knowing receipt liability in cases where crediting the account holder's account will destroy the claimant's continuing equitable interest (e.g. payments which reduce the account holder's overdraft)? The beneficial receipt inhibits banks' liability, even though the claimant must logically have a continuing equitable interest in their hands when cash is deposited or payment into the receiving bank's clearing account is made (tracing into a bank account with a positive balance would not otherwise be possible). One could say that the possibility of knowing receipt liability is unnecessary in this situation as banks can be liable for inconsistent dealing instead. However, challenging questions then arise about what the appropriate degree of fault for inconsistent dealing is (see Harpum, above) and where it should be set in this situation. Both matters require further thought.

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A TAXING DECISION

IT is a well-established principle of English law, formulated in Dicey, Morris and Collins, *The Conflict of Laws* (15th ed., 2012) as Rule 3 (changed to Rule 20 in 16th ed., 2022) that English courts will not enforce foreign revenue, penal or other public laws ("Rule 3"). In *Skatteforvaltningen v Solo Capital Partners* [2022] EWCA Civ 234 ("*Solo Capital Partners*") the Court of Appeal sought to clarify when a claim involves the enforcement of a foreign revenue, penal or other public law. It also sought to clarify the relationship between Rule 3 and the Brussels Regulation (Recast) (1215/2012), which applied because the proceedings were commenced before the end of the UK–EU transition period. The Court of Appeal correctly held that Rule 3 cannot apply to a private law claim made by a foreign tax authority when no tax is owed to that authority. However, the Court of Appeal was on less firm ground in holding that Rule 3 and the Brussels Regulation were mutually exclusive. This note will conclude by suggesting that disputes involving Rule 3 would be better dealt with by the doctrine of *forum non conveniens*.

Skatteforvaltningen ("SKAT"), the Danish tax authority, made several mistaken tax refunds under the Danish withholding tax regime. Under the Danish Withholding Tax Act, legal persons who are shareholders of Danish companies, but not tax resident in Denmark, are liable to pay 27 per cent tax in respect of dividends paid to them by Danish companies. This sum is withheld by the Danish companies when the dividends are paid. The Danish companies then pay the withheld sum to SKAT directly. Where the tax withheld exceeds the final tax due under a double taxation

treaty, the taxpayer can apply to SKAT for a refund of the excess withheld. SKAT is then under an obligation to refund that excess within six months.

The multiple defendants were not shareholders of Danish companies and did not receive any dividends out of which excess tax was withheld. Nonetheless, they applied for refunds from SKAT, falsely representing that they were such shareholders. SKAT issued refunds amounting to £1.44 billion to the defendants based on these misrepresentations. It brought claims in England, where the defendants were domiciled, to recover that sum on the basis of fraudulent and negligent misrepresentation. The applicable law and precise cause of action were yet to be determined.

Two preliminary issues came before the Court of Appeal. First, did the claims fall within the ambit of Rule 3? In other words, were these claims inadmissible because they sought the enforcement of a foreign revenue, penal or other public law? Second, if the claims did fall within the scope of Rule 3, could the rule apply where the court had mandatory jurisdiction under the Brussels Regulation? These issues are addressed in turn.

Sir Julian Flaux C., with whom Phillips L.J. and Stuart-Smith L.J. agreed, held that the claims did not fall within the scope of Rule 3. The claims did not amount to the enforcement of a foreign revenue, penal or other public law.

The claims did not amount to the enforcement of a foreign revenue law because it is an essential element of this aspect of Rule 3 that there is an outstanding liability to pay tax (at [127]). In the present case, the defendants were never liable for tax under the Withholding Tax Act. The defendants were not shareholders of Danish companies to whom dividends had been paid. As such, the claims by SKAT cannot have been concerned with the enforcement of foreign revenue law. Instead, these claims were concerned with ordinary, albeit high value, fraud.

Neither did the claims amount to the enforcement of any other public law, a broader category. This is because the claims did not enforce a sovereign right or vindicate a sovereign power (at [129]). Its claims, as the victim of a fraud, were the same as those available to any other ordinary citizen.

On this point, the Court of Appeal's judgment is correct. Where the claims being brought are ordinary private law claims, it is difficult to justify a blanket refusal of jurisdiction by reference to Rule 3. Rule 3 is principally aimed at preventing the extraterritorial enforcement of sovereign rights, being those rights which are not available to the ordinary citizen: *Government of India v Taylor* [1955] A.C. 491, 511 (H.L.). English law has exceptionally, from time to time, denied jurisdiction to private law claims by reference to Rule 3, but it is difficult to draw any coherent and unifying rationale from these cases. In *Mbasogo v Logo Ltd. (No 1)* [2006] EWCA Civ 1370, [2007] Q.B. 846, in which the claims were pleaded as ordinary tort claims, Rule 3 was invoked to prevent the court

from becoming involved in foreign affairs. In *QRS 1 APS v Frandsen* [1999] 1 W.L.R. 2169 (C.A.) private law claims which were funded by a foreign revenue were denied jurisdiction by reference to Rule 3 because the proceeds of the claim would have been applied to satisfy an outstanding tax liability. In any event, neither extraordinary rationale could have applied to *Solo Capital Partners*.

Holding that the claims did not fall within the scope of Rule 3 should have disposed of the appeal in its entirety. However, for reasons which remain mysterious, SKAT conceded that its claims against one of the defendants, ED&F Man, fell within the scope of Rule 3, rendering them inadmissible. In relation to these claims, SKAT relied on the effect of the Brussels Regulation. SKAT argued that the application of Rule 3 undermined the effectiveness of the scheme by which the Brussels Regulation allocated mandatory jurisdiction.

The Court of Appeal made short shrift of this argument. Sir Julian Flaux C. held that the Brussels Regulation simply did not apply. The Brussels Regulation only applies to "civil and commercial matters" (art. 1.1). Where claims fell within the scope of Rule 3, "it necessarily follows" that they did not concern "civil and commercial matters" (at [150]). As such, the effect of the Brussels Regulation on Rule 3 did not need to be considered.

On this point, the judgment of the Court of Appeal seems incorrect. It does not follow from the applicability of Rule 3 that the claims do not concern "civil and commercial matters". As outlined above, Rule 3 sometimes applies to cases involving ordinary private law claims. For example, Rule 3 denies jurisdiction to private law claims the proceeds of which are to be applied to satisfy an outstanding tax liability. Yet, such claims appear to concern "civil and commercial matters" for the purposes of Article 1.1 of the Brussels Regulation (see e.g. Case C-266/01, *Preservatrice Fonciere TIARD S.A. v Staat der Nederlanden* [2003] E.C.R I-4867, where a claim on a contract which guaranteed a customs debt was held to concern a "civil and commercial matter"). As Rule 3 and Article 1.1 can both apply on the same set of facts, little can be inferred from the mere applicability of Rule 3 about the applicability of the Brussels Regulation.

The Court of Appeal should have engaged with whether the Brussels Regulation applied irrespective of its conclusions on Rule 3. As the claims in *Solo Capital Partners* were ordinary private law claims, capable of being invoked by the ordinary citizen, the better view is that the claims did concern "civil and commercial matters", such that the Brussels Regulation applied. The court should have dealt with the difficult question of whether Rule 3 undermines the effectiveness of the regulation, as Andrew Baker J. did at first instance.

The above has illustrated some of the difficulties that any dispute involving Rule 3 is likely to involve. These difficulties stem from the fact that a

rationale which can explain all of the cases in which Rule 3 applies is difficult to identify. The complexity in this area has been furthered in recent years through the introduction of various public policy exceptions to Rule 3, which Sir Julian Flaux C. in *Solo Capital Partners* suggested should be extended to major international fraud (at [146]). As a result of these exceptions, the rule does not apply in some instances where any plausible rationale for it would suggest it should. All this complexity suggests that, if there is some simpler mechanism by which the same outcomes can be achieved, there may be good reasons to abandon Rule 3.

The doctrine of *forum non conveniens* might be that simpler mechanism. Where a claim is brought before an English court, the court can decline to exercise its jurisdiction where a different forum is clearly and distinctly more appropriate for the trial of the dispute. The objection to the availability of the English forum in most cases in which reliance on Rule 3 has been successful is that such claims should properly be brought in the courts of the countries the law of which the claimant is trying to enforce. Channelling this reasoning through *forum non conveniens* would help rationalise the haphazard applicability of Rule 3.

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EXCLUSIVE JURISDICTION IN PATENT ENTITLEMENT AND OWNERSHIP DISPUTES UNDER THE RECAST BRUSSELS I REGULATION

EXCLUSIVE jurisdiction in intellectual property (IP) disputes has been the subject of many court decisions in recent years, both in the EU and beyond. The judgment of the CJEU in *IRnova v FLIR* is the latest European development in this area (8 September 2022, C-399/2, EU:C:2022:648). It concerns the interpretation of Article 24(4) of the Brussels I Regulation 1215/2012 (Brussels Ia), which confers exclusive jurisdiction on the courts of the Member State of deposit or registration "in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence". In its judgment, the CJEU not only held that this article does not apply in entitlement and ownership disputes based on inventorship, but it also denied its application to patents registered in non-EU states.

The dispute involved two Swedish companies in the infrared industry. The plaintiff, IRnova, brought proceedings in Sweden arguing that it was entitled to American patents as well as European, American and Chinese patent applications registered and filed by the defendant, FLIR.

https://doi.org/10.1017/S0008197322000794 Published online by Cambridge University Press