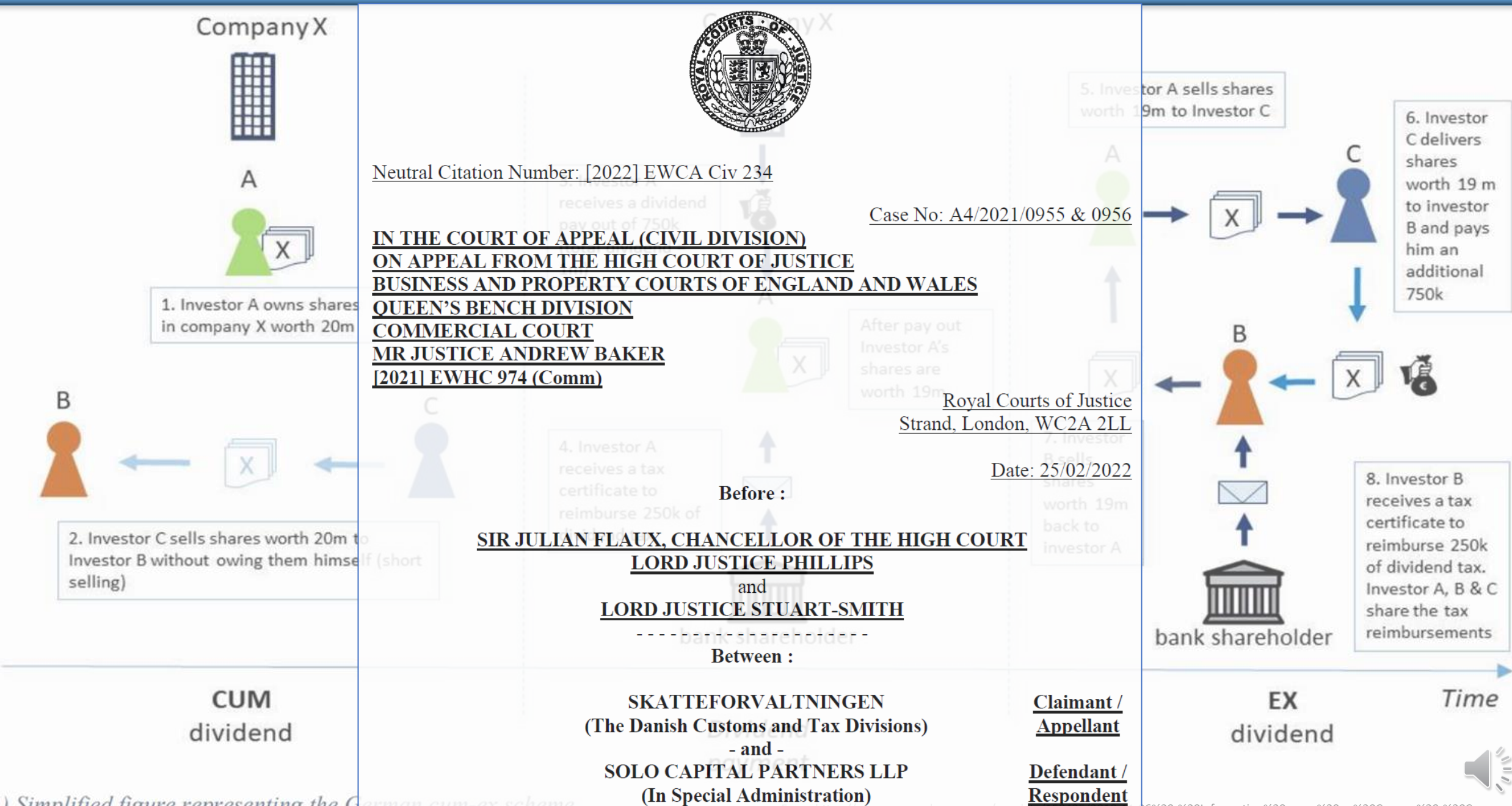
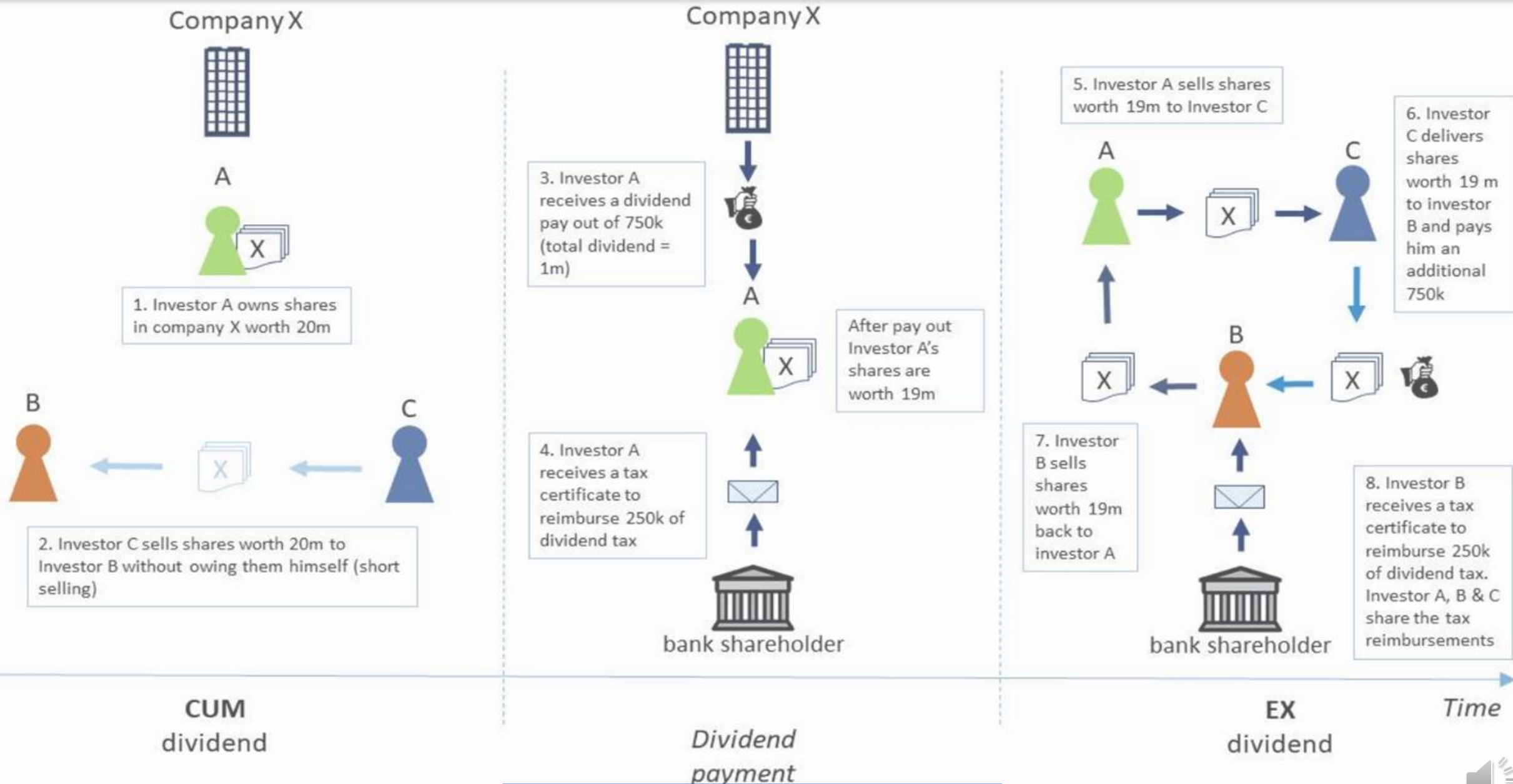


# I.A Jurisdiction to tax – DK cum ex case under UK revenue rule



1) Simplified figure representing the German cum-ex scheme

# I.A Jurisdiction to tax – DK cum ex case – what are Cum ex transactions



Further links below in the description





Solo Capital

Further links below in the description



## High Court decision

10. The principal focus of the main fraud allegation is the activity of Mr Sanjay Shah through his business, Solo Capital Partners LLP ('Solo'), together with other entities associated or said to be associated with Solo, at the time an apparently reputable financial services operation authorised and regulated by the FSA, later the FCA. There are further significant fraud allegations relating to the activities of individuals initially employed within Solo who, it is said by SKAT, came to use the same or similar, and allegedly fraudulent, methods of procuring SKAT to make payments
2. SKAT claims to have been induced by misrepresentations, over a three-year period from August 2012 to July 2015, to pay out as tax refunds it was not liable to pay, over DKK12.5 billion (c.£1.5 billion), 90% or more of which in the second half of that period, from March 2014. Five separate Claims have been consolidated into one action: CL-2018-000297 (70 defendants); CL-2018-000404 (25 defendants); CL-2018-000590 (8 defendants); CL-2019-000487 (9 defendants); and CL-2020-000369 (7 defendants). Allowing for overlap (some defendants are party to more than one Claim), in total 114 defendants were named. Taking account of common legal representation where that exists, at the time of this first preliminary issue trial, there were 21 separate legal teams from 18 firms of solicitors responding to SKAT's various claims, representing between them 74 of the defendants.

Further links below in the description



High Court  
decision

**Result**

177. The result is that by the application of Dicey Rule 3 in these proceedings, all of SKAT's claims fall to be dismissed.

Appeal  
Court  
decision

137. However, this is wrong as a matter of analysis. On SKAT's case the granting and payment of the refund applications was induced by fraud and, whilst exploitation of the Danish WHT regime may have been the mechanism by which the fraud was committed, it does not follow that the claim involves the enforcement of that regime. As I have already said, it is a claim for the recovery of monies from SKAT's general funds of which SKAT was defrauded. This claim clearly has the three features which the Court of Appeal in *Mbasogo* at [50] identified as necessary to escape Dicey Rule 3: "if in bringing the claim the claimant is not doing an act which is of a sovereign character or by virtue of sovereign authority and the claim does not involve the exercise or assertion of a sovereign right and the claim does not seek to vindicate a sovereign act or acts, then the court will both determine and enforce it".

**Conclusion**

154. For the reasons I have set out the appeal succeeds on Ground 1. The claims of SKAT against the alleged fraud defendants are not inadmissible by virtue of Dicey Rule 3. The

Dicey's "Conflict of Laws"

Author(s): J. H. Beale, Jr.

Source: *Harvard Law Review*, Oct. 26, 1896, Vol. 10, No. 3 (Oct. 26, 1896), pp. 168-174

Published by: The Harvard Law Review Association

Stable URL: <https://www.jstor.org/stable/1321757>

1. Investor A owns shares  
in company X worth 20m

168

HARVARD LAW REVIEW.

## DICEY'S "CONFLICT OF LAWS."<sup>1</sup>

AT last we have an adequate treatise on a branch of the law the importance of which to an American lawyer is great and growing.

Professor Dicey could write, and has written, the best book on the subject. His analysis and arrangement are strikingly novel, and commend themselves entirely

1) Simplified figure representing the German cum-ex scheme

### Introduction

1. This appeal concerns whether the claims made in these proceedings by the claimant, which is the Danish tax authority (to which I will refer as "SKAT"), are not admissible before the English courts by reason of Rule 3(1) of *Dicey, Morris & Collins on the Conflict of Laws* 15<sup>th</sup> edition (to which I will refer as "Dicey Rule 3") which provides:

"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;"

31. Lord Pannick QC submitted that on the authorities which define the scope of the revenue rule, the mere fact that the alleged fraud is committed in the context of taxation or against a foreign tax authority is insufficient to bring the matter within the rule which only applies where the claim is one, directly or indirectly, for tax which is due. The judge had failed to recognise that limitation on the revenue rule.

32. He then took the Court to the relevant authorities, beginning with the speech of Lord Goff of Chieveley as to the nature and purpose of Dicey Rule 3 in *Re State of Norway's Application (No.2)* [1990] 1 AC 723 at 807-8. Having set out the Rule as stated in *Dicey* Lord Goff said:

"In that rule, it is stated that the English courts have no jurisdiction to entertain such an action. However, in *Dicey & Morris* itself, at p. 101, it is recognised that the theoretical basis of the rule is a matter of some controversy. The editors express the opinion that the best explanation is to be found in the speech of Lord Keith of Avonholm in *Government of India v. Taylor*, where he said, at p. 511:

"One explanation of the rule . . . may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one state within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties."



# I.A Jurisdiction to tax – DK cum ex case – Dicey Rule 3 – Revenue Rule

126. The critical starting point for the purposes of Ground 1 of this appeal is to focus on the scope of Dicey Rule 3. What it renders inadmissible (whether under the narrower revenue rule or the wider sovereign powers rule) is an action, that is a claim, to enforce directly or indirectly a foreign revenue, penal or other public law. In its narrower form, the revenue rule, what it prohibits is enforcement of a direct or indirect claim for tax which is due but unpaid, as is clear from the speeches of the House of Lords in *Government of India* and from the passages from the speech of Lord Mackay in *Williams & Humbert* which I cited at [41]-[42] above. In its wider form, the sovereign powers rule, it focuses on whether the claim is one which involves the exercise or assertion of a sovereign right, as stated in the passage in [50] of the decision of this Court in *Mbasogo*:

“The critical question is whether in bringing a claim, a claimant is doing an act which is of a sovereign character or which is done by virtue of sovereign authority; and whether the claim involves the exercise or assertion of a sovereign right. If so, then the court will not determine or enforce the claim.”

131. Although there is no English authority directly on point which decides that a claim such as the present one is not a sovereign act or the vindication of a sovereign act, that was clearly the view of Dr Mann in the articles which were expressly approved by this Court in *Mbasogo*. Thus, in his 1954 article quoted at [42] of the judgment in *Mbasogo*, Dr Mann said:

“Where the foreign state pursues a right that by its nature could equally well belong to an individual, no question of a prerogative claim arises and the state's access to the courts is unrestricted. Thus a state whose property is in the defendant's possession can recover it by an action in detinue. A state which has a contractual claim against the defendant is at liberty to recover the money due to it. If a state's ship has been damaged in a collision, an action for damages undoubtedly lies.”

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. The alleged fraud defendants' submission that the claim to the refund is still a claim to tax is simply wrong as a matter of analysis and the judge fell into error in accepting that submission. Furthermore, because there is no unsatisfied claim to tax, the “essential feature” of the revenue rule as Lord Mackay described it in *Williams & Humbert* is absent. There is no qualification in his judgment

136. The submission by Mr Zellick QC that by making applications for refunds the Solo etc Applicants brought themselves within the Danish tax system and became Danish taxpayers is equally misconceived. As the Court pointed out during the course of argument, their applications were all based on the lie that they had paid tax in the first place, which on SKAT's case they had not. That attempt to characterise themselves as taxpayers cannot possibly bind SKAT as the victim of their fraud and the alleged fraud defendants cannot seek to take advantage of their own wrongdoing to bring themselves within Dicey Rule 3.

CUM  
dividend

Dividend  
payment

EX  
dividend

Time

4. Investor A  
receives a tax

Investor A's  
shares are  
worth 19m

7. Investor  
B sells

# I.A Jurisdiction to tax – DK cum ex case – Dicey rule 3 – Sovereign powers rule

60. Lord Pannick QC submitted that even if, contrary to SKAT's submissions, there were to be the possibility in this case of the application of a wider sovereign powers rule within Dicey Rule 3, there is in relation to that wider rule a limitation, as recognised in the passage at [5-40] of *Dicey* itself on which he relied, of public policy. The court will not decline to hear a case on the grounds that the claimant is seeking to exercise sovereign powers if there is a public policy reason to do so.

129. The argument by the alleged fraud defendants that the claim is precluded by the wider sovereign powers rule within Dicey Rule 3 is equally misconceived. In bringing a claim to recover the monies of which it was defrauded, SKAT is not doing an act of a sovereign character or enforcing a sovereign right, nor is it seeking to vindicate a sovereign power. Rather it is making a claim as the victim of fraud for the restitution of monies of which it has been defrauded, in the same way as if it were a private citizen.

140. Furthermore, as I have already intimated at [46] above, the alleged fraud defendants' reliance on the administrative procedures in which SKAT engaged to revoke its decisions to pay refunds is nothing to the point. There is no question of those administrative decisions somehow being a pre-condition of the present claims being brought and, far from supporting the alleged fraud defendants' case that by these proceedings SKAT is exercising sovereign powers, they support SKAT's case that it is seeking to resile from the powers that it was induced by fraud to exercise. Likewise, the first six stages of Mr Jones QC's seven-stage process referred to at [81] above are just part of the background to how the fraud was committed and, even if they could be characterised as sovereign acts, notwithstanding that at least stages (iii) to (v) were induced by fraud, they do not render the seventh stage, the claim made in these proceedings, either a claim for unpaid tax or the exercise of a sovereign power.

142. Furthermore, I agree with Lord Pannick QC that there is nothing in the US-Denmark DTA which entitles SKAT to recover the overpayments induced by fraud. Judge Kaplan dealt with the US-Denmark DTA in his Memorandum Opinion in the SKAT Litigation in New York saying that the DTA was irrelevant because SKAT's claims did not seek to collect tax owed by the defendants and covered by the DTA. Mr Beal QC relied upon the fact that SKAT had invoked mutual assistance at international level in order to obtain information from a number of other states including from the IRS. However, contrary to his submission, this does not demonstrate that SKAT is exercising sovereign powers in pursuing this claim. It has been open with the alleged fraud defendants as to the information it has obtained and has not sought to use it in these proceedings so as to give itself some special advantage only available to a sovereign body. It has not made some binding determination which has a special evidential effect in these proceedings.

146. Given the firm conclusion I have reached that Ground 1 should succeed because the claim against the alleged fraud defendants is not inadmissible by virtue of Dicey Rule 3, it is not necessary to reach any conclusion on SKAT's alternative case that, if the wider sovereign powers rule were otherwise applicable, the public policy exception to that rule should apply here. All that it is necessary to say is that, contrary to the argument on behalf of the alleged fraud defendants that Dicey Rule 3 is always absolute, it seems to me that the view expressed *obiter* by this Court in *Iran* that there is a public policy exception to the wider sovereign powers rule, is correct. Whilst not deciding the point, I can see much force in Lord Pannick QC's submission that the exception should apply here in a case of a major international fraud.

CUM  
dividend

bank shareholder

Dividend  
payment

bank shareholder

EX  
dividend

Investor A, B & C  
share the tax  
reimbursements

Time



# I.A Jurisdiction to tax – DK cum ex case – Why not Art. 27?

## ARTICLE 24— Mutual Agreement Procedure

### DK- UK Treaty

- (1) Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident.
- (2) The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention.
- (3) The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together to consider measures to counteract improper use of the provisions of the Convention.
- (4) The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.

## ARTICLE 25— Exchange of Information

- (1) The competent authorities of the Contracting States shall exchange such information as is relevant for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies or authorities) shall use the information only for such purposes.
- (2) In no case shall the provisions of paragraph (1) of this article be construed so as to impose on a Contracting State the obligation:
  - (a) To carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
  - (b) To supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State; or
  - (c) To supply information which would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

## ARTICLE 26— Diplomatic Agents and Consular Officers

Nothing in this Convention shall affect the fiscal privileges of diplomatic agents or consular officers.

## ARTICLE 26— Exchange of Information

### DK- US Treaty

- (1) The competent authorities of the Contracting States shall exchange such information as is relevant for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention, including information relating to the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. The exchange of information is not restricted by Article 1 (General Scope). Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
- (2) In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:
  - (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
  - (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State; or
  - (c) to supply information which would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).
- (3) Notwithstanding paragraph 2, the competent authority of the requested State shall have the authority to obtain and provide information held by financial institutions, nominees or persons acting in an agency or fiduciary capacity, or respecting interests in a person. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall obtain that information in the same manner and to the same extent as if the tax of the firstmentioned State were the tax of that other State and were being imposed by that other State, notwithstanding that the other State may not, at that time, need such information for purposes of its own tax. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings), to the same extent such depositions and documents can be obtained under the laws and administrative practices of that other State with respect to its own taxes.
- (4) For purposes of this Article, the Convention shall apply, notwithstanding the provisions of Article 2 (Taxes Covered), to taxes of every kind imposed by a Contracting State.

## ARTICLE 27— Administrative Assistance

- (1) The Contracting States undertake to lend assistance to each other in the collection of taxes referred to in Article 2 (Taxes Covered), together with interest, costs, additions to such taxes, and civil penalties, referred to in this Article as a "revenue claim."
- (2) An application for assistance in the collection of a revenue claim shall include a certification by the competent authority of the applicant State that, under the laws of that State, the revenue claim has been finally determined. For the purposes of this Article, a revenue claim is finally determined when the applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted.



CUM  
dividend

1) Simplified figure representing





# I.A Jurisdiction to tax – DK cum ex case – What happened to ED&F Man

7. The position of ED&F Man is different in the sense that there is no allegation that they were implicated in a fraud. Although it is alleged that misrepresentations were made by them, the misrepresentations are said to have been negligent.

27. The judge gave permission to appeal on Ground 2 but refused it on Ground 1 which, before the judge, was pursued against all the defendants including ED&F Man. The application for permission to appeal on Ground 1 was renewed before this Court but not against ED&F Man. Permission to appeal was granted by Males LJ. Ground 1 was not pursued against ED&F Man for what were described by Mr Fealy QC for SKAT as “pragmatic reasons” from which it follows that, unless SKAT is successful on Ground 2 against ED&F Man, it has to accept that its claim against them is inadmissible because of Dicey Rule 3.

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 *Nordrhein-Westfalen v Rosenthal* and *Harvardsky v Kozeny* referred to at [57] to [59] above, that in those circumstances, the revenue rule should not apply.

1. Invest  
in comp

B

2. Investor C sells s  
Investor B without  
selling)

div

C

6. Investor C delivers shares worth 19 m to investor B and pays him an additional 750k



8. Investor B receives a tax certificate to reimburse 250k of dividend tax. Investor A, B & C share the tax reimbursements

Time

