Trinity Term
[2026] UKSC 19
On appeal from: [2025] EWCA Civ 371

JUDGMENT

Skatteforvaltningen (The Danish Customs and Tax Administration) (Appellant) *v* MCML Ltd (previously known as ED&F Man Capital Markets Ltd) (Respondent)

before

Lord Sales, Deputy President
Lord Lloyd-Jones
Lady Rose
Lady Simler
Lord Doherty

JUDGMENT GIVEN ON
1 July 2026

Heard on 11 and 12 February 2026

Appellant
Lord Pannick KC
Charles Graham KC
KV Krishnaprasad
(Instructed by Pinsent Masons LLP)

Respondent
Ali Malek KC
Adam Temple
John Yap
(Instructed by Rosenblatt Law Limited)

LORD SALES AND LORD DOHERTY (with whom Lord Lloyd-Jones, Lady Rose and Lady Simler agree):

Introduction

1. This appeal concerns the doctrine of issue estoppel. Where an issue estoppel arises from the involvement of parties in earlier proceedings it has a very powerful effect. Save only in limited and exceptional circumstances, it means that the person who lost on that issue in those proceedings is prevented from raising it again and contesting the outcome on that issue in later proceedings between the same parties, even if it transpires that that outcome was wrong in law. This appeal is about the ambit of the doctrine of issue estoppel and the circumstances in which an issue estoppel will be found to have arisen, with that effect.

2. The key question in this appeal is whether a claim brought by the appellant ("SKAT") against the respondent ("EDFM") in December 2022 (the "2022 Claim" in the "2022 Proceedings") is barred by issue estoppel following the dismissal of an earlier claim brought by SKAT against EDFM in 2018 (the "2018 Claim" in the "2018 Proceedings").

Background

3. SKAT is the Danish Customs and Tax Administration. EDFM was a financial brokerage business at the time of the events on which the 2018 and 2022 Claims are based.

4. Danish law imposed a tax on dividends paid by a Danish company. This tax operated on a withholding basis. On declaring a dividend, a Danish company was obliged to pay 27% of the dividend to SKAT as withholding tax and the balance (73%) to VP Securities A/S, Denmark's central securities depository, for distribution to shareholders. Payment of the 27% withholding tax to SKAT by a Danish company discharged the Danish tax liability of its shareholders in respect of the dividends.

5. Some non-Danish shareholders were entitled under double taxation treaties not to be taxed, or not to be taxed at the full rate of 27%, on dividend income. In particular, tax-exempt US and Canadian pension plans were entitled under the relevant double taxation treaties not to be taxed on Danish dividends. Effect was given to this entitlement by such shareholders having a right under Danish law to be refunded by SKAT the withholding tax that had been deducted from their dividends. The 2018 Proceedings and the 2022 Proceedings both related to applications for refunds of withholding tax ("Refund Applications" by "Refund Applicants") that were presented to, and paid by, SKAT between August 2012 and July 2015.

The 2018 Proceedings

6. SKAT brought the 2018 Proceedings in the Commercial Court against 114 defendants, including EDFM. SKAT's case against EDFM was that it was liable for negligent misrepresentations contained in 420 tax vouchers issued by it to its clients, which the clients used in support of withholding tax refund applications to SKAT. SKAT also sought restitution of the fees EDFM received from those clients. In relation to 80 of the vouchers ("the Annex E vouchers"), SKAT maintained that clients had not received the amounts by way of dividends, or suffered the withholding of tax, set out in the vouchers. In respect of the remaining 340 tax vouchers, SKAT's case was that:

> "[t]o the extent that the specified shares were purchased and the relevant [Refund Applicant] held any interest in the specified shares or received any payment by way of dividend, it did so for the benefit of [EDFM]".

SKAT alleged that:

> "[EDFM], rather than the [Refund Applicant] was the beneficial owner of any specified shares or any dividend received by it …and therefore the relevant Refund Applicants were not entitled to WHT refunds."

7. SKAT claimed that some of the other defendants had acted fraudulently ("the Alleged Fraud Defendants"), but that allegation was not pleaded against other defendants who, like EDFM, were designated as "Non-Fraud Defendants". SKAT's case against the Alleged Fraud Defendants was that, contrary to the fraudulent misrepresentations they had made (or caused to be made) to SKAT in, or in support of, their applications for refunds of withholding tax, the relevant Refund Applicants owned no shares in Danish companies, had received no dividends from such companies and had suffered no withholding tax on such dividends. There was therefore never any withholding tax for SKAT to refund to those Refund Applicants.

8. On 16 July 2020 Andrew Baker J ordered that there should be:

> (i) a preliminary trial (the "Revenue Rule Trial") of the following issue ("the Preliminary Issue"):
>
> > "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?"

(Dicey Rule 3, now designated as Dicey Rule 20, is the rule of the English conflicts of laws 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 …"; in this judgment we refer to this as "the Revenue Rule".)

(ii) a preliminary trial of certain issues relating to the validity of the Refund Applications; and

(iii) a main trial of the remaining issues.

9. Andrew Baker J heard the Revenue Rule Trial on 22–25 March 2021. On 27 April 2021 he handed down judgment dismissing all of SKAT's claims as being inadmissible under the Revenue Rule: *Skatteforvaltningen (the Danish Customs and Tax Administration) v Solo Capital Partners LLP* [2021] EWHC 974 (Comm); [2021] 1 WLR 4237 (the "Revenue Rule Judgment").

10. SKAT sought permission from Andrew Baker J to appeal the judgment against EDFM on two grounds: first, that its claims in relation to the Annex E vouchers were not barred by the Revenue Rule ("EDFM Ground 1"); and second, in relation to all 420 tax vouchers, that application of the Revenue Rule was barred by the Brussels Recast Regulation in relation to defendants domiciled in the United Kingdom or the European Union ("EDFM Ground 2"). Andrew Baker J refused permission to appeal, so SKAT sought permission to appeal from the Court of Appeal. However, in that application, in respect of the claim against EDFM permission to appeal was only sought to advance EDFM Ground 2. In relation to other defendants, permission to appeal was sought on the grounds that SKAT's claims against them were not barred by the Revenue Rule ("Ground (i)") and that application of the Revenue Rule was barred by the Brussels Recast Regulation in relation to defendants domiciled in the United Kingdom or the European Union ("Ground (ii)"). The Court of Appeal granted SKAT's applications for permission to appeal, and on appeal SKAT succeeded on Ground (i) but failed on EDFM Ground 2 and Ground (ii). One group of defendants appealed unsuccessfully to this court in respect of Ground (i): *Skatteforvaltningen (the Danish Customs and Tax Administration) v Solo Capital Partners LLP* [2023] UKSC 40; [2024] AC 539. The essence of the decisions of the Court of Appeal and this court in relation to Ground (i) was that the claims fell outside the scope of the Revenue Rule because they did not involve any unsatisfied claims to pay taxes due in Denmark. The claims were not to recover tax but to reimburse sums of which SKAT had been defrauded.

The 2022 Proceedings

11. In the 2022 Proceedings SKAT has introduced new claims against EDFM. It now alleges that EDFM ran a business which involved preparing fraudulent tax vouchers for the sole purpose of inducing SKAT to pay withholding tax refunds to EDFM's clients who were tax-advantaged US or Canadian pension plans. The tax vouchers represented to SKAT that the client held shares in a Danish company and had received dividends on such shares from which tax had been withheld and thus borne by the client. SKAT alleges that each of these representations was false, to the knowledge of EDFM.

12. The 2022 Claim against EDFM is in respect of 286 tax vouchers, comprising the 80 Annex E vouchers, 201 other vouchers included in the set of 420 tax vouchers relied upon in the 2018 Claim (see para 6 above) and five tax vouchers which were not included in that claim ("the five new tax vouchers").

13. In the Commercial Court Bright J dismissed EDFM's contentions that the 2022 Claim was an abuse of process and that it was barred by issue estoppel: [2024] EWHC 148 (Comm). In his view the 2018 Claim and the 2022 Claim were different claims involving different causes of action and different factual allegations, so no issue estoppel arose. Upon examination of the circumstances in which SKAT raised its allegations of fraud in the second set of proceedings, there was no abuse of process by SKAT (according to the principle established in *Henderson v Henderson* (1843) 3 Hare 100) in doing so: paras 67–117.

14. The Court of Appeal ([2025] EWCA Civ 371; [2025] 4 WLR 52) agreed with Bright J that the 2022 Claim was not an abuse of process. However, the court held that SKAT's 2022 Claim was barred by an issue estoppel. The majority (Newey and Popplewell LJJ) held that all of SKAT's claims against EDFM in the 2022 Claim (including those in respect of the five new tax vouchers) were barred by issue estoppel arising from the treatment of the 2018 Claim by Andrew Baker J at first instance in relation to EDFM Ground 1, in respect of which there was no appeal. In their view, the issue covered by EDFM Ground 1 determined at the Revenue Rule Trial which gave rise to the estoppel was that "private law claims to recover [withholding tax] refunds paid out by SKAT based on applications conveying misinformation amount to enforcement of a foreign revenue law [ie so as to fall within the Revenue Rule]" (paras 124, 131, 135 and 140). As so framed, that issue covered the claims based on the five new tax vouchers as well as all the other vouchers relied upon in the 2022 Claim.

15. Nugee LJ took a different approach. He considered that the issue identified by the majority could not give rise to an issue estoppel because it was "a general proposition of law untethered to any particular facts" (paras 81 and 83). A party was only estopped by a judge's conclusion on the facts of a particular case, not by the legal principles or

propositions which led the judge to that conclusion (paras 63 and 69). He observed (para 69):

> "There has … 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."

In Nugee LJ's view the scope of the estoppel was to be defined by reference to the transactions common to the 2018 Claim and the 2022 Claim (paras 60 and 69). It extended to all claims based on the 420 tax vouchers which were common to both claims, but not to claims based on the five new tax vouchers. He considered (para 83) that the issue which gave rise to the estoppel was:

> "Do claims by SKAT against EDFM for compensation for paying out the [withholding tax] refunds that it paid out on the basis of the 420 allegedly misleading Tax Vouchers fall within the [Revenue Rule]?"

The grounds of appeal

16. This court granted SKAT permission to appeal on three grounds (permission on Ground 3 was granted de bene esse, ie reserving to EDFM the right to submit that the court should not address it):

> Ground 1: The majority of the Court of Appeal erred in concluding that an issue estoppel can arise from a prior court's formulation of a legal principle or articulation of legal reasoning, as opposed to the application of such principles or reasoning to the particular facts in issue in the earlier claim.

> Ground 2: Further, the Court of Appeal erred in concluding that the present proceedings were barred by issue estoppel in respect of an issue that was not necessary for, or fundamental to, the determination of the prior proceedings because: (a) that issue went beyond the particular facts alleged in the prior proceedings; and (b) the Court of Appeal was bound by *New Brunswick Railway Co v British and French Trust Corporation* [1939] AC 1 to conclude that the determination of an issue that was not traversable (ie not pleaded) in the earlier proceedings could not have been necessary for, or fundamental to, the prior decision. The Court of Appeal should have concluded that the relevant issue for the purposes of issue estoppel was the preliminary issue decided in the prior

proceedings, namely whether, and if so which of, SKAT's claims against EDFM, "as alleged" (ie on the facts pleaded in those proceedings), were inadmissible under the Revenue Rule.

Ground 3: Alternatively, if the issue decided in the prior proceedings went beyond an issue that arose on the particular facts alleged by SKAT against EDFM in those proceedings, issue estoppel should not bar SKAT's current claim by reason of "special circumstances" (within the principle of law articulated in *Arnold v National Westminster Bank* plc [1991] 2 AC 93—"*Arnold*"). In particular: (a) SKAT could not have appealed as against EDFM any aspect of Andrew Baker J's conclusions and/or reasoning that went beyond his determination of the preliminary issue as between SKAT and EDFM, and (b) Andrew Baker J's conclusions on matters that went beyond his determination of the preliminary issue as between SKAT and EDFM, which he reached in the course of deciding the preliminary issue as between SKAT and other defendants in the Revenue Rule Trial, were appealed and (together with his reasoning leading to those conclusions) have been overruled by the Court of Appeal and the Supreme Court in the proceedings concerned with the Revenue Rule.

17. The "special circumstances" exception in relation to an issue estoppel identified in *Arnold* (at p 109B, per Lord Keith of Kinkel), is where "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".

Submissions for SKAT

18. SKAT submitted that an issue estoppel does not arise from a prior court's formulation of legal principle or articulation of legal reasoning. It is the court's application of such principles or reasoning to the particular facts that creates an issue estoppel. While the immediate foundation of the ultimate decision can give rise to an issue estoppel, elements of the prior court's reasoning leading up to that conclusion cannot. The proposition which the majority of the Court of Appeal held the appellant was estopped from disputing is in substance a proposition of law derived from Andrew Baker J's reasoning as to the scope of the Revenue Rule rather than his application of such reasoning to the facts before him.

19. SKAT contends that the English and Privy Council authorities are consistent with issue estoppel not extending to pure points of law: *DSV Silo-und Verwaltungsgesellschaft mbH v Owners of The Sennar (The Sennar) (No 2)* [1985] 1 WLR 490, 490F–G and 494B; *Thoday v Thoday* [1964] P 181, 197–198; *Arnold* [1991] 2 AC 93, 105D–E; *Letang v*

Cooper [1965] 1 QB 232, 242–243; *Hoystead v Commissioner of Taxation* [1926] AC 155, 165; *Mills v Cooper* [1967] 2 QB 459, 468F–G; and see Spencer Bower and Handley, *Res Judicata* (6th ed, 2024), at para 8.04. There is Australian authority (*Blair v Curran* (1939) 62 CLR 464, 532–533 per Dixon J; *Ryde Municipal Court v Lizzio* (1982) 46 LGRA 431, 434–435 per Hutley JA; and *Young v Public Service Board* [1982] 2 NSWLR 456, 463 per Lee J) and an obiter dictum from the Singapore Court of Appeal (*Merck Sharp & Dohme Corp v Merck KGaA* [2021] SGCA 14, paras 16 and 51) which is to the same effect.

20. Whilst an issue estoppel arose in *Watt (formerly Carter) v Ahsan* [2008] AC 696, a case particularly relied upon by EDFM, SKAT maintains that the issue in question did not involve a pure point of law, but rather was about the legal quality or legal consequences of facts. The Employment Appeal Tribunal had applied the statutory criteria under section 12(1) of the Race Relations Act 1976 to the factual circumstances of the Labour Party as examined in the proceedings in order to find that it was a qualifying body subject to obligations not to discriminate on grounds of race in conducting the activity of selecting candidates for local government elections, so that Mr Ahsan was held to be entitled to complain about discrimination in respect of himself and to relief against it under the Act. It was that determination which constituted the issue estoppel which was held to apply in relation to later proceedings brought by him against the Labour Party.

21. SKAT argues that there are good reasons of principle and policy why issue estoppel should not be extended to pure points of law. Its non-application to points of law will not result in repeated litigation to an inappropriate degree, because the doctrines of precedent and abuse of process will prevent that. On the other hand, injustice would result if a litigant who chose not to press a point of law in the context of a claim of trifling importance—so that the cost and effort involved to contest it and have it resolved might have been thought to be unjustified, both from the point of view of the litigants and also of the court—was unable to raise the point in a later, much more significant, claim: *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, 917C–E (Lord Reid) and 947C–E (Lord Upjohn). The interests underlying issue estoppel—the public and private interest that there should be finality in litigation and the private interest of a party not to be vexed twice in the same matter (*Johnson v Gore Wood & Co* [2002] 2 AC 1, 31, per Lord Bingham of Cornhill)—do not require the courts to create bespoke legal principles that bind specific parties but not litigants in general, sometimes (as here) to erroneous decisions on pure points of law. The courts have cautioned against extending issue estoppel, in particular because its application denies a litigant their right to have access to the courts and to justice: *Howlett v Tarte* (1861) 10 CB NS 813; 142 ER 673 at 678.

22. SKAT objects to the formulation of the issue by Newey and Popplewell LJJ on the grounds that it is in substance an issue involving a pure point of law as to the scope of the Revenue Rule. It is not tethered to the cause of action underlying whatever private law claim SKAT might seek to bring, or the essential ingredients of the cause of action or the factual allegations on which SKAT might rely, or the nature of the misinformation that

might have been conveyed, or the relationship between SKAT and the persons who received such refunds. The formulation is far wider than the findings which Andrew Baker J made, all of which were tied to and limited by the particular claims advanced by SKAT in the 2018 Proceedings. Newey and Popplewell LJJ's formulation treats Andrew Baker J's legal reasoning (rather than his application of his account of the law to the facts before him) as giving rise to an issue estoppel. Their view that the same issue estoppel applied to the claim relating to the five new tax vouchers, which did not form part of the 2018 Claim, is based on the same erroneous approach, and indeed illustrates what is wrong with it.

23. SKAT further contends that Nugee LJ's different identification of the issue that gave rise to an issue estoppel is also incorrect. Whilst it requires a connection with the 420 tax vouchers which were the subject of the 2018 Claim, it is still objectionable because it would create an issue estoppel in respect of a much wider range of claims than those which were the subject of the 2018 Claim.

24. SKAT submits that the Court of Appeal erred in concluding that the 2022 Claim is barred by issue estoppel in respect of an issue that had not been necessary and fundamental to determination of the 2018 Claim. *Concha v Concha* (1886) 11 App Cas 541 is authority for the proposition that issue estoppel only applies to determinations by the prior court that were necessary to decide the case or the issue before it. Whether an issue arose on the parties' pleadings in prior civil proceedings is critical in deciding whether its determination was necessary and fundamental: *Outram v Morewood* (1803) 3 East 346, 102 ER 630; *Howlett v Tarte*; *Jones v Lewis* [1919] 1 KB 328; *New Brunswick Railway Co v British and French Trust Corporation Ltd* [1939] AC 1 ("*New Brunswick Railway*"). EDFM's submission that those cases involved estoppel by record rather than issue estoppel is ill founded. In each of them it was the prior judgment which gave rise to the estoppel. The distinction between estoppel by record and res judicata (including issue estoppel) had disappeared by the time those cases were decided.

25. The reasoning in *New Brunswick Railway* is not confined to default judgments. The critical relevance of pleadings in identifying the issue for the purpose of issue estoppel has been emphasised in numerous modern authorities: *Thoday v Thoday* [1964] P 181, 188; *Director of Public Prosecutions v Humphrys* [1977] AC 1, 43D–F; *R v Secretary of State for the Environment, ex parte Hackney London Borough Council* [1983] 1 WLR 524, 538H; and *Wall v Radford* [1991] 2 All ER 741, 749F–J.

26. The necessity requirement must be applied with "unrelenting severity": *Spens v Inland Revenue Commissioners* [1970] 1 WLR 1173, 1184 (Megarry J). An issue estoppel should not be found unless it is established "clearly and precisely": *Jackson v Goldsmith* (1950) 81 CLR 446, 455 (Latham CJ); and see *SAS Institute Inc v World Programming Ltd* [2018] EWHC 3452 (Comm); [2019] FSR 30, para 69 (Cockerill J).

27. As between SKAT and EDFM, all that Andrew Baker J had to decide in order to determine the Preliminary Issue was whether "SKAT's claims, as alleged" against EDFM in the 2018 Proceedings (see para 8 above), were inadmissible under the Revenue Rule. Contrary to the conclusion of the majority of the Court of Appeal, it was not necessary for him to decide that all private law claims to recover refunds of withholding tax paid by SKAT based on applications conveying misinformation amount to enforcement of a foreign revenue claim. Contrary to Nugee LJ's conclusion, it was not necessary for Andrew Baker J to decide that all claims by SKAT for compensation for the withholding tax refunds that it paid on the basis of the 420 allegedly misleading tax vouchers fell within the Revenue Rule.

28. SKAT contends that the scope of an issue estoppel is not to be enlarged by inferring or deducing from the reasoning of the first decision that the same decision would have been reached even if the facts had been different: *Duchess of Kingston's Case* (1776) 2 Smith's LC 644; *New Brunswick Railway*; *Caffoor v Income Tax Commissioner* [1961] AC 584. We have highlighted already that all that Andrew Baker J required to decide in order to determine the Preliminary Issue was whether the 2018 Claim was inadmissible under the Revenue Rule. It was not necessary for him to decide that all private law claims to recover withholding tax refunds paid out by SKAT based on applications conveying misinformation amount to enforcement of a foreign revenue law, or that all claims by SKAT against EDFM for compensation for paying withholding tax refunds pursuant to the 420 allegedly misleading tax vouchers fell within the Revenue Rule. In fact, he did not go that far; he found it unnecessary to say what the position would be in the case of mistakes as to identity (para 90 of the Revenue Rule Judgment). The Court of Appeal was wrong to discount the differences between the 2018 Claim and the 2022 Claim on the basis that they would not have made a difference to the Revenue Rule Judgment. The authorities show that an issue estoppel arising from the application of a legal principle by a judge to one set of facts is not to be extended to different facts by reasoning that the judge would have reached the same conclusion had they applied the principle to those different facts.

29. In the alternative to SKAT's principal arguments above, Ground 3 invokes the special circumstances exception to issue estoppel established in *Arnold*. SKAT submitted that if, contrary to SKAT's submissions on Grounds 1 and 2, this court concludes that the primary elements of an issue estoppel are established, SKAT should be permitted to rely on Ground 3 even though it did not rely upon the special circumstances exception before the lower courts. Whether there are special circumstances permitting a party to avoid the consequences of an issue estoppel is a question of law that does not require the resolution of any factual dispute. EDFM has had ample time to consider the point. It will suffer no irremediable prejudice if SKAT is permitted to rely on the exception. By contrast, it would be unfair if SKAT is not allowed to rely upon it because the issue on which the Court of Appeal decided that SKAT is estopped is one that was formulated for the first time during oral argument in the Court of Appeal. Special circumstances here include (i) the fact that Andrew Baker J's analysis of the Revenue Rule in the Revenue Rule Judgment is incorrect and has been overturned by the Court of Appeal and this court; (ii) that neither

of the propositions that the Court of Appeal held SKAT to be estopped from denying could have been challenged by appealing the Revenue Rule Judgment; (iii) that both Bright J and the Court of Appeal have held that SKAT is not abusing the process of the court by bringing the 2022 Claim; and (iv) that it is a relevant consideration that the 2022 Claim is a substantial one alleging serious financial fraud. SKAT has offered an explanation why it did not pursue Ground 1 when it appealed the Revenue Rule Judgment, namely that it made a pragmatic or tactical decision not to do so because the evidential basis for pursuing Ground 1 against EDFM appeared weaker, or at any rate less straightforward, than that for pursuing Ground (i) against the Alleged Fraud Defendants.

Submissions for EDFM

30. EDFM maintains that SKAT's core contention, namely that issue estoppel cannot arise in relation to any determination that extends beyond the precise claims and facts pleaded in the earlier proceedings, is inconsistent with authority and principle. EDFM contends that a determination which necessarily forms part of an earlier decision gives rise to an issue estoppel notwithstanding that it is capable of application beyond the claims or factual allegations before the earlier court, saying that this is supported by *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 ("*Virgin Atlantic*"), para 17; and *Thoday v Thoday*, above. It suffices that the issue in the earlier proceedings was a necessary step leading to the relevant outcome: *Carl Zeiss Stiftung v Rayner & Keeler Ltd* above, at p 914 (Lord Reid). Necessity is determined by the same interpretive exercise as identifying the ratio decidendi of a decision.

31. According to EDFM, SKAT's argument wrongly elides the distinctions between issue estoppel, cause of action estoppel and estoppel by record. Four of the cases upon which SKAT relies (*Outram v Morewood*, *Howlett v Tarte*, *Jones v Lewis* and *New Brunswick Railway*) were concerned with estoppel by record. Estoppel by record was a narrow doctrine which only prevented the direct contradiction of matters stated on the record, which the parties had failed previously to traverse. It has been superseded by, and no longer forms part of, the modern law of res judicata: *Baxendale-Walker v APL Management Ltd* [2018] EWHC 543 (Ch), paras 42–43. In addition, *Howlett v Tarte* and *New Brunswick Railway* were default judgments given in the absence of a pleaded defence: the reasoning in them did not have wider application. Numerous authorities, such as *Hoystead v Commissioner of Taxation* [1926] AC 155; *Blair v Curran*; *Arnold*; and *Watt v Ahsan*, recognise that issue estoppel may extend to subsequent proceedings involving different facts. In the present case the focus must be on facts relevant to the Revenue Rule as interpreted and applied by Andrew Baker J. The changes in SKAT's causes of action are irrelevant to the application of that rule.

32. EDFM submits that an issue estoppel can arise in respect of the earlier court's determination of any issue, including a point of law (pure or otherwise), fact, or mixed fact and law, provided the determination was necessary for the decision in the case.

Properly read, the authorities do not support the proposition that there cannot be an issue estoppel on a pure point of law. In any case, the issue on which SKAT is estopped is not a pure point of law. It involves the application of the Revenue Rule to a factual situation, ie SKAT seeking recovery of withholding tax refunds paid on the basis of applications conveying misinformation.

33. EDFM argues that Andrew Baker J focused not on the factual allegations against each individual defendant, but on the factual situation common to them all, viz SKAT's bringing private law claims to recover withholding tax refunds. His determination of the issue identified by the majority in the Court of Appeal was necessary to the Revenue Rule Judgment. It formed part of the ratio decidendi for dismissing the 2018 Claim. No narrower legal basis can explain that outcome. The same issue arises in the 2022 Claim, so that the 2022 Claim should be regarded as indistinguishable from the 2018 Claim. None of the alleged factual differences between them bear upon Andrew Baker J's application of the Revenue Rule. SKAT is still, in substance, suing to recover compensation for making payments it was not obliged to make.

34. EDFM points out that prior to SKAT's application to this court for permission to appeal SKAT did not suggest that the special circumstances exception derived from *Arnold* applied. In the exercise of its discretion, the court should not allow SKAT to advance that argument so late in the day, in the present appeal. In any case, there are no special circumstances which would justify excepting SKAT from being bound by the relevant issue estoppel. SKAT could have appealed the Revenue Rule Judgment, but it elected not to do so in relation to EDFM for reasons which remain obscure. The inference is that this was done for tactical reasons, and SKAT should not be permitted to escape the consequences of such a tactical decision. None of the recognised grounds for invoking the exception is engaged.

Discussion

35. In *Virgin Atlantic* Lord Sumption set out the general principles governing the doctrine of res judicata as follows (para 17):

> "Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent

> proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as 'of a higher nature' and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M&W 494, 504 (Parke B) … 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 *Hoystead v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198. 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. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

36. It is not surprising that Lord Sumption does not mention estoppel by record. The modern approach does not draw any sharp distinction between estoppel by record and issue estoppel, but regards issue estoppel as a form of estoppel by record: see, eg, *Blair v Curran* (1939) 62 CLR 464, 531 (Dixon J); *Harvey v Dunbar Assets plc* [2017] EWCA Civ 60; [2017] Bus LR 784, para 47; *Fraser v HLMAD Ltd* [2006] EWCA Civ 738; [2006] ICR 1395, paras 34–35, 39, 43, 51; *Halsbury's Laws of England* (5th edition, 2020), Vol 12A, at paras 1575–1576; and Michael Barnes KC, *The Law of Estoppel* (2020), paras 1.31–1.32.

37. The only suggested relevance of estoppel by record to this appeal is EDFM's submission that *Outram v Morewood*, *Howlett v Tarte*, *Jones v Lewis* and *New Brunswick Railway* were not issue estoppel cases but cases which applied a doctrine of estoppel by record which focused solely on the pleadings in the prior cases. We reject that submission. Examination of the judgments in each of those cases discloses that the estoppels arose

because of the judgments in the prior cases. The pleadings were not the factor of preclusion. On a proper reading of them each case concerned issue estoppel.

38. Issue estoppel may have the effect of restricting or denying a litigant's access to court to vindicate what is otherwise a good claim or of preventing a litigant from raising what is otherwise a good defence to a claim against them. When it applies, it involves a serious interference with the ordinary entitlement of litigants to present their claims and to defend themselves according to a proper understanding of their legal rights. That is a powerful effect. Conscious of this, and of the availability of and ground covered by the doctrine of abuse of process as a flexible mechanism to accommodate the private and public interests involved in the conduct of successive rounds of litigation, the courts have been astute to ensure that issue estoppel is kept within the narrow limits which are appropriate for a doctrine having such an effect.

39. The legal effect where an issue estoppel arises is more far-reaching than the legal effect associated with the doctrine of precedent. Under the doctrine of precedent, where an appellate court has ruled on a particular point of law which fell for decision in the case before it, other courts may be bound to follow that ruling. But a litigant in subsequent proceedings (even if they were a party in the earlier proceedings which established the precedent) is entitled to seek to distinguish the precedent or to raise grounds to persuade a court with relevant powers to do so to overrule it. If the justice of the case requires that the precedent should be qualified (by distinguishing it, and reformulating the relevant rule) or overturned, it is open to the litigant to seek justice in that way by having the correct rule of law identified and applied in their case. That possibility is foreclosed if the party is bound by an issue estoppel. The special circumstances exception in *Arnold* is narrow in scope. It does not provide the same opportunity as the doctrine of precedent for a party to seek to have the correct rule of law applied in their case. In light of the different legal effects produced by the doctrine of precedent and the doctrine of issue estoppel, and contrary to the submission of EDFM, there is no sound reason to give the application of an issue estoppel an ambit as wide as the ambit of the doctrine of precedent.

40. We consider that the following legal principles relating to issue estoppel are well established.

41. The issue decided in the prior proceedings must have been necessary and fundamental to the decision if it is to give rise to an issue estoppel. *Concha v Concha* (1886) 11 App Cas 541 is authority for the proposition that issue estoppel only applies to determinations by the prior court that were necessary to decide the case or the issue before it. The Court of Probate's order in that case granting probate to executors under a will stated that at the time of the will and at the time of his death the deceased was a domiciled Englishman, but it had been unnecessary for the Court to decide that point in order to grant probate, which was the order sought. The Appellate Committee held that the finding and recitation of the deceased's domicile in the order did not create an issue estoppel.

Lord Herschell LC explained (p 554) that the decision of the prior court giving rise to an estoppel:

> "must be limited to the matters necessarily decided in the litigation to which the executors are parties, and that if the executors choose, as it is said here they have chosen, to obtain a decision of the Court upon a point which is immaterial for the purpose of determining the rights in question between the parties, they cannot by tendering for decision an issue which is unnecessary for the determination of the case bind all parties claiming under the will, legatees of whatever description, because that finding has been obtained in such a suit under such circumstances by the executors. That really is the present case. If the residuary legatee is bound here at all he is bound by a finding of the learned judge which was quite unnecessary for the determination of what he had to decide, and by a finding of the learned judge which therefore could not be successfully appealed against."

42. The reason there could be no appeal against the finding of the judge is that ordinarily appeals to the Court of Appeal are against orders, not against findings made or reasons given by a judge: see *Lake v Lake* [1955] P 336, 343–344 (Sir Raymond Evershed MR), 345 (Hodson LJ); and *Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd* [2002] EWCA Civ 1142; [2003] 1 WLR 307, paras 25–31 (Waller LJ), 51 (Tuckey LJ) and 52–53 (Hale LJ).

43. Whether an issue arose on the parties' pleadings in the prior civil proceedings is critical in deciding whether its determination was necessary and fundamental. In *Outram v Morewood* 102 ER 630 Lord Ellenborough CJ explained (p 633):

> "it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury: but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them."

44. Since *Outram v Morewood*, the authorities on issue estoppel have consistently emphasised the importance of pleadings in deciding whether the determination of an issue

was necessary for, and fundamental to, the decision in the prior proceedings: see in particular *Howlett v Tarte* at pp 678 (Williams J) and 678–679 (Willes J); and *Thoday v Thoday* at p 188 (Willmer LJ). In *New Brunswick Railway*, a case involving the construction of 992 bonds issued by the appellant, the Appellate Committee held that the appellant was not bound by the interpretation of a different but identically worded bond in previous proceedings because the construction of the 992 bonds was not a relevant or "traversable" allegation in the earlier proceedings: see pp 20 (Lord Maugham LC), 25 (Lord Thankerton), 38 (Lord Wright) and 41–42 (Lord Romer). The identification of the relevant issue by reference to the pleaded claim for the relief sought (or defence raised) shows how narrow the focus is required to be to identify the extent of any issue estoppel which arises: ie it arises only in respect of the particular claim brought (or defence raised) in the proceedings.

45. While the immediate foundation of the ultimate decision can give rise to an issue estoppel, elements of the prior court's reasoning leading up to that decision cannot. In *Jones v Lewis*, Bankes and Warrington LJJ held (at pp 344–345 and 351–352, respectively) that the reasoning of the prior court leading up to its decision did not give rise to an issue estoppel. In *Blair v Curran*, Dixon J observed (p 533) that in order to decide whether a prior determination can create an issue estoppel it was necessary to consider whether it was "the immediate foundation" of the decision or "no more than part of the reasoning supporting the conclusion". He explained (pp 531–533):

> "The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. … in [an issue estoppel], for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.
>
> Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. …
>
> In the phraseology of Lord Shaw, 'a fact fundamental to the decision arrived at' in the former proceedings and 'the legal quality of the fact' must be taken as finally and conclusively established (*Hoystead v Commissioner of Taxation* [[1926] AC 155]). 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."

46. The critical point made by Dixon J is that an issue estoppel has a very narrow focus, being concerned with the facts that are fundamental or ultimate (in the sense that they necessarily had to be established to make good the cause of action being alleged or a defence put forward) and the legal quality of those particular facts. Applying that approach in the present case, the relevant facts in the 2018 Claim were the allegations that EDFM made negligent misstatements in the applications for the refund of withholding tax and the legal quality of those facts as determined in the Revenue Rule Judgment was that those allegations fell within the scope of the Revenue Rule, with the result that the claim based on them should be struck out. The different allegations in the 2022 Claim are that the relevant misstatements were made fraudulently. The Preliminary Issue proceeded on the basis of SKAT's pleaded case in the 2018 Proceedings, which covered only negligent misstatements, not fraudulent misstatements; so in the Revenue Rule Judgment Andrew Baker J made no findings or assumptions about fraudulent misstatements being made by EDFM and did not determine that such misstatements fell within the scope of the Revenue Rule.

47. To emphasise the significance of this feature of the case, we should explain that it would have been a different matter if EDFM's position had been, say, that relevant forms of words, said to be misstatements, alleged to have been used in filling in the applications for refund of withholding tax had not been used *at all* in those applications, and the trial judge determined that no such misstatements had in fact been made. Then, on the question whether in fact particular misstatements had been made or not, SKAT would have been subject to an issue estoppel that prevented it from asserting in subsequent proceedings that they had been made. But the fact of the use of the relevant forms of words in the applications was never in dispute in either the 2018 Proceedings or the 2022 Proceedings. What was in dispute in the 2018 Claim was whether the statements in the 420 applications were misstatements which were made negligently and, if so, whether such negligent misstatements fell within the scope of the Revenue Rule (which involved a determination of the legal quality, or effect in law, of those negligent misstatements). What is now in dispute in the 2022 Claim in relation to 281 out of those 420 applications (see para 6 above) is whether the statements set out in them were misstatements which were made fraudulently, which depends on factual matters which were not in issue previously, and, if so, whether such fraudulent misstatements fell within the scope of the Revenue Rule (so far as concerns their legal quality, or their effect in law). These are matters which were not addressed in the Revenue Rule Judgment. (And now of course, in light of the earlier decision of this court in these proceedings (see para 10 above), it is not even contended

that seeking a remedy in respect of such fraudulent misstatements, if established at trial, amounts to enforcement of tax so as to fall within the scope of the Revenue Rule.)

48. One reason why the scope of an issue estoppel is limited to the immediate foundation of a decision is that it would be potentially unjust for a party to be estopped by elements of judicial reasoning which went wider than was necessary for the prior court to determine the particular case before it. Issue estoppel is a matter of substantive law. The scope of an estoppel should not depend upon the happenstance of how widely or narrowly a judge chooses to frame the reasoning in their judgment. A party should not be prejudiced by the court having chosen to decide a point that the party did not need to dispute because the point was not necessary for the party to succeed in, or defend, the prior proceedings: see *Kirin-Amgen Inc v Boehringer Mannheim GmbH* [1997] FSR 289, 303 and 305 (Aldous LJ, with whom Hobhouse and Nourse LJJ agreed).

49. Moreover, as a practical matter, the time and effort that a party can reasonably be expected to invest in litigation depends on its context and on the value and importance of particular points arising in relation to it. It is not reasonable to expect litigants to spend time and effort litigating points which, in the first set of proceedings, appear to be of little significance. Further, as a matter of public policy, they should not be given incentives to do so, since the limited resources of the time and attention of courts should be focused on resolving points of substance that really matter to litigants, not peripheral or insignificant points that do not matter. That being the case, the doctrine of issue estoppel would be profoundly unfair and would work injustice if it were found to be applicable in a case where a party could have put some point in issue, but chose not to do so. That is why, in *Carl Zeiss Stiftung v Rayner & Keeler Ltd*, Lord Reid (at p 917C–E) and Lord Upjohn (at p 947C–E) urged the need for caution before settling the limits of issue estoppel.

50. The force of these considerations is underlined by the fact that there is a distinct aspect of the law of res judicata which exists to control against any unfairness between litigants, if one of them omits to raise a point in a first set of proceedings and then seeks to raise it later, namely the law on abuse of process first identified in *Henderson v Henderson* and explained in *Virgin Atlantic*. The law on abuse of process is carefully modulated to balance the equities between the litigants in that sort of situation, to achieve overall justice between them. In the present case, it is now accepted that, as held by Bright J and the Court of Appeal, SKAT's bringing the 2022 Claim does not involve any abuse of process. By contrast, the doctrine of issue estoppel, when it applies, operates in an inflexible way which is not sensitive in the same way as the doctrine of abuse of process to wider considerations of justice and the balancing of relevant interests. It would be contrary to the coherent application of the law in this area, and would work injustice, to give the doctrine of issue estoppel an expansive interpretation which cut across and significantly displaced the rules on abuse of process, which provide the appropriate framework for regulation of what has happened in this case.

51. A further reason for confining the operation of issue estoppel within narrow limits is that it would otherwise displace the operation of the doctrine of precedent in an inappropriate manner. The interpretive process for identifying the ratio decidendi of a case for the purposes of that doctrine is not the same interpretive process that is employed for identifying the immediate foundation of a decision for the purposes of issue estoppel. It would undermine the coherence of the law and the proper application of the doctrine of precedent to conflate the two. The doctrine of precedent has developed to strike a balance taking account of the need for certainty and predictability in the law, through authoritative guidance provided by the decisions of appellate courts (while also allowing for the possibility for correction of errors), and the desirability of doing justice in a particular case by applying the law relevant to that case, as properly identified by the courts: see para 38 above. Over-extensive application of the doctrine of issue estoppel, beyond the field in which it is strictly required to do justice between the parties to litigation, would undermine the balance struck more generally in the public interest, and taking account of the private interests of the parties, by the doctrine of precedent.

52. Such considerations underpin the emphasis upon the narrow operation of the doctrine of issue estoppel since the earliest cases when it was recognised. The scope of an issue estoppel is not to be enlarged by inference, deduction or argument from the prior decision: *Blackham's Case* (1708) 1 Salk 290; 91 ER 257, 258; *Duchess of Kingston's Case* (1776) 2 Smith's LC 644, 645); and see *In re Lehman Brothers Holdings plc* [2023] EWHC 3056 (Ch); [2024] 2 BCLC 396, paras 97–100. As the Lord Chief Justice of the Court of Common Pleas (Sir William de Grey) said in *Duchess of Kingston's Case* (at p 645):

> "the judgment of a court of concurrent jurisdiction, *directly upon the point*, is as a plea, a bar, or as evidence, conclusive, between the same parties, *upon the same matter, directly in question in another court*; [and] the judgment of a court of exclusive jurisdiction, *directly upon the point*, is, in like manner, conclusive *upon the same matter*, between the same parties, coming incidentally in question in another court, for a different purpose. *But neither the judgment of a concurrent or exclusive jurisdiction is conclusive evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment.*" (Emphasis added.)

53. An issue estoppel arising from a decision on one set of facts is not to be expanded to cover another set of facts, even if the factual differences were not material in law to the prior court's decision. In *New Brunswick Railway* the bond in the prior proceedings and the 992 bonds in the later proceedings were "all in the same form and of like amount and

date" (p 11). The Appellate Committee held that the prior judgment did not give rise to an issue estoppel. Lord Wright stated (p 38):

> "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. Even on the narrowest view of the decision in *Howlett v Tarte*…. which would limit it to excluding the estoppel only when the particular issue could not have been traversed in the former action, the estoppel could not arise in this case. This ground is enough to distinguish the present case from any other case in which an estoppel has been found."

Lord Romer observed (p 43):

> "…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."

Lord Maugham opined (p 20):

> "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."

Lord Maugham went on to say (p 21) that he did not need to decide the case on this basis because the earlier decision was a default judgment. While, because of that and the reasoning of the other members of the Appellate Committee (Lord Thankerton and Lord Russell of Killowen), it is arguable that the views of Lord Wright, Lord Romer and Lord Maugham on this point do not form part of the ratio of the decision, we find them highly persuasive. We do not consider they should be confined to cases where the earlier decision was a default judgment. We agree with Nugee LJ's observation (para 79) that what Lord Wright and Lord Romer said "is valuable guidance on the true scope of the doctrine of issue estoppel".

54. There is a considerable overlap between Grounds 1 and 2 in this appeal. We find it convenient to focus on Ground 2. If that ground is well founded it is unnecessary to determine whether a "pure" point of law (whatever that may be) can ever give rise to an issue estoppel.

55. In our view Ground 2 is well founded. To treat the issue formulated by the majority of the Court of Appeal (Newey and Popplewell LJJ), that "private law claims to recover [withholding tax] refunds paid out by SKAT based on applications conveying misinformation amount to enforcement of a foreign revenue law", as giving rise to an issue estoppel is inconsistent with the principles we have outlined.

56. The 2018 Claim against EDFM alleged negligent misrepresentation. It did not allege fraud. The factual and legal bases of the 2018 Claim and the 2022 Claim are different. They were different causes of action. The factual and legal bases of the 2022 Claim are not matters which were traversable in the 2018 Proceedings against EDFM.

57. In the 2018 Proceedings by SKAT against EDFM the judgment was that the claim as alleged was in substance a claim for tax which fell to be dismissed by reason of the Revenue Rule. The broader issue stated by the majority in the Court of Appeal is much wider. It extends to all private law claims to recover withholding tax refunds paid by SKAT based on applications conveying misinformation. That broader issue was not necessary or fundamental to Andrew Baker J's decision dismissing the claim against EDFM. It was not the immediate foundation of it.

58. In our view, EDFM's contention that the Revenue Rule as applied by Andrew Baker J to the alleged negligent misrepresentations by EDFM, as a valid defence, must on the judge's reasoning also have applied to those misrepresentations if made fraudulently (as is now alleged in the 2022 Claim), again as a valid defence, is a submission by way of inference by argument from the judge's judgment of a kind which lies outside the ambit of an issue estoppel (to use the language in *Duchess of Kingston's Case*, at para 52 above). The formulation of the issue by the majority in the Court of Appeal wrongly expands the scope of the issue estoppel arising from the decision made

on the facts alleged in the 2018 Claim against EDFM to cover another set of different facts, contrary to the guidance in *New Brunswick Railway*.

59. *Watt v Ahsan* does not support EDFM's submission. In the first set of proceedings brought by Mr Ahsan it was determined that the Labour Party was a qualifying body which was subject to the relevant obligations under the Race Relations Act 1976. That decision created an issue estoppel, binding on the parties, notwithstanding that a later court ruling involving different parties showed that it was wrong in law (para 33). Mr Ahsan was entitled to rely on that issue estoppel when he brought a second and third claim against the Labour Party alleging unlawful discrimination against him. The earlier ruling as to the qualifying status of the Labour Party created an issue estoppel because it was a determination by a court/tribunal of competent jurisdiction that the Labour Party satisfied the relevant statutory test (para 32), which was the immediate foundation for the claim brought against it. It was a decision as to the legal quality or significance of a set of facts regarding the nature and activities of the Labour Party established in the first proceedings which were the same in the second and third sets of proceedings, where the determination of that very issue was a critical element of the claim being made in each of the sets of proceedings. *Watt v Ahsan*, therefore, is an application of the principles governing when an issue estoppel arises as set out above and in no way extends those principles. It involved a situation very different from that before the court in this appeal.

60. Nugee LJ's formulation of the issue which created an issue estoppel tethered it to the 420 tax vouchers which were the subject of the 2018 Claim, with the result that the issue estoppel did not extend to the five new tax vouchers. However, that aside, in our respectful opinion his formulation suffers from the same difficulties as the majority's formulation. In light of the authorities reviewed above, the issue estoppel identified by him does not arise.

61. It follows that the 2022 Claim should not have been dismissed. We would allow the appeal.

62. In those circumstances it is unnecessary to consider Ground 3, including the question whether SKAT should be given permission to raise it on this appeal.