English Court of Appeal Finds an Issue Estoppel Based on a Judgment Which Had Already Been Overturned by the Supreme Court

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In *Skatteforvaltningen v MCML Ltd* [2025] EWCA Civ 371, the Court of Appeal confirmed, by majority, that findings on points of law in earlier proceedings can produce an issue estoppel that bars later proceedings. It also unanimously emphasized the deferential standard of appellate review when a litigant challenges a first instance judge's evaluation of the factors relevant to an abuse of process argument.

This marks the second time this year that the Court of Appeal has considered issue estoppel, after *Hulley Enterprises Ltd & Ors v The Russian Federation* [2025] EWCA Civ 108, which we covered previously.

Background. In 2018, the Danish revenue authority—Skatteforvaltningen ("SKAT")—launched claims against dozens of defendants (the "2018 Defendants"), alleging they had induced it to make refunds of withheld Danish taxes to them which were not due (the "2018 Claims"). Among various other causes of action, SKAT alleged the 2018 Defendants had misrepresented to it that they held shares in Danish companies and that the ultimate beneficial owners of those shares were entitled, pursuant to double tax treaties with Denmark, to refunds of any taxes withheld by SKAT on those companies' dividends. Against most of the 2018 Defendants, SKAT alleged fraudulent misrepresentation. Against the remainder, including a Defendant known as ED&F, it only alleged negligent misrepresentation. In all, SKAT sought to reclaim £1.5bn in wrongly issued withholding tax refunds—roughly £75mn was claimed against ED&F, across 420 disputed withholding tax applications.

The 2018 Defendants argued that SKAT's 2018 Claims were an attempt to enforce Danish revenue law via the English courts and so were barred by the foreign revenue rule. Andrew Baker J agreed and dismissed the 2018 Claims against all of the 2018 Defendants. SKAT appealed this decision in relation to every 2018 Defendant apart from ED&F to the Court of Appeal. During the Court of Appeal hearings on the revenue rule, SKAT's counsel explained that its choice not to appeal the dismissal of the 2018 Claims against ED&F was 'pragmatic'—the claims against ED&F were based on negligence rather than fraud, and made up less than 5% of the total claimed. In the event, the Court

of Appeal overturned Andrew Baker J's decision on the revenue rule and on a further appeal the Supreme Court agreed with the Court of Appeal.

As a result, after the Supreme Court's revenue rule decision, SKAT could pursue its claims against all the 2018 Defendants apart from ED&F. That trial recently concluded, and judgment is awaited. But in parallel, in late 2022, SKAT launched a second batch of claims against ED&F (the "2022 Claims"). These 2022 Claims concerned 281 of the original 420 applications for withholding tax refunds on which SKAT had based its 2018 Claims against ED&F, but now SKAT said those 281 applications were fraudulent rather than negligent. In addition, SKAT made new claims about five previously unchallenged applications ED&F had made for withholding tax refunds.

ED&F applied for SKAT's 2022 Claims to be struck out, arguing either that SKAT was issue estopped by Andrew Baker J's dismissal of the 2018 Claims against them or otherwise the 2022 Claims were an abuse of process.

Bright J refused to strike out on both grounds and ED&F (now known as MCML Ltd) appealed to the Court of Appeal.

Issue Estoppel. On issue estoppel, the Court of Appeal unanimously agreed that:

- An issue estoppel arises in cases where a constituent issue forming part of the cause of action was admitted or determined in prior proceedings between the same parties (citing Diplock LJ's classic formulation from *Thoday v Thoday* [1964] 1 All E.R 341);
- Prior judgments have generally stressed the need strictly to apply the test that the issues be the same;
- The policy behind issue estoppel is that it would be unjust and unreasonable to require the re-litigation of a settled issue between the same parties; and
- Issue estoppels can arise on questions of fact, of construction (unless later decisions strongly indicate the earlier one was wrong) and the legal consequences of facts (for example, the classification of something under a statute).

On the facts, ED&F contended that Andrew Baker J's decision established that *any* private law claims to recover compensation for withholding tax refunds SKAT had been wrongly induced to make fell afoul of the revenue rule. For Nugee LJ, this formulation was overbroad because it suggested it is possible for an issue estoppel on a pure point of law, untethered from any linkage to the transaction or circumstances at issue in the case. He thought the weight of authority stood against such an estoppel and therefore held that that ED&F's formulation needed saving by saying Andrew Baker J's decision

applied only to the 420 vouchers which SKAT had complained about in the 2018 Claims. Because nothing in Andrew Baker J's decision turned on any distinction between negligent and fraudulent misstatements, this estoppel therefore prevented SKAT from bringing the 2022 Claims in respect of the overlapping 281 vouchers. For Nugee LJ, what ED&F could not prevent, however, was SKAT's new 2022 Claims over the 5 additional vouchers.

Newey LJ, with whom Popplewell LJJ agreed, had no equivalent difficulty with finding that issue estoppels can arise on points of law. The majority found that ED&F were entitled to a strike out of all of SKAT's 2022 Claims.

Unfortunately for practitioners, the Court of Appeal did not spend long considering the principled arguments in favour of either approach. The result is at least initially unintuitive; a claimant can be bound on a point of law by a decision which has been unanimously overturned by the Supreme Court in respect of other similarly situated defendants. Accordingly, we expect the issue to be subject of more detailed consideration in future. The wait may not be long, as SKAT's application for permission to appeal to the Supreme Court is pending.

Abuse of Process. By contrast, the Court of Appeal was unanimous on every aspect of its reasoning on abuse of process, confirming that:

- The purpose of the abuse jurisdiction is to prevent a party from raising a point in later proceedings which they should have raised earlier (citing Lord Bingham in *Johnson v Gore-Wood* [2002] 2 AC 1);

- The fact a party could have raised a point by a given date does not necessarily mean they should have done so for the purposes of finding an abuse of process (further citing Lord Bingham in *Johnson*);

- The appellate review of a first instance judge's decision on abuse is deferential because they make a multifactorial, evaluative, and discretionary judgment. As a result, they only make a legal error capable of correction on appeal if they omitted to consider a material factor, considered an immaterial factor or otherwise erred in principle;

- Relevant factors include the potential resources wasted by allowing a point which should have been raised earlier to be litigated now and the balance of (in)justice between the parties, including the value and importance of the issues in dispute; and

- There is no automatic rule that if a party would suffer double vexation, the judge must automatically find there would be an abuse of process.

On the facts, Nugee LJ found essentially no merit in any of ED&F's challenges to Bright J's refusal to find an abuse of process, underscoring the public policy emphasis that English courts place on allowing claims of fraud to proceed to trial.

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