 963 and *Harvardsky* (2014) 983 NYS 2d 240 referred to at paras 57—59 above, that in those circumstances, the revenue rule should not apply."

34. Since the appeal was allowed on Ground 1, Ground 2 only remained relevant to the claim against EDFM. Here Sir Julian Flaux concluded that the claim against EDFM was a "revenue matter" rather than a "civil and commercial matter", saying at [150]:

> "150 Second, whatever the reason for SKAT not having pursued Ground 1 against ED&F Man (and although it was said that it was done for reasons of pragmatism, as I have already said, there does seem to be an inconsistency of approach), SKAT is fixed with the judge's conclusion that, so far as ED&F Man are concerned, Dicey Rule 3 makes the claim inadmissible. It must follow that either so far as those defendants are concerned the revenue rule applies, or the claim involves the exercise or assertion of a sovereign right. Whilst the test for the application of Dicey Rule 3 may not be identical to that for determining what is a "revenue etc matter" for article 1(1) of the Brussels Recast Regulation, it can be seen that its application leads to the same answer. If Dicey Rule 3 applies (as SKAT has to accept it does in relation to the claim against ED&F Man) then by the same reasoning, the basis for the claim by SKAT against those defendants is either a right which arises from an exercise of public powers or a legal relationship characterised by an exercise of public powers, from which it necessarily follows that the claim is a revenue matter outside the Brussels Recast Regulation."

35. His overall conclusion at [154] therefore was that SKAT's claims against the other defendants were not inadmissible by virtue of Dicey Rule 3, but that the claims against EDFM remained inadmissible pursuant to that rule.

36. Effect was given to the judgment by an Order dated 4 March 2022. This provided in paragraphs 1 and 2 as follows:

> "1. The Appeal is allowed, save in relation to ED&F Man. As against ED&F Man the Appeal is dismissed.
>
> 2. The Preliminary Issue is answered as follows:
>
> a. save as set out in paragraph 2(b) below, none of the Claimant's

claims, as alleged, in the Consolidated Proceedings are inadmissible under Dicey Rule 3;

b. The claim against ED&F Man, as alleged, is inadmissible under Dicey Rule 3."

37. The proceedings were remitted to the Commercial Court where they continued against the defendants other than EDFM. There was a substantial hearing before Andrew Baker J which took place over 13 days in January and February 2023 on what was called the "Validity Trial", that is a trial of further preliminary issues defined to determine foundational aspects of SKAT's allegations that the tax refund claims it says it should not have paid out were not valid claims under Danish tax law. That resulted in a judgment handed down by him on 24 March 2023 at [2023] EWHC 590 (Comm). It was followed by what was called the "Main Trial" to determine all remaining issues across all claims, which began on 15 April 2024 and is still continuing at the time of writing this judgment. We were told that it was currently due to run until April 2025.

Appeal to the Supreme Court

38. In the meantime the defendants appealed to the Supreme Court on the question whether the claims were inadmissible by virtue of Dicey Rule 3. The Supreme Court heard the appeal in July 2023 and handed down judgment on 8 November 2023 at [2023] UKSC 40. The appeal was dismissed for the reasons given in the judgment of Lord Lloyd-Jones JSC. The essential reasoning is at [38]-[39] as follows:

> "38 An examination of the substance of the respondent's pleaded claim shows that it is not a claim for sums due as tax in Danish law, nor is it a claim that the appellants are liable to the respondent because they have cheated the respondent out of tax which was due to it. It is not alleged by the respondent that any sums are due from the appellants as tax, nor is it alleged that any of the appellants were at any time under a liability to pay tax. Indeed, on the pleaded case there never has been any unpaid tax in this case. The respondent has been paid all the tax to which it was entitled by the genuine shareholders in the Danish companies. The substance of the claim is not to recover tax but to recover payments made by the respondent which were induced by fraud and to which the recipients were not entitled on any basis. It is a claim by a victim of fraud for reimbursement of the sums of which it has been defrauded.
>
> 39 A complete answer to the appellants' objection under the revenue rule to the admissibility of this claim is provided by the fact that there are no taxes due from the appellants. This essential requirement for the application of the revenue rule is missing. On the respondent's pleaded case, there never were any taxes due from the appellants. Those parties who made withholding tax refund applications and who received what may be described as "refunds", did not hold shares in the relevant Danish companies, had not received dividends net of withholding tax, were not subject to any liability to pay withholding tax, had not suffered deduction of any withholding tax and had no entitlement to recover any withholding tax. As a result, the present proceedings do not involve the indirect enforcement of any liability for fraudulently evaded tax. On the

> respondent's pleaded case there never was any tax payable by any of the appellants, let alone evaded. The Danish tax system undoubtedly provided the context and the opportunity for the alleged fraud and the operation of the fraud can be understood only by an examination of that system. It may well be that at the trial of this action it will be necessary to address that in detail. However, as we have seen, there is no objection to the recognition of foreign tax laws in that way. Because the present proceedings do not involve an unsatisfied claim to pay taxes due in Denmark, they fall outside the scope of the revenue rule."

39. None of this affected EDFM and they were not party to the appeal.

The current proceedings

40. The claims against EDFM having been declared inadmissible, EDFM might have been forgiven for thinking that that was that, as far as they were concerned. But in December 2022 SKAT commenced fresh proceedings against EDFM, this time alleging fraud. Those are the current proceedings.

41. The Re-Amended Particulars of Claim allege that between September 2012 and April 2015 SKAT received 425 applications for WHT refunds on behalf of clients of EDFM (either US or Canadian pension plans) each supported by an EDFM Tax Voucher, and paid out some DKK 596m (c. £68.9m) in reliance on them. But the claim was not based on all 425 applications. Instead it was limited to 286 applications that were purportedly based, wholly or partly, on "Cum-Ex Trades", on which SKAT paid out some DKK 339m (c. £39m). I explain what a Cum-Ex Trade refers to below. It will be recalled (see paragraph 17 above) that in the 2018 proceedings SKAT had made claims against EDFM based on 420 allegedly misleading Tax Vouchers (on which DKK 582m had been paid out), so the limitation in the current proceedings to claims based on 286 applications (on which DKK 339m had been paid out) involved, as Mr Malek said, a significant reduction in the size of the claim. On the other hand the claims included in the current proceedings include claims based on 5 Tax Vouchers that did not feature in the 2018 proceedings.

42. To understand what a Cum-Ex Trade is, it is necessary to appreciate that a contract to sell shares does not need to be (and normally is not) completed on the same day. The day on which the contracting parties enter into an agreement to buy or sell shares is referred to as the Trade Date; the date on which the contract is completed, or settled, by transfer of the shares from the seller to the buyer, is known as the Settlement Date. There is also a gap between a company declaring a dividend and paying it. The date on which a dividend is declared is known as the Declaration Date; the date on which the company pays is the Pay Date. But the company pays to the shareholders who are registered in the shareholders register on another date, the Record Date. Thus if one looks at the Tax Voucher set out at paragraph 14 above, the company concerned would have paid dividends on 12th March 2014 (the Pay Date) to shareholders registered on 11th March 2014 (the Record Date).

43. That Tax Voucher also gives another date, the Ex Date (7th March 2014). Shares can either be traded "*cum* dividend", that is the shares are sold together with the entitlement to a dividend, or "*ex* dividend", that is without such a right. The Ex Date is the first trading day on which shares start selling *ex* dividend. It is usually the day after the

Declaration Date (and the Declaration Date in the case of the Tax Voucher referred to was indeed 6th March 2014). It is now possible to explain what a Cum-Ex Trade is. A normal Cum-Cum Trade is one where (i) the Trade Date is before the Ex Date (and hence the shares are traded *cum* dividend) and (ii) the Settlement Date takes place before the Record Date (and hence the shares are also settled *cum* dividend, the buyer becoming registered by the Record Date and entitled to payment of the dividend). A Cum-Ex Trade by contrast is one where the Trade Date is before the Ex Date (and hence the shares are traded *cum* dividend) but the parties agree that the Settlement Date should be after the Record Date (and hence the shares are settled *ex* dividend, the buyer not being entitled to payment of the dividend as it is not registered in the Record Date).

44. SKAT's case as pleaded in its Re-Amended Particulars of Claim is that EDFM made the following representations in each Tax Voucher:

(1) The specified number of shares in the named Danish company were held by the named pension plan client over the dividend date, that is prior to and on the Ex Date.

(2) A payment representing a specific dividend had been received for the account of the named pension plan client on the identified Pay Date.

(3) Such dividend had been received on behalf of the named pension plan client net of a specific amount of tax that had been withheld by the named Danish company.

(4) EDFM honestly believed that the information set out in the Tax Voucher was accurate.

45. These representations are very similar to those pleaded in the 2018 proceedings. But each of these representations is now said to have been false to the knowledge of named individuals at EDFM. This is all extensively pleaded, both in relation to the Annex E trades and the other, non-Annex E trades, but it is not necessary to refer to the detail. It is sufficient to say that the case now sought to be made is that the pension plans never held any shares, or received any dividends, at all (in contrast to the 2018 proceedings where the allegation was, at any rate for the non-Annex E claims, that insofar as any shares had been purchased the pension plans did not hold shares, or receive dividends, beneficially).

46. On the basis of these allegations SKAT claims damages for deceit in the sum of c. DKK 339m (the amount paid out by SKAT by way of ostensible refund of WHT) and in addition in excess of £17m said to have been incurred by way of its own costs and costs paid to EDFM in respect of the 2018 proceedings. There is also a claim that EDFM held any monies it received out of the refunds on constructive trust for SKAT, with consequential claims to recover from EDFM any traceable proceeds of such monies, and equitable compensation for any part of such monies paid away. There is also an alternative claim under Danish law for compensation for wilful misconduct.

EDFM's application

47. By application notice dated 30 March 2023 EDFM applied to strike out the claim in the current proceedings on the grounds of issue estoppel and *Henderson v Henderson*

abuse.

48. The application was heard by Bright J from 23 to 25 January 2024 and he handed down a prompt and lucid judgment on 2 February 2024 at [2024] EWHC 148 (Comm). He dismissed the application on both grounds.

49. So far as issue estoppel is concerned, he dealt with this quite briefly. At [33]-[42] he set out the legal principles, noting at [33] that they were not really in dispute. At [37] he referred to the fact that many judgments have noted the significance of the requirement that the issue must be the same in each case and have emphasized that this criterion is considered very strictly; at [38]-[41] he expanded on this, saying at [41] that he agreed with a statement by Hildyard J in *Re Lehman Brothers Holdings plc* [2023] EWHC 3056 (Ch) at [95] that a "deduction from the earlier decision" in circumstances where "that earlier decision did not decide the issue" was not sufficient for issue estoppel.

50. At [43]-[49] he applied those principles to the facts. At [43] he referred to his having asked Mr Malek what the issue was that was precisely identical in both sets of proceedings, and quoted Mr Malek's answer which was:

> "…whether SKAT's claims for compensation for making tax refunds it was not obliged to make was a foreign revenue claim for the purpose of Dicey Rule 3, now Dicey Rule 20."

He said that the claims were not the same in both proceedings, the former claims being for negligent misrepresentation and the current claims for deceit (at [44]). He pointed out that the preliminary issue was defined by reference to "SKAT's claims, as alleged", or in other words on the facts pleaded, which did not include fraud (at [45]-[47]). He then gave his conclusion at [48] as follows:

> "48 The issue as between SKAT and ED&F Man in the Revenue Rule trial was similar to the analogous Revenue Rule Issue that in principle arises on the 2022 Proceedings, but the two are not identical. It is certainly possible to infer or deduce both how Andrew Baker J would have decided the latter issue, and how the Court of Appeal and the Supreme Court would have decided it. Each tribunal would have come to the same decision as it did on the claims that were, in fact, alleged in the Original Proceedings; the distinction between negligent misrepresentation and fraud would have made no difference. However, mere similarity and/or a possible inference or deduction is not sufficient to bring into play the doctrine of issue estoppel."

The application therefore failed so far as based on issue estoppel.

51. So far as abuse of process is concerned, he conducted a careful analysis of the evidence to identify whether SKAT "should have" brought its fraud claims in the 2018 proceedings. He concluded that SKAT must have appreciated that it was in a position to plead fraud within the first few weeks of January 2022 (at [89]); but that it did not follow that it should have done, as unless and until the judgment of Andrew Baker J on the application of the foreign revenue rule was reversed, there could be no case against EDFM at all (at [90]). But he held that SKAT should have told the Court of Appeal in

January 2022 that while the case as alleged in the 2018 proceedings did not include fraud SKAT had in mind to bring a fraud claim in the near future (and if it had not in fact decided whether to do so, it should have done) (at [92]-[93]); *a fortiori* SKAT should have told Andrew Baker J that it intended to allege fraud at a CMC that took place on 11 May 2022 (at [94]). Its failure to do so was a breach of the guidance given by Thomas LJ in *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260 (***"Aldi"***) at [31] that such issues "must be referred to the court seised of the proceedings".

52. But having examined what difference it would have made if SKAT had informed either the Court of Appeal or Andrew Baker J at the CMC of its intention to bring a deceit claim against EDFM, he concluded that it had made no real difference to EDFM, except that EDFM might possibly be slightly better off and the claim would be resolved later (at [113]). There had been no harassment or oppression of EDFM, and it had not been prejudiced by SKAT's delay (at [116]). In those circumstances he concluded that it would be unjust to deprive SKAT of the opportunity to have its claim adjudicated: the claim was a very substantial one which might well be sound; and the Court must be cautious about shutting litigants out of their right to justice (at [121]-[122]). He added at [123]:

> "123. However, it also seems to me relevant that the case SKAT wishes to bring is one of fraud. The general interests of justice, and the wider interests of society as a whole, are not well served if serious financial fraud is not brought to light. If fraud has been committed, the fraudsters should be exposed."

He therefore dismissed the application.

53. He refused permission to appeal but this was granted by Andrews LJ.

54. There are two Grounds of Appeal, namely that Bright J erred

(1) in concluding that SKAT is not subject to an issue estoppel; and

(2) in concluding that the current proceedings are not an abuse of process.

Ground 1: issue estoppel

55. The general principles of issue estoppel are well established and very familiar. Issue estoppel is one branch of the principle of *res judicata*. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 (***"Virgin"***), Lord Sumption JSC at [17] surveyed the various different legal principles included under the portmanteau term *res judicata*. One of these was issue estoppel, of which he said:

> "Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 State Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197—198."

56. We have had a number of authorities cited to us, starting with the *Duchess of Kingston's Case*. I do not think much direct help can be obtained from the latter, although it does illustrate the long history of the principle, there stated as being that the judgment of a court directly on a point is conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose.

57. The classic statement by Lord Diplock in *Thoday v Thoday* [1964] P 181 (***"Thoday"***) at 197 is as follows:

> "The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call "cause of action estoppel," is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties… The second species, which I will call "issue estoppel," is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

58. It may be noted that in the same case Willmer LJ said at 191:

> "Fourthly, however, apart from cases in which the same cause of action or the same plea in defence is raised, there may be cases in which a party may be held to be estopped from raising particular issues, if those issues are precisely the same as issues which have been previously raised and have been the subject of adjudication."

59. Other statements of high authority in the cases cited to us include the following:

(1) In *New Brunswick Railway Co v British and French Trust Corpn Ltd* [1939] AC 1 (***"New Brunswick"***) Lord Maugham LC said at 20:

> "If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them."

(2) In *Arnold v National Westminster Bank plc* [1991] 2 AC 93 (***"Arnold"***) Lord Keith said at 105D:

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

(3) In *Vervaeke v Smith* [1983] AC 145 (***"Vervaeke"***) Lord Hailsham LC at 156D referred to the earlier decision as having been a decision "on the very point at issue" in the later proceedings (not cited to us, but referred to by Cockerill J in *SAS Institute Inc v World Programming Ltd* [2018] EWHC 3452 (Comm), [2019] FSR 30 at [43], which was).

60. In the light of these authorities I am not surprised therefore that Bright J asked Mr Malek what the issue was that was "precisely identical" in both the 2018 and current proceedings. Nor am I surprised that when Mr Malek formulated the issue as he did, namely whether "SKAT's claims for compensation for making tax refunds it was not obliged to make was a foreign revenue claim", Bright J concluded that the issues in the two set of proceedings were not precisely identical. What Andrew Baker J was concerned with in the 2018 proceedings was whether SKAT's claims for compensation as articulated in those proceedings were foreign revenue claims. But the claims brought in the current proceedings are not the same claims. That is not disputed: the causes of action are different, being framed in deceit rather than negligence, and involve different allegations. Indeed if the causes of action had been the same, there would have been no need to consider the question of issue estoppel at all as there would have been a cause of action estoppel. So the decision of Andrew Baker J that SKAT's claims in the 2018 proceedings were caught by the foreign revenue rule is self-evidently not a decision that SKAT's different claims in the current proceedings are also caught by the rule. So formulated, the issues are indeed different, and not precisely identical.

61. In this Court, EDFM's Grounds of Appeal formulated what was said to be the identical issue raised in the 2018 proceedings and the current proceedings in similar terms, namely:

> "whether the Claimant's claims against the Defendant for compensation for making tax refunds the Claimant was not obliged to make are foreign revenue claims and therefore inadmissible for the purposes of the Revenue Rule."

That suffers from the same difficulties identified by Bright J. The question whether SKAT's claims brought against EDFM in the 2018 proceedings were foreign revenue claims is not the same question as whether SKAT's claims brought in the current proceedings are foreign revenue claims because the claims are not the same claims.

62. In the course of oral argument it became clear that what really underlies this ground of appeal is a more ambitious contention, which is that what Andrew Baker J decided is that *any* claim by SKAT for compensation for making tax refunds it was not obliged to make is a foreign revenue claim, or as Mr Malek formulated the issue in the course of argument:

> "Do private law claims to recover WHT refunds paid out by SKAT based on applications conveying misinformation amount to enforcement of a foreign revenue law?"

It is not really disputed that Andrew Baker J did decide that, and held that such claims do fall foul of the foreign revenue rule. So if that is the kind of issue that is capable of giving rise to an issue estoppel, then one can see the argument that it is also determinative of the same issue in the current proceedings and hence that none of the claims in the current proceedings can be pursued. The point can be tested by the claims based on the 5 new Tax Vouchers which are pleaded in the current proceedings but were not pleaded in the 2018 proceedings. Plainly Andrew Baker J did not in terms purport to decide anything about SKAT's claims based on those 5 Tax Vouchers as no claim based on those 5 Tax Vouchers was before him. But if SKAT is estopped from disputing that *any* claim by it for compensation for being misled into paying out tax refunds to those not entitled to them is caught by the foreign revenue rule, then it cannot now pursue them.

63. That to my mind raises quite a fundamental question as to the proper scope of the doctrine of issue estoppel. The question is whether a party can be estopped not just by a judge's conclusion on the facts of a particular case, but by the legal principles that he considered led to that conclusion.

64. I do not think this question can be safely answered simply by referring to the ways in which the doctrine of issue estoppel has been described in the cases, such as by asking whether there is "some issue which is necessarily common to both" sets of proceedings (*Virgin*); or whether "fulfilment of an identical condition is a requirement common to two or more different causes of action" (*Thoday*); or whether the issue in the later proceedings is the same as "an issue ... distinctly raised and decided in" the former action (*New Brunswick*); or whether there has been a decision on "the very point at issue" (*Vervaeke*). If the issue is formulated as being "whether any claim by SKAT for compensation for paying out tax refunds to those not entitled to them is caught by the foreign revenue rule", then it does look as if precisely the same issue arises in both the 2018 and current proceedings. But that I think would be to fall into the trap of reading judgments without reference to what was in fact in issue in a particular case.

65. In my view it is necessary to examine, by reference to the decided cases, what sort of issues have been held to be capable of giving rise to an estoppel. One can say that at least the following types of issue have been identified as capable of giving rise to an estoppel.

66. First, issues of fact. There is no doubt that factual decisions can give rise to an estoppel, and many of the cases are concerned with questions of this type. *Thoday* is an example. There the question was whether a judge's decision dismissing a wife's cruelty petition precluded her from relying on substantially the same factual allegations in answer to the husband's subsequent desertion petition. That depended on what factual conclusions the first judge had come to. Indeed when introducing the question of estoppel Diplock LJ said this (at 197):

> " "Estoppel" merely means that, under the rules of the adversary system of procedure upon which the common law of England is based, a party is not allowed, in certain circumstances, to prove in litigation particular

> facts or matters which, if proved, would assist him to succeed as plaintiff or defendant in an action."

This way of expressing the principle shows that what Diplock LJ primarily had in mind was estoppel as a rule of evidence that precluded proof of particular facts. Another example in the cases before us is *Turner v London Transport Executive* [1977] ICR 952, where the question was whether a finding of "malice" by an Employment Tribunal could be relied on as an issue estoppel in subsequent County Court proceedings.

67. Second, issues of construction. Again there is no doubt that a decision of a competent court on a question of construction can operate as an estoppel preventing the parties from disputing that construction in subsequent proceedings. Examples can be found in *New Brunswick* where the issue was the construction of a clause in a bond; in the decision of the High Court of Australia in *Blair v Curran* [1939] 62 CLR 464 where the issue was the construction of a clause in a will; and in *Arnold* where the issue was the construction of a rent review clause in a lease. In *Arnold* the House of Lords in fact decided that although the same question of construction arose on the next rent review there were special circumstances preventing an estoppel from arising, namely that subsequent decisions strongly suggested that the decision of Walton J in the first action was wrong. We are not concerned in the present case with this exception to issue estoppel, as SKAT accepted both before Bright J and before us that it was not relying on any such special circumstances.

68. Third, an issue estoppel can arise from what has been called "the legal quality of a fact", the phrase used by Lord Shaw in *Hoystead v Commissioner of Taxation* [1926] AC 155 (***"Hoystead"***) at 165; or "the legal consequences of facts", the phrase used by Diplock LJ in *Mills v Cooper* [1967] 2 QB 459 at 468. In *Hoystead* the question was whether 6 beneficiaries under a will were entitled, for the purposes of Australian land tax, to a deduction of £5000 each, or only one deduction between them. That turned on whether they were "joint owners" within the meaning of the relevant legislation. For 1919-20 the Commissioner had allowed them only one deduction, but the Privy Council held that he was estopped because in previous litigation it had been accepted that the beneficiaries were joint owners. In *Mills v Cooper* [1967] 2 QB 459 (not cited to us but referred to in *Arnold*) the question was whether the respondent had the status of a "gypsy". Other examples are *Khan v Golechha International Ltd* [1980] 1 WLR 1482 where the question was whether a transaction was one of moneylending within the scope of the Moneylenders Acts; and *Watt v Ahsan* [2007] UKHL 51, [2008] 1 AC 696 where the question was whether the Labour Party was a qualifying body for the purposes of the Race Relations Act 1976.

69. But in all these cases the issue that is capable of giving rise to an estoppel is an issue that is tied to the particular transaction or other circumstances with which the first Court is concerned, and the estoppel, where it does operate, prevents the parties from re-opening the question as to *that* transaction or *those* circumstances. There has, so far as I can see, been cited to us no case where an estoppel has been held to have operated on a *different* transaction or applicable to *different* circumstances on the basis that some legal principle or proposition of law decided in the first case also covers the second case. Indeed *Spencer Bower and Handley on Res Judicata* (6th edn, 2024) says at §8-04:

> "The Supreme Court of India has held that there can be no issue estoppel

as to 'a pure question of law'. This must be correct."

The decision referred to is *Johnson v Susai* [1991] AIR SC 993, but it appears to turn on a rather different point (whether jurisdiction can be conferred on a court by estoppel) and neither party suggested we could obtain any help from it. But that still leaves the suggestion in *Spencer Bower and Handley* that there can be no issue estoppel as to a pure point of law.

70. Let me illustrate the point by taking a rather simpler example than the present. Suppose A sues B for payment of a sum said to be due under a contract. B may defend the action on any number of grounds. Some of these are undoubtedly capable of giving rise to an issue estoppel (against A if the defence succeeds, and against B if it fails). So for example if B's defence is a purely factual one such as that his signature on the contract was forged, then a decision on that question will be binding on the parties, and will preclude them from relitigating the point if A subsequently sues B in a second action for a further sum said to be due under the same contract. So too if B's defence in the first action is that on the true construction of the contract the sum is not due; a decision in the first action, whether in favour of A or B, will prevent the parties from arguing for a different construction of the same clause in a second action on the same contract (subject to the special circumstances exception recognised in *Arnold*). And thirdly if B's defence is that, on a true analysis of the circumstances, there was no consideration provided by A and hence the supposed contract was not legally binding, that too would preclude the parties from relitigating the point in a second action on the same contract.

71. But suppose B's defence is that there was no consideration provided by A, and A, while accepting that he had not provided any consideration in fact, argues that the doctrine of consideration no longer applies under English law and hence that the contract is valid after all. If the judge for some reason accepts that argument, and B for some reason chooses not to appeal, then it would no doubt follow that the legal conclusion that *that* contract is binding on him can operate as an estoppel, and would prevent B from rearguing the point in a second action on the same contract. But would the judge's conclusion on the question of law that the doctrine of consideration no longer applies operate as an issue estoppel? If it did, it would mean that A could sue B on any number of other contracts that A and B had entered into where A had not provided consideration, even though none of those contracts had been before the Court, and even though it was obvious that the judge's ruling was in fact legally wrong; and since estoppels generally operate without limit of time, it would mean that A could sue B on contracts where A had provided no consideration even if they were entered into many years later.

72. This example may seem rather far-fetched and unrealistic. But one can imagine much less implausible cases. Suppose, to adapt the facts of the well-known case of *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816, B's defence is that the contract is void for failure to comply with certain requirements under the Consumer Credit Act 1974, and A's answer is that the provisions of the 1974 Act have to be read down to comply with s. 3 of the Human Rights Act 1998. The judge accepts A's argument and holds that the contract is valid, despite the fact that the contract was entered into before the Human Rights Act 1988 came into force (and hence, as we now know from *Wilson*, the argument should not have been accepted). The judge's (erroneous) decision in the first action would on the principles above preclude B from rearguing that point in a second action on the same contract. But B may have entered

into any number of contracts with A where the same point arises. Would it also prevent B from taking the point in an action on those other contracts?

73. I do not think we get any clear answer to this from the authorities. The closest that one comes to it is in *New Brunswick*. Here the appellant railway company in 1884 issued a series of "First Mortgage Gold Bonds". The series consisted of 6000 bonds, all in the same form and of like amount and date. Each bond provided for payment on 1 August 1934 of "One Hundred Pounds Sterling Gold Coin of Great Britain of the present standard of weight and fineness" and for interest thereon "at the rate of Five Pounds Sterling per centum per annum payable semi-annually". In the House of Lords it was held that the respondent, which had sued as the holder of 992 of the bonds, was entitled in respect of principal on each bond not to the nominal sum of £100 but to the sterling equivalent of the relevant weight of gold, which was rather more. But the question arose whether the same was true of the 6-monthly interest payment also due on 1 August 1934. Was this 2½ % of the principal sum due, or £2 10s?

74. As a matter of construction, all of their Lordships thought it was the latter. But the respondent argued that it was entitled to the benefit of an issue estoppel. It had in August 1934 taken proceedings against the railway company on another bond in the same series, No 3300, and obtained a default judgment in which both the principal and interest were calculated by reference to the price of gold, and indeed had obtained a declaration from the Court to that effect, namely that on the true construction of the bond it was entitled to receive (a) by way of principal such a sum as represented the price in London in sterling, calculated on 1 August 1934, of the relevant weight of gold of the standard of fineness specified in the Coinage Act 1870 and (b) by way of half-yearly interest a sum equal to 2½ % of the said amount. It now relied on that as estopping the railway company from arguing for any other construction of the interest provision in the 992 bonds on which it sued in the second action.

75. This argument was rejected by all their Lordships. One reason was that the judgment in the first action was only a default judgment, and therefore should be given a very limited effect. Lord Maugham LC said (at 21) that an estoppel based on a default judgment must be very carefully limited, and that a defendant in such a case is estopped from setting up in a subsequent action only a defence which was necessarily and with complete precision decided in the previous judgment, and that was not the case here. Lord Russell said (at 28) that none of the authorities cited would justify them in adopting the view that the doctrine applied to estop a defendant against whom a default judgment had been obtained based upon a particular construction of one contract from raising as a defence in contesting a subsequent action on a different contract (but couched in the same or similar language) that the construction of that contract is different from the adjudged construction of the other contract. Lord Wright said (at 38) that all necessary effect is given to the default judgment by treating it as conclusive of what it directly decides, but that he would regard any further effect in the way of estoppel as an illegitimate extension. Lord Thankerton (at 26) simply said that he agreed for the reasons stated by the others that there was no estoppel.

76. But another reason given by at least some of their Lordships was that the question in the second action was a different question from that in the first. This is most clearly stated by Lord Romer (at 41-3). He said that he did not need to express any opinion on whether a judgment by default could ever give rise to an estoppel because, assuming it could, there was nothing in the judgment in the former action that estopped the

appellants from litigating the question of the amount of interest payable under the 992 bonds sued on in the present action. His reasons were as follows:

> "In the earlier action the only question of construction mentioned in the writ or in the statement of claim was one as to the construction of the bond then being sued upon, and the judgment pronounced in default of appearance cannot, in my opinion, be regarded as having determined the question of the construction of the other bonds possessed by the respondents. For that question was never a traversable issue in the action, and would not have been a traversable issue even if the action had been fought out upon a defence that merely put in issue the allegations contained in the statement of claim. Had the question of construction been then determined by the Court after argument, the decision would no doubt have been followed in any action brought subsequently upon any other bonds in the same form; and would necessarily have been followed had the decision been that of this House. But this would have happened whoever might have been the plaintiff in the action subsequently brought. It would have resulted however from the respect paid to authority and not from an application of the doctrine of res judicata. In other words it would have resulted from the fact that in the former action a precisely similar question had been decided, and not because the same question had been decided.
>
> …
>
> It is no doubt true to say that whenever a question has in substance been decided, or has in substance formed the ratio of, or been fundamental to, the decision in an earlier action between the same parties, each party is estopped from litigating the same question thereafter. But this is very different from saying that he may not thereafter litigate, not the same question, but a question that is merely substantially similar to the one that has already been decided. If in an action the question of the construction of a particular document has been in substance decided, each party to the action is estopped from subsequently litigating the same question of construction of that particular document. But he is not estopped from subsequently litigating the question of construction of another document even though the second one be in substantially identical words. For the documents are two distinct documents, and the questions of their construction are two distinct questions."

77. To similar effect was Lord Wright, who after referring to the fact that the earlier judgment was a default judgment, continued (at 38):

> "But in the present case it is not necessary to go so far, because there is an even stronger reason against admitting the estoppel. It is true that the default judgment expressly declares that the plaintiffs were entitled to half-yearly interest on the basis of the gold clause. I may observe that in my experience it is unusual, and I think it is undesirable, in a default judgment to make a declaration on the construction of a document, but apart from that it is here a declaration limited to bond 3300. There was no issue before the Court as to any or all of the 992 bonds now sued on.

> The construction of each and any of these bonds was not a traversable issue in the previous action. The appellants could not be charged with the omission to traverse a claim which could not be traversed in that action because it was not before the Court. … This ground is enough to distinguish the present case from any other case in which an estoppel has been found."

78. Lord Maugham LC initially appears to take a similar view, saying (at 20):

> "In the earlier action here the only relevant issue was as to the true construction of the only bond then sued upon; and an allegation that other bonds of the same issue were in precisely the same form would have been irrelevant and improper. In fact, however, the statement of claim contained no such allegation. Nor is it true to assert that all the bonds of such an issue are necessarily in the same terms. The issue of construction in the second action could indeed be proved in the second action to be similar to that decided in the first; but it related to a different cause of action based on other bonds and could not be asserted to be the same issue."

But ultimately he reserves his position saying, at 21:

> "I do not think it necessary to express an opinion as to whether the alleged estoppel would have succeeded if the appellants had appeared in and contested the first action."

79. I do not propose to consider if what Lords Romer and Wright said technically formed part of the *ratio* of the decision. Whether it did or not, I think it is valuable guidance on the true scope of the doctrine of issue estoppel. It is noticeable that Lord Romer's view is not based on any suggestion that there was any arguable difference between the construction of bond 3300 and that of the 992 bonds later sued on. There does not seem to have been any doubt that they were as a matter of fact identically worded. Indeed he accepts that a decision on bond 3300 would be followed as a matter of judicial precedent, and this is because that would be a decision on a "precisely similar question" to the construction of the 992 bonds. But it would not be the same question.

80. If that is right, then I think a similar conclusion must follow here when considering whether the claims pleaded in the current proceedings based on the 5 new Tax Vouchers are the subject of an estoppel. What Andrew Baker J decided in the 2018 proceedings was that SKAT's claims for compensation based on the 420 Tax Vouchers there pleaded were caught by the foreign revenue rule. The question whether SKAT's claims for compensation based on the 5 new Tax Vouchers are similarly caught by the foreign revenue rule is no doubt a "precisely similar" question (and if it had been upheld, Andrew Baker J's decision on the point would no doubt have been followed as a matter of precedent) but it is not "the same" question. In my judgement therefore there is no issue estoppel as respects these claims.

81. To put it another way, I do not consider that the question whether *any* claim by SKAT for compensation for having been misled into wrongly paying out WHT refunds to those not entitled to them is caught by the foreign revenue rule is an issue that is capable of giving rise to an issue estoppel. A decision on such a question is neither a decision

on the particular facts nor on the "legal quality", or "legal consequences" of facts; it is a proposition of law, untethered to any particular facts, and I am not persuaded that conclusions on pure points of law are capable of giving rise to an estoppel.

82. I have spent some time on the question of the claims based on the 5 new Tax Vouchers not because they are of importance in themselves – they are comparatively small claims and it is doubtful if SKAT would pursue the proceedings for the sake of those claims alone – but because it helps to tease out what I regard as the true scope of the operation of issue estoppel. Much more significant is how that applies to the other claims brought by SKAT in the current proceedings, namely those based on the remaining 281 Tax Vouchers that were also the subject of claims in the 2018 proceedings.

83. For the reasons that I have given I do not accept Mr Malek's reformulated issue (paragraph 61 above) because it is stated as a general proposition of law untethered to any particular facts. But it can be adapted quite easily to become an issue on the particular facts by rewriting it as follows:

> "Do claims by SKAT against EDFM for compensation for paying out the WHT refunds that it paid out on the basis of the 420 allegedly misleading Tax Vouchers fall within the foreign revenue rule?"

84. So formulated, this is no longer the statement of a legal proposition in the abstract but is tied to claims in respect of the particular refunds paid out by SKAT in reliance on the particular Tax Vouchers pleaded in the 2018 proceedings. I do not think it suffers from the same difficulties as those I have discussed above in relation to the claims based on the 5 new Tax Vouchers. A decision on this issue is a decision on the legal quality (or legal consequences) of the facts relied on by SKAT in the 2018 proceedings, and is therefore in my view an issue of the type that can rise to an issue estoppel. Was that issue decided by Andrew Baker J in the 2018 proceedings in favour of EDFM? I think it plain that it was. Does the very same issue arise in the current proceedings? Again I think it plain that it does, insofar as the claims in the current proceedings are based on the same Tax Vouchers. I think it follows that SKAT is therefore precluded by issue estoppel from relitigating that point in relation to those claims.

85. Does it make any difference that the claims in the current proceedings are framed in deceit and based on certain misrepresentations said to have been made fraudulently whereas the claims in the 2018 proceedings were framed in negligence and based on misrepresentations said to have been made negligently? I do not think it does. This means that the causes of action now sued on are different, but as I have already referred to, you only get to a question of issue estoppel if the causes of action in the two sets of proceedings are different because if they are the same, there is a cause of action estoppel. The relevant question, it seems to me, is whether the difference between the two causes of action makes any material difference to the issue which is said to have given rise to the estoppel. As Mr Graham accepted in argument, not every fact pleaded is material: if it had been pleaded in the first action that the Tax Vouchers were on blue paper, and in the second action that they were on pink paper, this would not be a material difference as it would make no difference to the legal analysis.

86. Here the relevant allegation in the 2018 proceedings was that SKAT paid out certain monies by way of WHT refunds to those not entitled to them, and did so in reliance on 420 Tax Vouchers prepared by EDFM that inaccurately represented that the pension

plans concerned were entitled to refunds. Andrew Baker J decided that SKAT's claims for compensation for having done so were caught by the foreign revenue rule, and it is clear from his judgment that the question whether the allegation was of negligent misrepresentations or of fraudulent ones was immaterial to his analysis: see his judgment at [30]-[32] (cited above at paragraph 24). It is also clear that neither Sir Julian Flaux in this Court nor Lord Lloyd-Jones in the Supreme Court thought that it made any difference either. Mr Graham did have a submission that the Supreme Court considered that fraud might make a difference in certain circumstances; but that does not seem to me to affect the position. Those are not in fact the circumstances here; but in any event what appears to me to be relevant is whether Andrew Baker J's decision that SKAT's claims in the 2018 proceedings were inadmissible was, or arguably was, affected by whether the misrepresentations relied on were said to have been made negligently or fraudulently. On that the position seems to me to be entirely clear.

87. Nor do I think that it makes any difference that the falsity of the representations is pleaded slightly differently in the two cases. Andrew Baker J's decision that SKAT's claims to recover the monies it paid out were caught by the foreign revenue rule did not depend in any way on the details of the representations or the respects in which they were said to be untrue. Again, the essential allegations which led him to decide the preliminary issue as he did were that SKAT had paid out money by way of ostensible WHT refund to those not entitled to them as a result of EDFM providing the misleading tax vouchers that it had, and was seeking compensation from EDFM for having done so. None of that turns on the precise respects in which EDFM's representations were said to have been untrue.

88. Mr Graham pointed out that Andrew Baker J was careful to say that he was not deciding anything about a case where the misrepresentation was as to the identity of the applicant for a refund such that SKAT had made a payment to party B mistakenly thinking it was paying party A (in his judgment on the preliminary issue at [90]). But I think that can be put on one side. There has never been any question of that sort of misrepresentation being relied on in either the 2018 proceedings or the current proceedings. In each of the proceedings the misrepresentations relied on are statements in the particular Tax Vouchers pleaded that the named pension plan in each case was entitled to a refund of WHT withheld on dividends paid to it. Andrew Baker J's decision was that the foreign revenue rule applied to SKAT's claims for compensation for refunds paid out on the basis of the Tax Vouchers said to have been misleading in that way, and the fact that he expressly said he was not deciding what the position would have been in the case of misidentification does not change the nature of what he did decide.

89. In those circumstances I conclude that SKAT is indeed precluded by issue estoppel from asserting in these proceedings that the foreign revenue rule does not apply to its claims against EDFM for compensation for paying out moneys by way of WHT refunds as a result of misleading Tax Vouchers, so far as such claims are based on the Tax Vouchers pleaded in the 2018 proceedings (that is all except the claims based on the 5 new Tax Vouchers).

90. To that extent I would allow the appeal on Ground 1.

Ground 2 – Abuse of process

91. If I am right so far, the question of abuse of process becomes far less important, as it

only matters for the claims based on the 5 new Tax Vouchers. But I will consider it briefly. In short, I think Bright J was entitled to come to the conclusions that he did, and no sufficient ground has been shown for reversing them.

92. The principles of *Henderson v Henderson* abuse are again well established and very familiar, and they were not in dispute between the parties (save for one point of detail on the burden of proof). In *Virgin* at [17] Lord Sumption summarised the general principle as follows:

> "Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones."

93. As Lord Sumption explains (see *Virgin* at [19] and [24]), the modern law on the subject really began with the decision of the Privy Council in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, and the point has been taken up in a large number of subsequent decisions, the most important of which is the decision of the House of Lords in *Johnson v Gore-Wood* [2002] 2 AC 1. There Lord Bingham endorsed and explained the principles of *Henderson v Henderson* abuse in a very well-known passage at 30H to 31F, set out by Bright J in his judgment at [50]. I need not cite it all, but the central statement of principle is as follows:

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.… It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

94. At [51ff] Bright J set out a number of other principles drawn from the decided cases. Save for the point on the burden of proof, no criticism has been suggested of his statement of the law. What this ground of appeal is concerned with is his application of the principles to the facts of this particular case.

The burden of proof

95. The first point taken by Mr Malek under Ground 2 is the point on the burden of proof.

96. Mr Malek accepts that the overall burden of proof is on the party alleging abuse, as clearly stated by Lord Bingham in *Johnson v Gore-Wood*; see also *Dexter v Vlieland-Boddy* [2003] EWCA Civ 14 at [49(iii)] per Clarke LJ. But he submits that there is a shifting evidential burden under which it is for SKAT to make good any reason that it relies on as to why it did not deploy during the 2018 proceedings the material that it

now seeks to rely on: see *Finzi v Jamaican Redevelopment Foundation* [2023] UKPC 29 (***"Finzi"***) at [71] per Lord Leggatt JSC.

97. Bright J rejected a similar submission that had been made to him, saying at [64(2)]:

> "64 There are three further points I should note:
>
> …
>
> (2) Second, the burden is on the applicant to establish abuse, and remains on the applicant throughout. This was clearly stated both by Lord Bingham in *Johnson v Gore-Wood* and by Clarke LJ in *Dexter v Vlieland-Boddy*. Mr Malek KC suggested that there is a shifting evidential burden, relying on *Finzi v Jamaican Redevelopment Foundation* [2023] UKPC 29, per Lord Leggatt at [91]. I am sceptical that this is what Lord Leggatt can have meant, because a shifting evidential burden would be inconsistent with the iterative approach that Lord Bingham preferred. I note that this appears to have been the reason the Privy Council insisted that the burden is on the applicant throughout in *Investec Trust v Glenalla* [2018] UKPC 7, per Lord Kerr at [190].

98. What Lord Leggatt said in *Finzi* at [71] was this:

> "71 …Moreover, given that the questions of what information the claimant had during the earlier proceedings and why any such information was not deployed are matters peculiarly within the claimant's knowledge (and often veiled by legal professional privilege), fairness requires that the burden of proving such matters should lie with the claimant."

99. That at first sight does appear pertinent, but this was in fact a different type of case. It was one where the claimant was seeking to set aside a judgment as having been obtained by fraud. Thus in [72] Lord Leggatt said:

> "72 The Board thus considers that, where a claimant relies on evidence not adduced in the original proceedings to allege that a judgment or settlement in those proceedings was obtained by fraud, the burden is on the claimant to establish (1) that the evidence is new in the sense that it has been obtained since the judgment or settlement, or (2) if the evidence is not new in this sense, any matters relied on to explain why the evidence was not deployed in the original action."

Since in such a case it is the claimant who is seeking to set aside a judgment that is *prima facie* binding, it is no surprise that the burden of establishing that is on the claimant. That is a different situation from the case where, as here, the defendant invokes the principle of *Henderson v Henderson* abuse to prevent the claimant from pursuing a second claim which *ex hypothesi* has not already been adjudicated on, where the overall burden is on the defendant to establish abuse.

100. Mr Malek said that fairness nevertheless required that SKAT should give good reasons for the suggestion that it did not and could not understand the documents or pursue a

claim in fraud in the 2018 proceedings. Mr Graham counters with *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7, [2019] AC 271 at [190] where Lord Hodge JSC said that "it might have been better" (that is, for the Court of Appeal of Guernsey) "… to avoid reference to a shifting evidential burden." But as Mr Malek pointed out, in fact the Privy Council considered that the Court of Appeal was "entitled to conclude that … in the absence of any persuasive reason for the new claims not having been included in the earlier litigation, the abuse had been made out."

101. As this shows, even without invoking the notion of a "shifting evidential burden" a Court can undoubtedly take into account any lack of explanation from the claimant as to why the claims it has brought in a second action were not brought in the first. But that seems to me no more than a common sense statement as to what justifies a Court in reaching factual conclusions. I doubt it involves any question of law at all. But even if it does, I do not see how it would have made any difference in the present case.

102. The relevant factual conclusions that Bright J reached were as follows:

(1) SKAT could not have pleaded fraud until it had reviewed the entirety of EDFM's disclosure, which consisted of over 180,000 documents (at [76]).

(2) Disclosure took place in tranches, from 3 August 2020 onwards, the 9th and final tranche being disclosed on 19 March 2021 (at [73], [75], [77]).

(3) By then SKAT had in its hands the documents that when fully considered, cross-referenced and analysed by someone appropriately knowledgeable enabled it to plead fraud (at [78]).

(4) In the course of US proceedings SKAT instructed an expert, Mr Graham Wade. He produced his first report on 31 December 2021 (at [82]).

(5) SKAT's evidence consisted of witness statements given by Ms Jennifer Craven of Pinsent Masons LLP, its solicitors. Her evidence was that SKAT was not in a position to understand the significance of the documents disclosed by EDFM without the assistance of Mr Wade's expertise (at [82], [84]).

(6) Bright J accepted that evidence, although he held that SKAT must have understood the significance of the disclosure sufficiently from the first of Mr Wade's three reports (at [85]). That would have enabled SKAT to plead fraud within a few weeks. SKAT must have appreciated therefore that it was in a position to plead fraud within days or at most weeks of Mr Wade's first report, that is in the first few weeks of January 2022 (at [89]).

103. Given that these were the conclusions he came to, it is not apparent how any question in relation to shifting evidential burdens could be of any practical significance. This was quite plainly not a case where Bright J made findings of fact on the basis of where the burden of proof on any particular issue or factual question lay. On the contrary he made a specific finding as to when SKAT was first in a position to plead fraud, and he did so on the basis of evidence from SKAT directed at that very point which he expressly accepted. So even if he had thought that an evidential burden had fallen on SKAT he still would have reached exactly the same conclusions as he did. This was his own view too. When giving his reasons on Form N460 for refusing permission to

appeal he said of this point:

> "[EDFM's] argument on burden of proof, arising from [*Finzi*] at [71], was not capable of making any difference to the outcome."

For the reasons I have given I agree, and would dismiss this aspect of Ground 2.

Material factors not taken into account

104. The next point taken by EDFM is that Bright J failed to take into account certain detailed points which showed that SKAT could have pleaded fraud earlier.

105. There was no dispute between the parties as to the approach of this Court to appeals against a judge's decision that there has, or has not, been *Henderson v Henderson* abuse. It was summarised by Thomas LJ in *Aldi* at [16] as follows:

> "16 In considering the approach to be taken by this court to the decision of the judge, it was rightly accepted by Aspinwall that the decision to be made is not the exercise of a discretion; WSP were wrong in contending otherwise. It was a decision involving the assessment of a large number of factors to which there can, in such a case, only be one correct answer to whether there is or is not an abuse of process. None the less an appellate court will be reluctant to interfere with the decision of the judge where the decision rests upon balancing such a number of factors; see the discussion in *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1WLR 577 and the cases cited in that decision and *Mersey Care NHS Trust v Ackroyd (No 2)* [2007] HRLR 580, para 35. The types of case where a judge has to balance factors are very varied and the judgments of the courts as to the tests to be applied are expressed in different terms. However, it is sufficient for the purposes of this appeal to state that an appellate court will be reluctant to interfere with the decision of the judge in the judgment he reaches on abuse of process by the balance of the factors; it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him."

106. We heard oral argument on this aspect of the case from Mr Temple. He relied on certain specific matters. But it became apparent that these were not so much points that Bright J was unaware of, or left out of account as immaterial; they were points that he considered and took into account, but was unpersuaded by. This was what he himself said when giving his reasons on Form N460 for refusing permission to appeal, namely:

> "Henderson v Henderson abuse. My decision turned on the facts (cf. Judgment [66]) and my conclusion as to when Skat both could and should have raised a fraud claim.
>
> - I took all [EDFM's] points on this into account. They are not sufficient to gainsay Skat's evidence from Ms Craven (Judgment [82] to [87]) and the points made in submissions and accepted by me re the need for

expert input (Judgment at [88], [89]. They were taken into account in the conclusion at [90], [91]."

107. I think he was entirely justified in characterising this aspect of the appeal in that way. The case advanced by EDFM does not really seem to me to be one of failure to take into account material factors in the way contemplated by Thomas LJ in *Aldi*. It is in truth a challenge to Bright J's conclusion on a question of fact, namely that SKAT did not in fact understand the significance of EDFM's disclosure until after receipt of Mr Wade's first report. As such I think it could only be reversed on appeal on the familiar and very limited grounds that factual conclusions can be successfully challenged.

108. In my judgement the various points marshalled by Mr Temple under this head are not, individually or cumulatively, sufficient to justify displacing Bright J's conclusion, based as that was on Ms Craven's evidence. I can deal with them quite briefly in those circumstances, as follows:

(1) The first was that in May 2018 SKAT wrote to the Danish Public Prosecutor for Special Economic and International Crime with a complaint of suspected fraud. In the letter SKAT said that its review of EDFM's custody account uncovered fraud committed by EDFM. Mr Temple said that this showed that EDFM had access to the underlying share custodian records; and its own analysis was such as to enable it to allege that EDFM's Tax Voucher had inflated the tax reclaim. It does show that SKAT had obtained custody records in relation to one transaction which undoubtedly looked suspicious. But as Bright J said (at [71(2)]) making an accusation to an investigating authority is not the same as pleading fraud under the English rules. More significantly to my mind, he added that it was incomplete and lacked detail: in fact it seems to me to have concerned only a very small part of what was later pleaded.

(2) In June 2018 SKAT brought proceedings in a US District Court against certain of the pension plans that had received monies by way of WHT refund. In those proceedings SKAT alleged fraud. Mr Temple said that SKAT's Complaint showed that it had concluded that the relevant pension plan did not own any shares at all. But this seems to me to take matters no further. It is impossible to tell from the extracts from the pleading that we have whether SKAT at that stage made any allegations about EDFM's knowledge of the position.

(3) Next was a decision of the Danish Tax Tribunal in January 2020. The decision recites SKAT's submissions to the Tribunal, made in August 2019. These include allegations that EDFM had fabricated documentation and certified ownership of shares contrary to the facts. Mr Temple said that Bright J mischaracterised this as another instance of making an accusation to an investigating authority rather than, as it was in fact, a set of submissions that showed that SKAT not only had access to certain share custody accounts but had also reached certain conclusions. But what the submissions in fact show is that SKAT had had access to a very limited number of share custody accounts, and on the basis of this had felt able to submit that EDFM's documentation could not be treated as reliable. That falls a long way short of the comprehensive allegations pleaded in the current proceedings.

(4) In September 2019 EDFM served its Amended Defence in the 2018 proceedings

which admitted that the 80 Annex E Tax Vouchers were inaccurate in that the relevant pension plan had not received the amounts set out in each Tax Voucher by way of dividend and had not suffered WHT in the amounts set out therein. Bright J noted this, but also noted that EDFM did not admit negligence let alone fraud and that this only related to a fraction of the 420 Tax Vouchers relied on. Mr Temple said that they made up a significantly larger proportion by value of the claims in the current proceedings; but I do not think this affects the main point Bright J made which is an admission that certain Tax Vouchers were wrong was neither an admission of fraud nor of any significance in relation to the other Tax Vouchers.

(5) On 3 August 2020 EDFM started disclosing documents to SKAT. One of the documents disclosed was a presentation referred to as the Bottomley presentation which details a particular proposed trading structure. Some of the notes to the presentation are certainly such as to arouse suspicion, such as reference to making "the trade look like a pairs trade", or allowing the trade "to appear as an arbitrage". But Bright J was well aware of the potential significance of this, referring to it in argument as "about as close as you usually come to a smoking gun, isn't it?" SKAT was also aware that it raised questions that needed answering and on 10 February 2021 its solicitors (Pinsent Masons) wrote to EDFM's solicitors (Rosenblatt) asking a whole series of questions including whether this trading structure was used by EDFM in respect of any of the relevant trades in the Tax Vouchers sued on. We have not been shown any clear answer from Rosenblatt to that question.

(6) Mr Temple referred to some other isolated documents from EDFM's disclosure such as a group of e-mails which had all been disclosed by November 2020 (although, perhaps tellingly, not in the same batch). But we cannot possibly conclude on the basis of a few selected documents that Bright J was wrong in his conclusions (i) that SKAT needed to review the entire disclosure before being in a position to plead fraud and (ii) that it was not in a position to understand the significance of the material it had until it received Mr Wade's first report.

109. In those circumstances I do not think we can conclude that Bright J's decision that SKAT first had the material to plead fraud in the first few weeks of January 2022 was wrong, or not open to him on the evidence.

110. I would therefore dismiss this aspect of Ground 2.

Breach of Aldi guidelines

111. Bright J concluded that SKAT first could have pleaded fraud in January 2022. But that did not mean that it should have then done so: unless and until Andrew Baker J's ruling on the foreign revenue rule was reversed, there was nothing to amend as the claim had been struck out (at [90]). But Bright J held that SKAT could have raised the existence of a case in fraud with the Court of Appeal in January 2022, or at the next CMC before Andrew Baker J in May 2022; and accepted (i) that the Court of Appeal should have been told that SKAT had in mind to bring a fraud claim and (ii) that it was extremely surprising that Andrew Baker J was not told on 11 May 2022 in clear terms that SKAT intended to allege fraud against EDFM (at [91]-[94]). What he was told was that "it is

not inconceivable that proceedings may be brought against [EDFM] based on a fraud"; in fact SKAT had already decided to bring such a claim and that should have been conveyed to Andrew Baker J (at [96]-[99]).

112. Bright J then went on to examine in some detail what difference it would have made. If SKAT had pleaded fraud before March 2021 (when the preliminary issue was heard by Andrew Baker J) then the case against EDFM would have followed the same course as that against other defendants, with EDFM taking part in the appeals to this Court and the Supreme Court on the foreign revenue rule, the Validity Trial, and the Main Trial (at [102]). EDFM would have been no better off; and might well have been somewhat worse off given that the hearings it now faces will be much shorter overall (at [106]).

113. If the Court of Appeal had been told in January 2022 that SKAT was thinking of pleading fraud it would have made no difference (at [107]). If Andrew Baker J had been told in clear terms in May 2022 that SKAT did intend to plead fraud, that would have affected the directions he made (at [108]). He might have made directions to enable such a claim to form part of the Main Trial, but Bright J could not conclude he would have done, and in any event it would not have put EDFM in any better position than it now faced (at [110]-[113]). At [116] he concluded that:

> "this is not a case where there has been any harassment or oppression of [EDFM]."

114. The third aspect of Ground 2 challenges Bright J's conclusions that EDFM had suffered no prejudice and that the breach of the *Aldi* guidelines did not require the proceedings to be halted.

115. On the first point Mr Malek said that the principle was that a party should not be vexed twice, and here EDFM had been. They had been joined into mammoth litigation; they had been let out; and now found themselves facing a claim after all.

116. If (as I would hold) SKAT are estopped by issue estoppel from pursuing any claim other than that based on the 5 new Tax Vouchers, then I do not think EDFM has any cause for complaint. On that basis it is not being sued twice in relation to the same matters; it was sued once in relation to the 420 Tax Vouchers pleaded in the 2018 proceedings, and will now face a claim for the further 5 Tax Vouchers. I do not think that can be regarded as oppressive or as constituting harassment.

117. But I will consider what the position would be if there were no issue estoppel. On that basis, there is some truth in the point that EDFM, having defeated a claim in relation to the 420 Tax Vouchers, would now be facing a claim based on many of the same Tax Vouchers. I accept that that could be characterised as being vexed twice. But I agree with Mr Graham that that by itself does not mean that the second proceedings are abusive. The principle that a litigant should not be vexed twice in the same matter is a principle of public policy expressed at a high level of generality and is one of the principles that underlies the doctrine of *Henderson v Henderson* abuse, as indeed it underlies all the different types of *res judicata*. But it is not a practical test of whether there is abuse or not. That, as Lord Bingham said in *Johnson v Gore-Wood*, requires a broad merits-based assessment; one cannot formulate a hard and fast rule to determine whether abuse is to be found or not.

118. Here Bright J conducted a broad merits-based assessment. I think he was plainly right to consider, as part of such an assessment, what difference it would have made – that is, to what extent EDFM were worse off in practical terms – if SKAT had pleaded fraud before the hearing of the preliminary issue; or had told the Court of Appeal in January 2022 that it might plead fraud; or had told Andrew Baker J in May 2022 that it had decided to do so. And no criticism has been made of the careful analysis he conducted. As he pointed out, EDFM is not facing the prospect of relitigating anything argued first time round, as all that was argued and decided in the 2018 proceedings as far as EDFM was concerned was the applicability of the foreign revenue rule; and that would not need to be revisited in the current proceedings because the Supreme Court decision had made it clear what the answer was. So the practical effect of SKAT's breaches of the *Aldi* guidelines was simply that EDFM is facing a trial of the remaining issues in its own stand-alone action rather than being included in the Validity Trial and Main Trial in the 2018 proceedings. It is certainly not self-evident that that puts them in any worse position at all, for the reasons given by Bright J. I therefore reject the submission that he erred in failing to conclude that EDFM were prejudiced in facing a second claim.

119. The other main point made by Mr Malek under this head was that there is a public interest, reflected in the overriding objective, that cases should be managed efficiently and in such a way as to allot to each an appropriate share of the Court's resources. That is why the *Aldi* guidelines exist.

120. Bright J was not unaware of this aspect of the case. At [115] he said:

> "115. It [SKAT's failure to raise or plead its case in fraud against EDFM] certainly would have made a difference to the court (and, indirectly, to other court-users). The rationale for the claims against all the defendants being consolidated into Original Proceedings, and case-managed together by a designated judge, was that this would enable the Commercial Court's time and resources to be deployed to maximum efficiency. SKAT's failure to comply with the *Aldi* guidance has had an adverse impact on this."

But he contrasted that with the lack of prejudice to EDFM; he also considered that EDFM seemed to be content for the case against it to proceed slowly (at [117]). He also referred to the fact that the claim was a substantial one which might well be sound, and concluded that it would be unjust to shut out SKAT. This was principally because the Court must be cautious about shutting litigants out of their right to justice; but also because the claim was one of fraud and the general interests of justice and the wider interests of society as a whole are not well served if serious financial fraud is not brought to light (see his judgment at [123] cited at paragraph 52 above).

121. This seems to me a paradigm example of a broad merits-based assessment, taking into account the private interests of SKAT in being able to bring its claim and of EDFM in not having to face litigation twice on the same matter, as well as the public interests in the efficient management of cases and the appropriate use of court resources on the one hand, and in bringing fraud to light on the other. I do not think any ground has been shown on which we could properly intervene in this carefully considered assessment.

122. I would therefore reject this aspect of Ground 2 as well.

Conclusion

123. For the reasons I have given, I would allow the appeal on the question of issue estoppel insofar as the current proceedings are based on the same Tax Vouchers as were pleaded in the 2018 proceedings, but not insofar as they are based on different Tax Vouchers; I would dismiss the appeal on the question of *Henderson v Henderson* abuse.

Lord Justice Popplewell:

124. I am grateful to Nugee LJ for his clear exposition of the facts and issues which arise in the appeal. Like him I would have dismissed the appeal on ground 2, abuse of process, for the reasons he gives. On ground 1, issue estoppel, I differ from him only on the question whether issue estoppel can apply to the claims for the additional five Tax Vouchers, and would allow the appeal in relation to the entirety of the current proceedings for the reasons given by Newey LJ.

Lord Justice Newey:

125. Like Nugee LJ, I think that Bright J was entitled to come to the conclusions he did on abuse of process. I also agree with Nugee LJ that SKAT is prevented by issue estoppel from pursuing its claim in so far as it is based on the Tax Vouchers pleaded in the 2018 proceedings. However, I part company from Nugee LJ in relation to the extent of the estoppel. In my view, issue estoppel provides EDFM with a complete defence to the proceedings.

126. As Nugee LJ has mentioned, in *Virgin* Lord Sumption described issue estoppel as "the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties".

127. For something decided in earlier proceedings to give rise to an issue estoppel, it must have been fundamental to the outcome of those proceedings. In *Hoystead*, Lord Shaw, giving the judgment of the Privy Council, said at 170 that the principle extended to any point which was "in substance the ratio of and *fundamental* to the decision". Turning to how the principle bore on the case before the Board, Lord Shaw explained at 171:

> "It was not merely incidental or collateral to the question so decided [previously] that the appellants were joint owners. It was *fundamental* to it. Unless it had been decided that, under the settlement, Mr. Campbell's children had a beneficiary interest in land or income 'in such a way that they are taxable as joint owners' they could not have been taxed at all."

(Emphasis added in each instance.)

128. Other authorities confirm that a determination will generate an issue estoppel only where fundamental to the decision. *Spencer Bower and Handley: Res Judicata* (6th. ed.) ("*Spencer Bower*") states at paragraph 8.23:

> "The determination must be fundamental, not collateral. An express decision will not necessarily create an issue estoppel. Only determinations which are necessary for the decision, and fundamental to

> it, will do so. Other determinations, however positive, do not."

Foxton J recently cited this paragraph with approval in *PJSC National Bank Trust v Mints* [2022] EWHC 871 (Comm), [2022] 1 WLR 3099, at paragraph 45. Passages in previous editions of *Spencer Bower* to similar effect were endorsed by May and Balcombe LJJ in *In re State of Norway's Application (No 2)* [1990] 1 AC 723, at 743 and 752, by Mance LJ in *Lincoln National Life Insurance Co v Sun Life Assurance of Canada* [2004] EWCA Civ 1660, [2005] 1 Lloyd's Rep 606, at paragraphs 41 to 45, and by Moore-Bick LJ in *P & O Nedlloyd BV v Arab Metals Co (No 2)* [2006] EWCA Civ 1717, [2007] 1 WLR 2288, at paragraph 24.

129. Dixon J, sitting in the High Court of Australia, addressed the circumstances in which an issue estoppel will arise in *Blair v Curran* (1939) 62 CLR 464. He said at 532-533:

> "Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous.
>
> … But matters of law or fact which are subsidiary or collateral are not covered by the estoppel. Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion. Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation."

130. On the facts of the case before him, Dixon J concluded that a previous decision had created an estoppel such that an interest in a business carried on by a testator was to be taken to have passed to certain beneficiaries. Answering in the affirmative the question whether a declaration made in the earlier proceedings "necessarily involves the proposition that an interest in the business of conducting sweepstakes, if not otherwise validly disposed of, falls under the clause [i.e. a clause in the testator's will] as a residuary gift of Tasmanian property", Dixon J said at 533 that "there is no legal hypothesis which would account for the widow's life interest passing under it consistent with any narrower interpretation or effect being given to the clause than that stated".

131. In the present case, as Nugee LJ has explained in paragraph 62 above, there is no real dispute that Andrew Baker J decided that "private law claims to recover WHT refunds paid out by SKAT based on applications conveying misinformation amount to enforcement of a foreign revenue law" and so fall foul of the foreign revenue rule. Nor can there be any doubt that his conclusion on this point was fundamental to his overall decision. Far from being subsidiary or collateral, that was essentially the basis on which he determined what was before him.

132. As, however, he has said in paragraph 81 above, Nugee LJ does "not consider that the question whether *any* claim by SKAT for compensation for having been misled into wrongly paying out WHT refunds to those not entitled to them is caught by the foreign revenue rule is an issue that is capable of giving rise to an issue estoppel". While, therefore, Nugee LJ has concluded that "SKAT is … precluded by issue estoppel from asserting in these proceedings that the foreign revenue rule does not apply to its claims

against EDFM for compensation for paying out moneys by way of WHT refunds as a result of misleading Tax Vouchers, so far as such claims are based on the Tax Vouchers pleaded in the 2018 proceedings", he takes the view that there is no issue estoppel as respects the claims based on the five new Tax Vouchers: see paragraphs 80 and 89 above.

133. My own view is that the issue estoppel arising from Andrew Baker J's decision is not so limited. It seems to me that the claim which SKAT now advances is barred by issue estoppel in its entirety and not merely in relation to the Tax Vouchers on which SKAT relied before Andrew Baker J.

134. It is, I think, clear from the authorities that issue estoppels can arise from determinations on points of law as well as points of fact. Thus, *Spencer Bower* states in paragraph 8.04, "The determinations which will found an issue estoppel may be of law, fact, or mixed fact and law". In *Jones v Lewis* [1919] 1 KB 328, Bankes LJ said at 344-345, "No question of fact which was directly in issue between the parties to the action before Bray J., and which was decided by him, could be further litigated by either party, and the same would apply to the exact point decided by Bray J., whether it were *a point of law or of mixed law and fact*". In *Hoystead*, Lord Shaw commented at 165 that "[p]arties are not permitted to begin fresh litigations because of new views they may entertain of *the law of the case*" and, at 168, that "whether the point as to joint ownership depended upon admission of fact upon evidence led or upon argument upon *construction of a statute*, that is … nothing to the point in considering the question of estoppel". In *Blair v Curran*, Dixon J observed at 531 that "[a] judicial determination directly involving an issue of fact or *of law* disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies". In *Mills v Cooper*, Diplock LJ explained at 468-469:

> "a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of *the legal consequences of facts*, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him."

In *Watt v Ahsan*, Lord Hoffmann said in paragraph 31 that issue estoppel arises "when a court of competent jurisdiction has determined some question of fact or *law*, either in the course of the same litigation (for example, as a preliminary point) or in other litigation which raises the same point between the same parties". (Emphasis added in each instance.) In *Carl Zeiss Stiftung v Rayner & Keeler (No 2)* [1967] AC 853 ("*Carl Zeiss*"), at 916F-917B, Lord Reid indicated that there was no justification for a distinction between issues of fact and issues of law.

135. As Nugee LJ has noted in paragraph 69 above, *Spencer Bower* states in paragraph 8-04:

> "The Supreme Court of India has held that there can be no issue estoppel

as to 'a pure question of law'. This must be correct."

Nugee LJ has explained that the authority which *Spencer Bower* cites in fact "appears to turn on a rather different point", but in any event the proposition that "private law claims to recover WHT refunds paid out by SKAT based on applications conveying misinformation amount to enforcement of a foreign revenue law" (which, as I have said, provides the foundation of Andrew Baker J's decision) is not a "pure" point of law. It relates the foreign revenue rule to a factual situation: i.e. one where SKAT is seeking to recover WHT refunds paid out on the basis of applications conveying misinformation.

136. Nugee LJ attaches considerable significance to *New Brunswick*. In that case, as Nugee LJ has explained, the holder of 992 bonds relied on a default judgment which it had obtained in respect of another bond in the same series as giving rise to an estoppel, but the House of Lords rejected the contention. Lord Maugham LC expressed the view at 21 that "an estoppel based on a default judgment must be very carefully limited" and, approaching matters on the basis that in such a case a defendant is estopped from setting up in a subsequent action only a defence which was "necessarily, and with complete precision, decided by the previous judgment", considered that that condition was not satisfied. He had said at 20:

> "If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them; but in my view the doctrine cannot be made to extend to presumptions or probabilities as to issues in a second action which may be, and yet cannot be asserted beyond all possible doubt to be, identical with those raised in the previous action. In the earlier action here the only relevant issue was as to the true construction of the only bond then sued upon; and an allegation that other bonds of the same issue were in precisely the same form would have been irrelevant and improper. In fact, however, the statement of claim contained no such allegation. Nor is it true to assert that all the bonds of such an issue are necessarily in the same terms. The issue of construction in the second action could indeed be proved in the second action to be *similar* to that decided in the first; but it related to a different cause of action based on other bonds and could not be asserted to be the same issue. Moreover, it is a matter of common knowledge that such bonds are often issued at different dates and in different countries, matters which might well have a possible bearing on their true construction."

137. Lord Russell took a similar view. He said at 28:

> "My Lords, numerous authorities upon this question of estoppel were cited to us, but after considering them with care I can find none which would justify us in adopting the view, much less compel us so to do, that the doctrine applies so as to estop a defendant (against whom a default judgment has been obtained based upon a particular construction of one contract) from raising as a defence in contesting a subsequent action on a different contract (but couched in the same or similar language), that the construction of that contract is something different from the

> adjudged construction of the other contract. It is true that in the judgment of the Judicial Committee in the case of *Hoystead v. Commissioner of Taxation* the following passage occurs: 'It is seen from this citation of authority that if in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point whether of assumption or admission, which was in substance the ratio of and fundamental to the decision.' These no doubt are wide words, but they relate to a case of estoppel by a judgment in contested proceedings; and I am not prepared to extend them to the case of a default judgment on a claim under contract A, followed by an action under a similarly worded contract B."

138. Lord Wright, too, referred both to the alleged estoppel being founded on a default judgment and the fact that that judgment related to different bonds. He said at 38:

> "There are grave reasons of convenience why a party should not be held to be bound by every matter of fact or law fundamental to the default judgment. It is, I think, too artificial to treat the party in default as bound by every such matter as if by admission. All necessary effect is given to the default judgment by treating it as conclusive of what it directly decides. I should regard any further effect in the way of estoppel as an illegitimate extension of the doctrine, which in the absence of express authority I am not prepared to accept.
>
> But in the present case it is not necessary to go so far, because there is an even stronger reason against admitting the estoppel. It is true that the default judgment expressly declares that the plaintiffs were entitled to half-yearly interest on the basis of the gold clause. I may observe that in my experience it is unusual, and I think it is undesirable, in a default judgment to make a declaration on the construction of a document, but apart from that it is here a declaration limited to bond 3300. There was no issue before the Court as to any or all of the 992 bonds now sued on. The construction of each and any of these bonds was not a traversable issue in the previous action. The appellants could not be charged with the omission to traverse a claim which could not be traversed in that action because it was not before the Court."

139. Finally, Lord Romer said at 43:

> "It is no doubt true to say that whenever a question has in substance been decided, or has in substance formed the ratio of, or been fundamental to, the decision in an earlier action between the same parties, each party is estopped from litigating the same question thereafter. But this is very different from saying that he may not thereafter litigate, not the same question, but a question that is merely substantially similar to the one that has already been decided. If in an action the question of the construction of a particular document has been in substance decided, each party to the action is estopped from subsequently litigating the same question of construction of that particular document. But he is not estopped from subsequently litigating the question of construction of

> another document even though the second one be in substantially identical words. For the documents are two distinct documents, and the questions of their construction are two distinct questions."

140. As I see it, the decision in *New Brunswick* can be seen to have been founded on two matters: first, concern that the extent to which a judgment by default (where issues will not have been "distinctly raised and decided") can generate issue estoppels should be limited; and, secondly, the possibility that one bond might fall to be construed differently from another, especially since it is "a matter of common knowledge that such bonds are often issued at different dates and in different countries, matters which might well have a possible bearing on their true construction". So understood, I do not think *New Brunswick* lends any real support to SKAT's case on this appeal. The issue estoppel for which EDFM contends neither derives from a default judgment nor relates to the construction of a contract. The question we have to decide is whether it is open to SKAT to quarrel with a proposition at which Andrew Baker J arrived after full argument (to the effect that "private law claims to recover WHT refunds paid out by SKAT based on applications conveying misinformation amount to enforcement of a foreign revenue law" and so fall foul of the foreign revenue rule) and which is just as applicable to the five new Tax Vouchers as to those which featured in the proceedings before Andrew Baker J.

141. In *Arnold*, Lord Keith, with whom Lords Griffiths, Oliver and Jauncey agreed, saw *New Brunswick* as one of a number of cases providing "indications that special circumstances may exist where the earlier proceedings have resulted in a default judgment": see 107. In the light of that and other considerations, Lord Keith concluded at 109 that there was "an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings". Lord Keith further concluded, quoting from the judgment of Sir Nicholas Browne-Wilkinson V-C, that "a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel": see 110 and also 109B-C, where he said that one of the purposes of the principle of issue estoppel was to work justice between the parties so that it was open to the courts to recognise that in special circumstances inflexible application of it may have the opposite result, referring to the speech of Lord Upjohn in *Carl Zeiss* at 947D-E to that effect.

142. The "special circumstances" principle recognised in *Arnold* treats the doctrine of issue estoppel as one in which the requisite identity of issue is a necessary but not always sufficient requirement. This may be no more than a reflection of the fact that issue estoppel is an equitable doctrine such that it is not to be applied unless it would be inequitable for the party against whom the estoppel is alleged to seek to relitigate the issue. This accords with what Lord Keith said at 109B-C, and Clarke LJ's observation in *Good Challenger Navegante SA v Metalexportimport SA (The Good Challenger)* [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep 67, at paragraph 54:

> "The application of these principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice."

143. However the principle in *Arnold* is characterised, whether as an exception to the

doctrine or as an application of the underlying equitable requirement of justice, it serves to mitigate any injustice which might otherwise stem from an issue estoppel in respect of a matter of law. It is not, however, suggested in the present case that there are "special circumstances" such as to prevent an issue estoppel arising in the way that EDFM alleges. In the circumstances, as I have indicated, my own view is that SKAT is precluded by issue estoppel from pursuing any of its claim against EDFM. I would therefore allow the appeal and strike out the proceedings in their entirety.