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WHAT is the scope of Dicey Rule 20 (Dicey, Morris and Collins, *The Conflict of Laws*, general eds. L. Collins and J. Harris, 16th ed. (London 2022)) that "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"? This was the question faced by the Supreme Court in *Skatteforvaltningen v Solo Capital Partners LLP* [2023] UKSC 40, [2023] 3 W.L.R. 886.

Skatteforvaltningen ("SKAT") is the Danish tax authority. Under Danish tax law, non-residents of Denmark receiving dividends from Danish companies must pay tax which is withheld at source. Those meeting certain statutory requirements are entitled to refunds of the withheld tax. SKAT argued that, due to the defendants' fraudulent misrepresentations, it was induced to pay around £1.44 billion to applicants for tax refunds (the defendants' clients) who did not own any shares in relevant Danish companies, did not receive any dividends, and thus did not suffer any withholding of tax. SKAT brought various claims in the English courts, including for deceit, unlawful means conspiracy, dishonest assistance, knowing receipt and unjust enrichment.

The defendants contended that SKAT's claims were inadmissible by virtue of the common law principle summarised in Rule 20(1) (formerly Rule 3(1)). The modern understanding is that such claims are inadmissible in the sense that an English court will decline in such cases to exercise its jurisdiction (*Re State of Norway's Application (Nos. 1 and 2)* [1990] 1 A.C. 723, 808 (Lord Goff)).

On the trial of a preliminary issue, the trial judge dismissed SKAT's claims, concluding that they were inadmissible under Rule 20(1) ([2021] EWHC 974 (Comm), [2021] 1 W.L.R. 4237). The Court of Appeal allowed SKAT's appeal ([2022] EWCA Civ 234, [2022] Q.B. 772).

The defendants appealed to the Supreme Court on two grounds. The first ground was that SKAT's claims engaged the prohibition in Rule 20(1) against the enforcement of foreign revenue laws (the "revenue rule"). The second ground was that SKAT's claims engaged the broader prohibition in Rule 20(1) against the enforcement of foreign public laws (the "sovereign authority rule"). The Supreme Court unanimously dismissed the appeal, the only judgment being given by Lord Lloyd-Jones. SKAT's claims were therefore held to be admissible.

On the first ground, Lord Lloyd-Jones, citing Lord Keith's speech in *Government of India v Taylor* [1955] A.C. 491, reasoned that the rationale behind the revenue rule was that a claim for tax by a foreign authority would be an assertion of sovereign authority by one state within the territory of another, contrary to concepts of territorial

sovereignty (the "sovereignty rationale") (at [22]). In doing so, Lord Lloyd-Jones rejected the alternative rationale offered by Lord Keith, namely that interstate embarrassment might result if a domestic court is required to adjudicate on the merits of foreign law (the "embarrassment rationale"). Relying on Lord Mackay's speech in *Williams & Humbert Ltd. v W&H Trade Marks (Jersey) Ltd.* [1986] A.C. 368, Lord Lloyd-Jones held that the revenue rule only applies to proceedings featuring unsatisfied demands for tax which foreign tax authorities seek directly or indirectly to recover (at [36]). By endorsing *Williams & Humbert*, Lord Lloyd-Jones rejected a broad approach to the revenue rule which the defendants argued followed from *Peter Buchanan Ltd. v McVey* [1955] A.C. 516 (an Irish decision cited with approval by Lord Keith in *Government of India*). SKAT's claims therefore did not engage the revenue rule as, on SKAT's case, there never were any unsatisfied demands for tax (at [39]).

The second ground, that SKAT's claims engaged the broader sovereign authority rule, was also rejected. Applying a test outlined by the Court of Appeal in *Mbasogo v Logo Ltd.* [2006] EWCA Civ 1370, [2007] Q.B. 846, Lord Lloyd-Jones held that SKAT's claims did not "involve any act of a sovereign character, any exercise or enforcement of a sovereign right, or any vindication of sovereign power" (at [58]). Rather, SKAT's claims could have been brought by any private citizen who had been similarly defrauded.

While the Supreme Court's decision is undoubtedly correct, certain aspects of the reasoning merit scrutiny. First, it seems curious that, having concluded that the revenue rule was not engaged, it was thought necessary to further consider whether the sovereign authority rule was engaged. Revenue claims, alongside penal claims, are merely examples of claims that are inadmissible on the general basis that they enforce foreign public laws (*Attorney-General of New Zealand v Ortiz* [1984] A.C. 1, 20–21 (Lord Denning M.R.)). In *Skatteforvaltningen*, the only relevant foreign public law was the Danish tax regime. Therefore, the conclusion that the revenue rule was not engaged should have been sufficient to dispose of the appeal – the absence of an unsatisfied demand for tax meant that there was no attempted enforcement of foreign public laws. When it had already been concluded that the claims did not enforce any foreign public laws, the defendants should not have been allowed a second bite at the cherry. Although Lord Lloyd-Jones suggested that a claim that does not engage the revenue rule might only engage the sovereign authority rule in "exceptional circumstances" (at [54]), it remains difficult to see what exceptional circumstances could engage the latter rule if the claim does not enforce foreign public laws.

Second, if the revenue rule is merely an example of a broader prohibition against enforcing foreign public laws, the result in *Skatteforvaltningen* seems to narrow the scope of Rule 20(1) in both revenue and

non-revenue cases. The insistence on an unsatisfied demand for tax in the revenue context suggests that, by analogy, the existence of a foreign public law claim is required to engage Rule 20(1) in non-revenue cases. Neither the fact that SKAT was seeking to vindicate a sovereign interest (the integrity of public finances), nor the fact that SKAT's losses were suffered through a mechanism that is unique to sovereigns (issuing tax refunds) were sufficient to engage Rule 20(1).

Mbasogo sits uneasily with this. In *Mbasogo*, the Republic of Equatorial Guinea sued various defendants in England for damages reflecting, inter alia, expenses incurred in responding to an attempted coup orchestrated by the defendants. Despite the claims being private law tort claims rather than Equatorial Guinean public law claims, the Court of Appeal held that they were inadmissible. According to the Court of Appeal, Rule 20(1) is not limited to the enforcement of foreign public laws (*Mbasogo*, at [60]), but also encompasses private law claims. In effect, the Court of Appeal adopted a test similar to that in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd.* (1988) 165 C.L.R. 30, where the High Court of Australia held that Rule 20(1) extends to claims enforcing foreign "governmental interests" (*Government of the Islamic Republic of Iran v The Barakat Galleries Ltd.* [2007] EWCA Civ 1374, [2009] Q.B. 22, at [123]). In *Mbasogo*, the factors said to engage Rule 20(1) were that (1) the claims arose from the vindication of a sovereign interest (the preservation of national security) and (2) the mechanism by which the losses were suffered (investigating the conspiracy, detaining suspects etc.) was one by which only a sovereign could suffer loss (*Mbasogo*, at [57]–[58]). *Skatteforvaltningen* indicates, however, that these factors are now insufficient to engage Rule 20(1). *Skatteforvaltningen* further suggests that Equatorial Guinea's claims should not have been dismissed as there was no attempted enforcement of any foreign public law.

The Supreme Court in *Skatteforvaltningen*, though citing the test in *Mbasogo* with apparent approval, seemingly overlooked the fact that the result in *Mbasogo* is inconsistent with *Skatteforvaltningen*. *Mbasogo* should therefore be revisited, especially since the Supreme Court has now rejected the embarrassment rationale on which the Court of Appeal placed considerable emphasis (see *Mbasogo*, at [64]–[66]). Further, the *Mbasogo* approach creates uncertainty by raising difficult questions as to when private law claims will engage Rule 20(1); any claim by a foreign state, even in private law, could be said to further a sovereign interest (J.G. Collier, "Conflict of Laws and Enforcement of Foreign Public Laws: Antipodean Attitudes" [1989] C.L.J. 33, 34–35).

Another outstanding issue arises from previous cases which have held that private law claims can engage Rule 20(1) if they indirectly enforce foreign public law claims, such as where a liquidator sues former

company directors in circumstances where there are outstanding foreign tax debts, as occurred in *Peter Buchanan* itself (which was applied by the Court of Appeal in *QRS 1 ApS v Frandsen* [1999] 1 W.L.R. 2169). Although Lord Lloyd-Jones referred to these authorities with apparent approval (*Skatteforvaltningen*, at [26] and [30], respectively), his Lordship did not, and was not required to, engage with the criticism that the private law claims in those cases did not involve assertions of sovereignty, regardless of the foreign public law claims in the background (see A. Briggs, "The Revenue Rule in the Conflict of Laws: Time for a Makeover" [2001] S.J.L.S. 280, 296–98). However, such criticisms have renewed force given the rejection in *Skatteforvaltningen* of the embarrassment rationale upon which the reasoning in those decisions was largely based.

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