Neutral Citation Number: [2023] EWCA Civ 695

Case No: CA-2022-000812

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
MR JUSTICE EDWIN JOHNSON AND UPPER TRIBUNAL JUDGE RUPERT JONES
[2022] UKUT 00045 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2023

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE NUGEE
and
LADY JUSTICE FALK

- -

Between:

ROYAL BANK OF CANADA	**Appellant**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Jonathan Peacock KC and Sarah Black (instructed by **Norton Rose Fulbright LLP**) for the **Appellant**
Jonathan Bremner KC and Michael Ripley (instructed by **Solicitor and General Counsel to the Commissioners for HMRC**) for the **Respondents**

Hearing dates: 17 and 18 May 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction

1. This appeal concerns the corporation tax treatment of payments made to the Appellant, the Royal Bank of Canada ("RBC"), pursuant to rights acquired by it in 1993 from the receiver of a Canadian oil and gas corporation, Sulpetro Limited ("Sulpetro"). Sulpetro had been granted the rights under a sale and purchase agreement ("SPA") that it had entered into in 1986 with BP Petroleum Development Limited ("BP"), the commercial effect of which was to transfer to the BP group Sulpetro's interest in the Buchan oil field, a field located within the UK sector of the continental shelf. The rights transferred by Sulpetro's receiver to RBC comprised a "royalty" in respect of production from Buchan, broadly equal to half of the amount by which the market value of each barrel of oil produced exceeded US$20.

2. HMRC's position is that the profits arising to RBC fall within the scope of UK corporation tax and are taxable as part of a deemed separate "ring fence" trade applicable to oil-related activities, to which a supplementary charge also applies. RBC's position is that the terms of the UK/Canada Double Tax Convention (the "Treaty") do not permit the UK to exercise taxing rights over the profits, and that in any event the relevant domestic legislation does not render the profits chargeable to UK tax.

3. HMRC succeeded in both the First-tier Tribunal ("FTT") and the Upper Tribunal ("UT"). RBC appeals with the permission of this Court.

4. As in the UT, Jonathan Peacock KC and Sarah Black appeared for RBC and Jonathan Bremner KC and Michael Ripley appeared for HMRC. I am grateful for the clear written and oral submissions of Counsel for both parties.

The facts

5. The facts are uncontroversial and can largely be taken from an agreed statement of facts, salient parts of which were recorded in the FTT decision as follows:

> "3. The Appellant carries on a banking business in Canada and in other jurisdictions through branches and subsidiaries. The Appellant carries on business in the United Kingdom through a branch based in London.
>
> 4. In the early 1980s the Appellant advanced a secured loan (the 'Loan') [of $540 million Canadian Dollars ('CAD')] to Sulpetro Limited ('Sulpetro'), a Canadian company engaged in oil exploration and exploitation activities. Sulpetro carried on its oil exploration and exploitation activities in (inter alia) the Buchan Field of the North Sea. The Buchan Field lies within the United Kingdom sector of the continental shelf (i.e. within the areas designated by Order in Council under section 1(7) of the Continental Shelf Act 1964).
>
> 5. A licence to explore and exploit the Buchan Field (the 'Licence') was granted by the United Kingdom government to Sulpetro (UK) Limited ('SUKL'), a United Kingdom incorporated and resident subsidiary of Sulpetro. SUKL and Sulpetro agreed pursuant to an "Illustrative

Agreement" that Sulpetro would incur all the development and exploitation costs in relation to the Buchan Field and, in return, Sulpetro would receive the Licence holder's share of the oil won from the Buchan Field.

6. Sulpetro entered into financial difficulties in 1985 and the Appellant appointed a receiver in 1987.

7. Sulpetro sold its interest in the Buchan Field to BP Petroleum Development Limited ('BP') a United Kingdom incorporated and resident company on 7 December 1986 under a Sale and Purchase Agreement ('SPA'). [In fact, the FTT notes that the sale appears to have occurred on 22 December 1986.]

8. As set out in the SPA, Sulpetro transferred to BP: (1) "the Shares", being 100% of the issued share capital in SUKL; and (2) certain "Tangible Assets", "Sulpetro's Licence Interests" (being all beneficial rights and interests in the Licences held by Sulpetro) and certain Data. Under Clause 4.1 of the SPA the cash consideration paid by BP was allocated between (a) Sulpetro's Assets other than the Shares and Sulpetro's Licence Interests, (b) Sulpetro's Licence Interests and (c) the Shares in SUKL.

9. Under the SPA BP agreed, in addition, to make a series of "other payments". These included (SPA clause 5.4) the payment of (what was described as) a royalty to Sulpetro in respect of (inter alia) all production from the Buchan field (the 'Payments'). In broad terms, the Payments were payable where the market price per barrel of oil (less certain expenses) exceeded USD $20 per barrel. It is these Payments that are the subject of this appeal.

10. In 1993, Sulpetro was in financial difficulties and went into receivership. The Appellant was a creditor of Sulpetro. The receiver was discharged by court order from its obligations as receiver manager of all the undertaking, property and assets of Sulpetro. Pursuant to the court order the "BP Petroleum Limited royalty interest" (i.e. the right to the Payments) was assigned to the Appellant for nil consideration. Sulpetro was also dissolved from the register of Corporations in Canada for "noncompliance" on 4 October 1993.

11. The unrecovered debt at the time of the court order was approximately CAD $185 million. The Appellant treated the loan of CAD $185 million to Sulpetro as a bad debt which was written off in its accounting period ended 31 October 1993, with an equivalent tax deduction obtained by the Appellant in Canada. Since that time, Payments received by the Appellant have been accounted for as a recovery of the bad debt and, for Canadian tax purposes, the Appellant has treated the Payments as taxable income in the year the amounts were paid.

12. BP's interest in the Buchan field was subsequently transferred to Talisman Energy Inc. As a result of that transfer, Talisman took on (and BP divested itself of) the legal obligation to make the Payments pursuant to the

> SPA. Talisman has made the Payments to the Appellant in the accounting periods to which this appeal relates. The position, therefore, is that Talisman had a legal obligation to make the Payments and the Appellant has a legal right to receive the Payments.
>
> 13. No end-date was specified in the SPA for the Payments. As a result, the Payments will continue for as long as the Buchan Field is productive and the conditions for the making of the payment of the Payments are met."

6. For convenience, I will adopt definitions used in the agreed statement of facts. The following additional factual details and clarifications are also worth adding:

   a) RBC is a Canadian incorporated and tax resident company. Although it does have a London branch, there is no suggestion that the Loan or the Payments were in any way connected with that branch.

   b) The licence interest granted to SUKL in respect of the Buchan field conferred a 12.7% interest in it (FTT decision at [16]). It is clear from the SPA that, at least at the date of the sale by Sulpetro, the operator of the Buchan field was BP (clauses 3.4 and 3.5).

   c) As part of the completion steps contemplated by the SPA, the Illustrative Agreement was novated such that Sulpetro was replaced as a party by BP. However, the Licence remained held by SUKL.

   d) The summary set out above appears to suggest that there were two separate receiverships. In fact, Sulpetro went into receivership in 1987 and the receivership ended in 1993, when its remaining assets were distributed to creditors and RBC wrote off the outstanding balance of the Loan as a bad debt.

   e) The assignment of the rights to the Payments to RBC was made for a nominal consideration of $1 on 28 October 1993, pursuant to an approval given by a court order which also discharged the receiver.

   f) As the summary above implies, Talisman also entered into a novation agreement under which it assumed the liability to make the Payments. It did so with effect from 1 July 1996.

   g) It appears from the evidence that for lengthy periods prior to 2000 no Payments became due, because the oil price was generally below $20. Thereafter, the price was routinely above $20 and Payments were made accordingly.

   h) Talisman has treated the Payments it made as deductible in computing its ring-fence profits from its UK oil exploitation trade.

   i) As the FTT explains, the position regarding Talisman is in fact a little more complex than the summary indicates, including that it has since been acquired by Repsol SA. However, nothing turns on that.

7. HMRC became aware of the Payments when they were checking Talisman's tax return for 2013, and obviously became concerned about the impact of the deductions on the amount of tax collected. This led to discovery assessments on RBC for the years ended

31 October 2008 to 2011 and amendments to RBC's self-assessments for the years ended 31 October 2012 to 2015. The total amount of tax at stake for these periods, excluding interest, is around £19m. RBC's understanding is that any UK tax chargeable would in practice not be capable of being credited against the Canadian corporate tax that it is has already borne on the Payments, resulting (it says) in an effective tax rate of over 80%.

The contractual documents

The Illustrative Agreement

8. No copy of the Illustrative Agreement is available, but it was common ground that it was entered into between Sulpetro and SUKL and that it took the form of an example agreement between two entities in the Signal Oil group that had been obtained from the National Archives. It also appears from the available documents that the Illustrative Agreement was dated 19 November 1982 and that it replaced an earlier informal understanding.

9. Based on the Signal Oil example, and adapting the text to remove differences that the parties agreed existed between the arrangements, the most relevant provisions are as follows (references to the "Licensee" being SUKL, the "Secretary" being the Secretary of State for Trade and Industry, and the "Regulations" being the applicable regulations related to petroleum production):

> "**Article 2**
> Subject to law, the Regulations, the license and this Agreement, Licensee shall conduct petroleum exploration operations in and in connection with all the areas covered by the license and, if petroleum is discovered, shall develop the areas and shall produce the petroleum therefrom. Licensee shall be and at all times remain responsible to the Secretary for (a) the full and proper discharge of all obligations under the license, and (b) the conduct of the operations in accordance with law and with the Regulations. Licensee may enter into contracts with others to perform on its behalf and under its responsibility such operations as Licensee may desire to be so performed.
>
> **Article 3**
> Licensee shall pay to the Department of Trade and Industry during the term of the license the consideration by way of royalty or otherwise for the grant of such license, determined by the Secretary with the consent of the Treasury and specified in the license, at the times and in the manner specified.
>
> **Article 4**
> Licensee shall ensure that all petroleum won and saved from the licensed area other than petroleum used therein for the purpose of carrying on drilling and production operations or pumping to field storage or refineries shall be delivered on shore in the United Kingdom unless the Secretary gives notice of his consent in writing to delivery elsewhere, and in such case Licensee shall ensure compliance with any conditions subject to which that consent is given.

> **Article 5**
> [Sulpetro] shall provide [100%] of all funds and equipment required for the exploration, development and operations under the license, and for all investment therefor and all expenses thereof, including the payment of royalty and other payments called for by the Regulations, the Schedules thereto, and the license, and for all activities for the full and proper discharge of all obligations under the license. … [Sulpetro] shall provide the budget and work programs, which shall comply in all respects with law, the Regulations, the license and other obligations of the Licensee, and such programs shall be carried out.
>
> **Article 6**
> [Sulpetro] shall own and receive [100%] of all the petroleum won and saved to which the licensee as defined in the license (i.e., all co-licensees) is entitled under the license. [Sulpetro] shall receive no reimbursement of any kind for any investment made or expenses incurred, and [Sulpetro] must look solely to income derived from the extraction of petroleum for the return of any capital so invested or expenses incurred. The disposal by [Sulpetro] of petroleum won and saved from the licensed areas shall be in accordance with law, the Regulations and the license…"

10. It can be seen from this that:

    a) It was SUKL, and not Sulpetro, that was responsible for developing the licenced area and producing the oil (Article 2).

    b) Similarly, it was SUKL and not Sulpetro that owed obligations to the Secretary of State under the licence, including for the payment of royalties and to ensure that oil was brought on shore (Articles 2 to 4).

    c) Sulpetro provided the funds (including for the payment of royalties) and equipment, and also provided the budget and work programs, which the parties agreed would be carried out (Article 5). Thus Sulpetro had the sole right to direct the work.

    d) Sulpetro would "own and receive" the oil won (Article 6).

SPA

11. The SPA was entered into between Sulpetro and BP on 22 December 1986. It recited that Sulpetro owned, and wished to sell to BP, the shares in SUKL and certain other assets in the UK and UK continental shelf. Clause 2 provided for the sale of "Sulpetro's Assets" for the "Consideration". The effect of the definitions was that the "Assets" sold encompassed the shares of SUKL, interests in identified UK licences held by Sulpetro or SUKL (including in respect of Buchan), and tangible assets (such as plant and equipment) and data relating to those licences, but with a carve out to the extent that those interests or other assets were held by SUKL itself (and so transferred via the sale of the shares). It was common ground that the effect was that the licence in respect of Buchan, which was held by SUKL, transferred to BP indirectly via the sale of the SUKL shares.

12. The Consideration was stated in clause 4. It amounted to around £17 million, of which £10,000 was allocated to the SUKL shares. Clause 4 provided for certain subsequent adjustments to the Consideration but had no cross-reference to the obligation to make the Payments in clause 5.4, or indeed to other payment obligations contained in clause 5.

13. Clause 5 is headed "Other Payments". It created a number of payment obligations. Clause 5.1 required BP to pay Sulpetro an amount equal to certain tax credits received. Clause 5.2 required both parties to make certain balancing payments in respect of cash balances, stock and operating costs and contained an express provision stating "for the avoidance of doubt" that those payments did not form part of the Consideration. Clause 5.3 made provision for payments between the parties in respect of certain insurance and audit related amounts.

14. Clause 5.4, the provision which created the rights to the Payments, is in the following terms (references below to Humbly Grove are to an onshore field in which Sulpetro/SUKL also had an interest and which was also transferred to the BP group pursuant to the SPA, but in respect of which no payments were subsequently made):

> "5.4.1 Subject to Clause 5.4.2, with effect from the Effective Date, BP shall, in respect of each Quarter pay a royalty to Sulpetro in respect of all production from Buchan and Humbly Grove.
> For each Quarter, a royalty rate, per barrel in US Dollars, to be applied to actual production from Buchan and Humbly Grove respectively, will be calculated for each field in accordance with the following formula:
>
> 50% (A-B)
>
> where:
> 'A' is the Actual Market Value (as hereinafter defined) per barrel of Petroleum production from Buchan and Humbly Grove attributable to the interests in those fields acquired by BP pursuant to this Agreement, less Royalty and Production Taxes payable per barrel. Such Royalty and Production Taxes per barrel shall be determined by dividing the actual Royalty and Production Taxes payable in a Quarter in respect of production from Buchan or Humbly Grove, as the case may be, by the number of barrels produced in such Quarter from the relevant field;
> 'B' is the notional market value per barrel of such Petroleum production in the same Quarter on the basis of a US$20 per barrel selling price less any Royalty and Production Taxes that would be payable on such notional market value.
> [The clause went on to define "Actual Market Value" in respect of Buchan, essentially as the actual sale price at the Grangemouth refinery or tankship at Hound Point, subject to a "floor" of the lowest spot price for comparable oil on the date of sale.]
> 5.4.2 The Royalty Payments contemplated in clause 5.4.1 shall only be made in respect of any Quarter where A is greater than B.
> …"

15. Clause 6 contained more detail about the quarterly accounting required and the dates that Payments were required to be made. Clause 8 dealt with the steps required at completion.

16. As already indicated, there is nothing that expressly provides for the Payments, or the right to the Payments, to form part of the "Consideration" for the Assets sold. Clearly, however, the right to the Payments was conferred in exchange for something. Mr Peacock submitted that it was most sensibly understood as a right created by BP in exchange for the novation of the Illustrative Agreement in its favour, and I did not detect that Mr Bremner disagreed with that proposition. I agree with Mr Peacock. Clause 8.1 of the SPA expressly provided for the novation to be entered into as one of the completion steps. It was the novation of the Illustrative Agreement that gave BP the right to any oil won from what had been the Sulpetro group's interest in the Buchan field, and accordingly it was that novation that would in due course enable BP to obtain the benefit of proceeds of sale of the oil, and give rise to an obligation to make the Payments.

The relevant legislative provisions

The charge to corporation tax on exploration and exploitation activities

17. The accounting periods in issue fall both before and after the rewriting of the corporation tax code in the Corporation Tax Act 2009 ("CTA 2009"), the Corporation Tax Act 2010 ("CTA 2010") and the Taxation (International and Other Provisions) Act 2010 ("TIOPA"). It was common ground that there were no material differences between the rewritten and predecessor legislation, so I will refer only to the rewritten legislation.

18. As a general rule, non-UK resident companies such as RBC are within the charge to corporation tax on trading profits only if they carry on the relevant trade in the UK through a UK permanent establishment, and only to the extent that the profits are attributable to that permanent establishment. However, oil-related activities in the UK and its sector of the continental shelf are subject to special rules. Any such activities carried on as part of a trade are treated as a (deemed) separate trade, pursuant to s.279 CTA 2010. Profits are subject to both corporation tax and a supplementary charge, and a "ring fence" operates to prevent the profits from being reduced by, for example, losses from other activities. Further, ss.1313(2) and (3) CTA 2009 have the effect that profits from such activities are deemed to be profits of a trade carried on in the UK through a UK permanent establishment. They provide:

> "(2) Any profits arising to a non-UK resident company –
> (a) from exploration or exploitation activities, or
> (b) from exploration or exploitation rights,
> are treated for corporation tax purposes as profits of a trade carried on by the company in the United Kingdom through a permanent establishment in the United Kingdom.
> (3) In this section –
> "exploration or exploitation activities" means activities carried on in connection with the exploration or exploitation of so much of the seabed and subsoil and their natural resources as is situated in the United Kingdom or the UK sector of the continental shelf,
> "exploration or exploitation rights" means rights to assets to be produced by exploration or exploitation activities or to interests in or to the benefit of such assets, and

"the UK sector of the continental shelf" means the areas designated by Order in Council under section 1(7) of the Continental Shelf Act 1964."

19. The Tribunals both held that the Payments were profits within s.1313(2)(b) on the basis that "exploration or exploitation rights" extends to "rights to … the benefit of" assets produced by exploration or exploitation activities.

The Treaty

20. The Treaty was originally entered into on 8 September 1978, and has since been amended. It has effect for the purposes of relieving double taxation by virtue of The Double Taxation Relief (Taxes on Income) (Canada) Order 1980 (SI 1980/709), made by an Order in Council pursuant to what is now Chapter 1 of Part 2 of TIOPA. It is uncontroversial that, if relief is available, then that will override the domestic charging provisions, even if those provisions are enacted later than the relevant Order in Council: s.6 TIOPA (previously s.788 of the Income and Corporation Taxes Act 1988). The constitutional reason for this is articulated in the illuminating judgment of Singh LJ in *Irish Bank Resolution Corporation Ltd v HMRC* [2020] EWCA Civ 1128, [2020] STC 1946 ("*Irish Bank*"), where he explained at [55]-[57] that the doctrine of implied repeal does not operate in the context of double tax treaties.

21. The most relevant provisions of the Treaty, in the form that was in force in the relevant periods, are as follows:

"**Article 3 General definitions**

1. In this Convention, unless the context otherwise requires:

(a)

…

(ii) the term "United Kingdom" means Great Britain and Northern Ireland, including any area outside the territorial sea of the United Kingdom which in accordance with international law has been or may be hereafter designated, under the laws of the United Kingdom concerning the Continental Shelf, as an area within which the rights of the United Kingdom with respect to the sea-bed and sub-soil and their natural resources may be exercised;

2. As regards the application of the Convention by a Contracting State any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes which are the subject of the Convention.

Article 6 Income from immovable property

1. Income from immovable property, including income from agriculture or forestry, may be taxed in the Contracting State in which such property is situated.

2. For the purposes of this Convention, the term "immovable property" shall be defined in accordance with the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or

the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property.
3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property and to profits from alienation of such property.
4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of professional services.

Article 7 Business profits
1. Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits that are attributable to the permanent establishment in accordance with the provisions of paragraph 2 may be taxed in that other State.
…
4. Where profits include items of income or gains which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

Article 12 Royalties
1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
…
4. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright, patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience, and includes payments of any kind in respect of motion pictures and works on film, videotape or other means of reproduction for use in connection with television broadcasting.

Article 13 Capital gains
1. Gains derived by a resident of a Contracting State from the alienation of immovable property situated in the other Contracting State may be taxed in that other State.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State … may be taxed in that other State.
…
4. Gains from the alienation of—
(a) any right, licence or privilege to explore for, drill for, or take petroleum, natural gas or other related hydrocarbons situated in a Contracting State, or
(b) any right to assets to be produced in a Contracting State by the activities referred to in sub-paragraph (a) above or to interests in or to the benefit of such assets situated in a Contracting State,

may be taxed in that State.
5. Gains from the alienation of—
(a) shares, other than shares quoted on an approved stock exchange, deriving their value or the greater part of their value directly or indirectly from immovable property situated in a Contracting State or from any right referred to in paragraph 4 of this Article…
may be taxed in that State.
6. The provisions of paragraph 5 of this Article shall not apply—
(a) in the case of shares, where immediately before the alienation of the shares, the alienator owned, or the alienator and any persons related to or connected with him owned, less than 10 per cent of each class of the share capital of the company…
8. Gains from the alienation of any property, other than that referred to in paragraphs 1, 2, 3, 4 and 5 of this Article shall be taxable only in the Contracting State of which the alienator is a resident.
…

Article 27A Miscellaneous rules applicable to certain offshore activities
1. The provisions of this Article shall apply notwithstanding any other provision of this Convention.
2. A person who is a resident of a Contracting State and carries on activities in the other Contracting State in connection with the exploration or exploitation of the sea bed and subsoil and their natural resources situated in that other Contracting State shall, subject to paragraph 3 of this Article, be deemed to be carrying on a business in that other Contracting State through a permanent establishment situated therein.
3. The provisions of paragraph 2 of this Article shall not apply where the activities referred to therein are carried on for a period or periods not exceeding in the aggregate 30 days in any 12 month period…"

The attestation provisions at the end of the Treaty are also relevant:

"In witness whereof the undersigned, duly authorised thereto, have signed this Convention.
Done in duplicate at London, this 8th day of September 1978, in the English and French languages, both texts being equally authoritative."

22. HMRC's position, accepted by the FTT and UT, is that the Payments fall within the definition of immovable property in Article 6(2), and specifically within what was referred to as the fifth limb of the extended definition in the second sentence, namely "rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources".

Treaty interpretation

23. There was no dispute between the parties about the principles to apply in interpreting an international treaty. Article 31(1) of the Vienna Convention on the Law of Treaties (1969) (the "Vienna Convention") requires a treaty to be:

> "… interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

24. Article 31 also provides that the context extends beyond the treaty itself to certain other sources, including subsequent agreements between the parties in respect of the interpretation of the treaty, subsequent practice that establishes such an agreement and any relevant rules of international law.

25. Article 32 permits recourse to further supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31, or to determine that meaning when it would otherwise be ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

26. As Lord Reed explained in *Anson v HMRC* [2015] UKSC 44, [2015] STC 1777:

> "[56] Put shortly, the aim of interpretation of a treaty is therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties. That intention is ascertained by considering the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose. Subsequent agreement as to the interpretation of the treaty, and subsequent practice which establishes agreement between the parties, are also to be taken into account, together with any relevant rules of international law which apply in the relations between the parties. Recourse may also be had to a broader range of references in order to confirm the meaning arrived at on that approach, or if that approach leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable."

27. Later in his judgment Lord Reed commented on the fact that the process of interpretation must take account of the fact that what is being interpreted is an international convention, not a UK statute. He said this:

> "[110] Article 31(1) of the Vienna Convention requires a treaty to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". It is accordingly the ordinary (contextual) meaning which is relevant. As Robert Walker J observed at first instance in *Memec* [1996] STC 1336 at 1349, 71 TC 77 at 93, a treaty should be construed in a manner which is "international, not exclusively English".
> [111] That approach reflects the fact that a treaty is a text agreed upon by negotiation between the contracting governments…"

He went on to emphasise in the same paragraph the courts' predisposition, when faced with "narrow and technical constructions", to favour an interpretation which reflects the "ordinary meaning of the words used and the object" of the treaty.

28. This echoes the well known passage of Lord Diplock's speech in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, at pp.281-282:

> "The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K.) Ltd.* [1978] AC 141, 152, 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation'."

29. The Treaty we are concerned with here, like most bilateral double tax treaties, is based on the OECD Model Tax Convention ("MTC"). As explained by Lord Briggs in *Fowler v HMRC* [2020] UKSC 22, [2021] 1 All ER 97, guidance as to how such a treaty is to be interpreted can also be found in OECD Commentaries on the MTC, which (even where they post-date the treaty in question) should be "given such persuasive force as aids to interpretation as the cogency of their reasoning deserves" (see at [16] and [18], citing Patten LJ's judgment in *Smallwood v HMRC* [2010] EWCA Civ 778, [2010] STC 2045 at [26(5)]; see also *Irish Bank*, where the 2008 version of the Commentary was considered in interpreting a treaty entered into in 1976).

30. Both parties were content to rely on the Commentary that accompanied the 2005 version of the MTC, which had been selected by RBC as the one closest to the tax years with which this appeal is concerned. Unless otherwise indicated, references below to the "Commentary" are to that version, rather than to the latest version which was published in 2017.

The decisions below

31. Additional issues were addressed by the FTT and UT that are not before this Court. A substantial part of the FTT decision addresses an unsuccessful challenge by RBC to the validity of the discovery assessments for the years ended 31 October 2008 to 2011. In both the FTT and UT, RBC also failed in an attempt to argue that, if the Payments were subject to tax, it should be entitled to deduct its loss on the Loan. The issues that arise on this appeal were, in brief summary, addressed as follows.

32. The FTT found that the rights to the Payments were created as part of the contractual arrangements under which the right to work the Buchan field, including the ownership of all oil won from it, was transferred to BP by Sulpetro. Talisman then assumed the obligation to make the Payments by way of part payment for the assignment to it of the right to work the field (and own the oil won). Further, the assignment of the rights from Sulpetro to RBC did not affect their fundamental nature.

33. Both the FTT and UT rejected RBC's arguments that the wording HMRC relied on in Article 6(2) of the Treaty was confined to income derived from the grant rather than the transfer of rights, that a restrictive interpretation was supported by the French text and by Article 13(4), and that Sulpetro (as opposed to SUKL) had in any event not held rights to work the oil.

34. As already mentioned, the FTT and UT also found that the Payments fell within s.1313(2)(b) CTA 2009.

The grounds of appeal

35. The grounds of appeal are as follows:

Ground 1: the UT erred in its interpretation of the Treaty, in particular: a) the interrelationship between Article 6 and Articles 7, 12, 13 and 27A; and b) the effect of the French language version of Article 6.

Ground 2: the UT erred in its application of the Treaty by wrongly proceeding on the basis that Sulpetro rather than SUKL had the right to extract oil, failing to take account of the true contractual and regulatory position.

Ground 3: the UT erred in its interpretation and application of s.1313 CTA 2009, in particular in determining that contractual payments computed by reference to another party's benefit from the sale of oil amounted to the benefit "of" the oil.

Respondents' notice

36. HMRC seek to uphold the UT's decision for the reasons it gave or alternatively for two additional reasons, namely:

a) even if the right to the Payments did not fall within the extended definition of immovable property in Article 6(2), the Payments were nonetheless sufficiently connected with the exploitation of the UK's sector of the continental shelf to constitute income from immovable property within Article 6(1); or

b) insofar as the Payments represented gains from the alienation of UK oil-related interests or shares deriving their value therefrom, they could be taxed pursuant to Article 13(4)(b) and (5)(a).

The parties' submissions in outline

Submissions for RBC

37. Mr Peacock submitted that the UT appeared wrongly to proceed on an assumption that the Payments should be taxed in the UK, rather than construing the Treaty in accordance with the Vienna Convention. Absent specific provision, the starting point was that Article 7 would preclude UK tax because the relevant profits were not attributable to RBC's UK branch. On a proper interpretation of the Treaty, including the French text, the relevant part of Article 6 applied only to the rights of a grantor to receive payments from a grantee as consideration for the grant of a right to work mineral resources. Only that sort of right properly fell to be treated as immovable property and therefore as giving rise to income from land, just as if a landowner derived income by working the land himself or (most analogously) received rental income. This interpretation was supported by the French text of Article 6, by the OECD Commentary on equivalent wording in the model article on royalties (which appears in Article 12 of the Treaty), and by Article 13. RBC's analysis did not leave a "hole" as suggested by the UT, but rather was consistent with the existence of a coherent code that also included Article 27A. HMRC's interpretation would render Article 13(4) otiose. The UT also misunderstood RBC's case in material respects.

38. Further, bearing in mind that SUKL and not Sulpetro held the Licence, Sulpetro had never held the right to work the relevant resources as Article 6 required, and had therefore not been in a position to confer that right on BP. Thus the Payments were not consideration "for … the right to work" Buchan. All Sulpetro (and so RBC, standing in its shoes) had was a contractual right to sums calculated by reference to oil production and oil prices. The UT's approach of looking at what it considered to be the "reality" was flawed. A similar point applied in response to the argument that the Payments fell within Article 6(1) in any event.

39. Mr Peacock further submitted that, in any event, RBC had no rights to the benefit "of the oil" within s.1313(2). It was Sulpetro, and later BP and Talisman, that had that benefit. RBC's claim was to a sum of money computed by reference to the price of oil.

Submissions for HMRC

40. Mr Bremner submitted that the correct starting point was the UK legislation rather than the Treaty, both because the Treaty was only relevant if domestic taxing provisions were engaged, and because under Article 3(2) undefined terms followed the domestic law of the relevant Contracting State. But in any event the FTT and UT accurately recorded the principles to apply and reached the correct conclusions. RBC's criticisms of the UT's decision were misplaced. If RBC's appeal were allowed then substantial profits derived from the exploitation of natural resources in the UK continental shelf would escape UK tax, and there would be scope for tax avoidance.

41. The argument that the words relied on in Article 6(2) were limited to payments made for the grant of rights was not supported by the terms of the Treaty, had no principled justification, would lead to irrational distinctions and would provide a ready means of avoiding tax. Articles 12 and 13 did not assist RBC, and Article 6 took priority over Article 7. In any event Article 6(1) applied without recourse to the extended definition of immovable property. Alternatively, the UT were wrong to reject the argument that the UK had taxing rights under Article 13, which it could exercise in a manner of its choosing, in this case by taxing the Payments as income rather than capital gains.

42. It was also incorrect to maintain that Sulpetro never had the "right to work", given the terms of the Illustrative Agreement. Sulpetro provided the funds and equipment and was responsible for both the "budget and work programs". It was also entitled to the oil won. It disposed of those rights to BP in consideration for the right to receive the Payments. RBC's approach fell foul of the requirement to construe a Treaty on broad principles of general acceptation, rather than constrained by technical rules of English law.

43. Further, s.1313 applied for the reasons given by the FTT and UT. The "benefit of" oil was distinct from rights to or interests in it. The result accorded with the purpose of the regime.

Discussion: Ground 1 – scope of Article 6

44. At the heart of Ground 1 is a question about the proper scope of Article 6. Specifically, Ground 1 is concerned with the meaning of the fifth limb of the second sentence of the definition of immovable property in Article 6(2), namely "rights to variable or fixed

payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources" (the "fifth limb").

45. For the reasons discussed below, I have concluded that the better interpretation of the fifth limb is that it is confined to rights to payments held by a person who has some form of continuing interest in the land in question to which the rights can be attributed. In reaching that conclusion, I have found support in a combination of the Commentary, other provisions of the Treaty and the French text of Article 6.

General: Article 6 and the MTC

46. An initial point to make is that, with two exceptions in Article 6(3) and (4), Article 6 follows the equivalent Article in the MTC very closely. There are no material differences between Article 6(1) and (2) and their equivalents in the MTC. This explains the inclusion of some language that might not otherwise have been chosen by the UK or Canada. In particular, while a reference to usufruct might have been at least partially appropriate given the application of civil law in Quebec, Mr Peacock explained that the reference to "provisions of general law respecting landed property" was originally designed to address an issue concerning property rights attached to Italian landed estates.

47. The Commentary explains the rationale for Article 6 in the following terms:

> "Paragraph 1 gives the right to tax income from immovable property to the State of source, that is, the State in which the property producing such income is situated. This is due to the fact that there is always a very close economic connection between the source of this income and the State of source."

48. Thus, Article 6(1) confers a right to tax income from immovable property on the State in which the property is located. This is on the basis that the property is the source of the income, and it is regarded as having a "very close economic connection" with the State in which it is located. In the case of business profits this taxing right will exist even though the relevant income is not otherwise taxable under Article 7 because it is not attributable to a permanent establishment in the relevant State: see Article 7(4). That point is also made clear by the reference to immovable property of an enterprise in Article 6(4). The Commentary confirms this and explains that, in the case of an enterprise, income may be only indirectly derived from immovable property, but that this will not prevent Article 6 from applying. The reference here to "indirectly" is presumably to the fact that, for a trader, the income may simply form a component of the trader's taxable profit, but nonetheless for Article 6 purposes it is not to be treated as losing its character as income from immovable property.

49. Article 6(1) is permissive. It confers a power to tax on the State where the property is located (the State of source), but it does not confer exclusive taxing rights: contrast Article 7(1), with its reference to "shall be taxable only in that State". The State of residence of a taxpayer who receives income from immovable property located in the other State would, therefore, typically be entitled to tax income falling within Article 6 as well as the State of source, subject to Article 21 of the Treaty which may require credit to be given for tax levied by the State of source.

50. The two departures from the MTC referred to above are the inclusion of a reference to profits from the alienation of property in Article 6(3), and an addition to Article 6(4) referring to income from immovable property used for the performance of professional services.

51. The former departure is of some relevance to this case. It reflects a reservation recorded in the Commentary on the part of Canada, in which Canada has reserved the right to include a reference to income from the alienation of immovable property in Article 6(3). I note that the inclusion of a reference to profits from alienation makes it clear that profits from the disposal of immovable property that are in the nature of income profits rather than capital gains – most obviously trading profits – can be taxed in the State in which the property is situated. In contrast, capital gains made on the disposal of immovable property would fall within Article 13(1). As to what constitutes capital gains rather than income profits, the effect of Article 3(2) of the Treaty is that that question is determined by reference to the tax laws of the relevant Contracting State (here the UK), because the term is not defined in the Treaty.

The definition in Article 6(2)

52. Article 6(2) defines immovable property. The first sentence of Article 6(2) makes clear that the definition applies for the purposes of the Treaty as a whole, and that the starting point is the domestic law of the Contracting State in which the property is situated. In the context of this case, and bearing in mind that Article 3 effectively extends references to the UK to include its sector of the continental shelf, that is a reference to English law or, possibly (and given Buchan's geographical location), to the laws of Scotland.

53. The second sentence of Article 6(2) lists certain items that are to be treated as immovable property, whatever the domestic law position. They include a mixture of physical items and certain legal rights, including rights of usufruct and, relevantly, the fifth limb. However, unlike the reference to usufruct the effect of the fifth limb is to treat the relevant property as being not the right to work etc itself but as comprising the <u>right to receive payment</u> as consideration for it.

54. This raises a question which in my view is relevant to determining the scope of the fifth limb. Article 6 permits a Contracting State to tax income from immovable property situated in its jurisdiction. That is straightforward to apply to physical objects and interests in or rights to use land such as usufruct. There would be little doubt that the location of the relevant property is the same as the location of the physical land. It is much less straightforward to apply to a purely contractual right to receive payments in exchange for a right to work land, at least where that right is held by a person with no interest in the land. Under principles of private international law, a contractual right of that nature might well be regarded as situated in the country in which it can be recovered or enforced, in accordance with the general rule for choses in action (*Dicey, Morris & Collins on the Conflict of Laws*, 16th ed, Rule 136 and 23-025). This would not necessarily be where the land is situated.

55. This difficulty can be resolved if the right in question is of a nature which has a legal, and not simply economic, link to land. In the case of mineral resources, the obvious example would be a right of a landowner to receive royalties under a mineral lease or licence, or their equivalents under other legal systems. No distortion of language would

be needed to conclude that such a right is situated in the State where the relevant land in which the landowner holds an interest is located. Even if the right to receive payments was strictly personal in nature there would be a clear link with the land because the recipient would hold it in his capacity as the owner of an interest in the land. Taxation of that income by the State in which the land is situated would accord with the clear purpose of the Treaty. The holder of the right would be deriving income from his interest in land situated in that State.

56. I comment further on Ground 1 below, but insofar as RBC's argument that the fifth limb should be restricted to grants of rights reflects the points I have just made I consider there to be substance in it. A restriction of that nature also finds some support in *Klaus Vogel on Double Taxation Conventions*, 5th ed. ("*Vogel*") at paragraphs 127-137, which refers to the fifth limb as covering:

> "debt-claims that the taxpayer receives as consideration for granting someone else the right to use the immovable property. In this respect, the remuneration claim is thus the economic substitute for the lost natural resources."

57. *Vogel* goes on to explain that the fifth limb governs the taxation of mineral royalties in particular. Interestingly, it also suggests that the principal relevance of providing that the rights to the payments should themselves comprise immovable property (rather than the right to work etc) was to enable taxing rights in respect of capital under Article 22 of the MTC to continue after the time of extraction and up to the point when the remuneration claim expires. Article 22 of the MTC permits taxation of capital represented by immovable property by the State where the property is located. There is no equivalent of Article 22 of the MTC in the Treaty.

58. Of further interest, *Vogel* also questions the scope of the fifth limb, particularly in the context of debt claims with "no more than a historical relation to the immovable property", noting that even debt claims secured by a mortgage are accepted as generally falling within Article 11 (the interest article) rather than Article 6.

59. This last point is reflected in the Commentary on Article 6, which states, without further elaboration, that:

> "No special provision has been included as regards income from indebtedness secured by immovable property, as this question is settled by Article 11."

60. Before leaving the Commentary, it is also worth noting some of the reservations expressed by various States in relation to Article 6. I have already referred to Canada's reservation of a right to tax income from the alienation of property. It is also of note that both New Zealand and Australia express broad reservations to include "rights relating to all natural resources".

61. I would further observe that, if HMRC were right, the tax treatment of rights relating to mineral and other natural resources would differ markedly from that in respect of other rights with some economic connection to the value of land. A comparison might be made with a provision included in the terms of sale of land for the purchaser to pay additional consideration (overage), for example if a successful development is

undertaken and a profit is made on a subsequent sale. If such an arrangement gave rise to an amount which could be characterised as income in the hands of the original seller then it might be taxed as profits from the alienation of the land under Article 6(3) of the Treaty. But it could not realistically be argued that the right to the payment itself fell to be treated as immovable property, such that a person other than the original seller who came to hold the right could be taxed under Article 6. In contrast, rights to such amounts under the terms of a lease granted to a developer might be capable of being treated as income from immovable property, even if received by someone other than the original vendor. While it could be said in response that Article 6 makes specific provision for mineral-related rights in the fifth limb, setting them apart from other land-related rights, rights of usufruct would not generally include rights to extract minerals (suggesting that mineral rights needed to be addressed specifically), and further *Vogel* provides an explanation about the need to address the treatment of extracted resources in a particular way (see [57.] above).

62. I will now turn to other provisions of the Treaty, before returning to the French text of Article 6(2) on which RBC relies. In summary, I agree with Mr Peacock, and respectfully disagree with the Upper Tribunal, that they assist RBC's case.

Article 12

63. Article 12 deals with intellectual property rights, and so is not directly applicable to this case. However, there is relevantly similar language in the definition of royalties in Article 12(4), which refers to "payments of any kind received as a consideration for the use of, or the right to use" such rights. It is true that the subject matter of the definition is the income itself (the "royalties"), whereas here we are concerned with income from the relevant rights, but that distinction is immaterial. Further, the difference in wording between "use" in Article 12, and "working" or "work" in Article 6, simply reflects the different subject matter.

64. The Commentary on Article 12 states at paragraph 8 that:

> "The definition covers both payments made under a license and compensation which a person would be obliged to pay for fraudulently copying or infringing the right. The definition does not, however, apply to payments that, whilst based on the number of times a right belonging to someone is used, are made to someone else who does not himself own the right or the right to use it (see, for instance, paragraph 18 below)."

65. Paragraph 18 gives an example of a "mixed" contract where an artist receives a fee for a musical performance but the performance is also recorded. It explains that the fee for the performance would fall under Article 17 of the MTC (which deals with income derived by performers and sportsmen and, broadly, permits the State where the performance occurs to levy tax), but royalties in respect of subsequent sales of the recording paid to the artist as holder of the copyright would fall within Article 12. However, if the copyright in the recording belongs to a person to whom the artist had agreed to provide his services or to a third party, then payments made to the artist would fall under Article 7 or 17, and not under Article 12.

66. The 2017 version of the Commentary includes an additional paragraph, paragraph 8.2, that emphasises that payments made in exchange for an outright transfer of rights do

not fall within Article 12. It states:

> "Where a payment is in consideration for the transfer of the full ownership of an element of property referred to in the definition, the payment is not in consideration "for the use of, or the right to use" that property and cannot therefore represent a royalty."

After commenting on potential classification difficulties in respect of certain transactions, such as exclusive licences for a limited period or a transfer of rights limited by geographical area, and emphasising the need to consider each case on its facts, the Commentary goes on to say this:

> "…in general, if the payment is in consideration for the alienation of rights that constitute distinct and specific property (which is more likely in the case of geographically-limited than time limited rights), such payments are likely to be business profits within Article 7 or a capital gain within Article 13 rather than royalties within Article 12. That follows from the fact that where the ownership of rights has been alienated, the consideration cannot be for the use of the rights. The essential character of the transaction as an alienation cannot be altered by the form of the consideration, the payment of the consideration in instalments or, in the view of most countries, by the fact that the payments are related to a contingency."

67. It is therefore clear that the words "payments of any kind received as a consideration for the use of, or the right to use" intellectual property rights is intended to be restricted to income received by someone who owns the relevant right (or the rights to use it). It does not apply to a person who has no interest at all in the relevant intellectual property, whether because they have alienated it or, like the artist who has agreed that copyright in a recording will be owned by a third party, never owned it. Given the similarity of wording, this is relevant to the interpretation of the fifth limb.

Articles 13 and 27A

68. Articles 13 and 27A, on which RBC also rely, are of more direct relevance in this case. It is important to consider them together, because they provide a coherent, and explicit, structure for the allocation of taxing rights in respect of natural resources, and in particular hydrocarbons, a resource of obvious practical significance to both States.

69. Article 27A, the first version of which was introduced with the first protocol to the Treaty in 1980 (SI 1980/1528), deals with offshore activities. It ensures that offshore exploration and exploitation activities will generally give rise to a deemed permanent establishment in the relevant State, with the result that taxing rights arise under Article 7. There is no equivalent of Article 27A in the MTC.

70. Article 13 deals with capital gains. In addition to Article 13(1), which follows the MTC and permits taxation of gains on the alienation of immovable property situated in the State in question, there are bespoke provisions in Articles 13(4) and (5) that (broadly) ensure that gains from the alienation of licences to explore for or exploit hydrocarbons and from assets produced from those activities can be taxed in the location of the activity, and further that tax cannot be avoided by an indirect disposal of such assets through the medium of selling shares in a company.

71. It is notable that the UK and Canada agreed to include these specific, and obviously carefully drafted, provisions in respect of offshore activity and disposals of assets related to hydrocarbon exploration and exploitation.

72. While it carried on activities in the North Sea, Sulpetro would have been within the scope of Article 27A (if it was not otherwise within the scope of UK tax). Further, the sale of its interests to BP would have fallen within the scope of both Article 13(4) and (to the extent that value was attributable to the shares of SUKL) Article 13(5). On the basis that the creation of the right to the Payments was most obviously associated with the novation of the Illustrative Agreement, and in particular the right under it to the oil won (see [16.] above), that element of the gain would most clearly fall within Article 13(4)(b) as a gain from the alienation of a "right to assets to be produced" by the relevant activity.

73. I will return to the points raised by the Respondents' Notice below, but leaving those to one side it is notable that the taxation treatment for which HMRC contend is not based on the specific provisions that the parties considered appropriate to include in respect of matters that were clearly of particular concern to them. Instead, HMRC rely on a provision that forms part of a definition taken directly from the MTC and that is not directed specifically at offshore or hydrocarbon-related activity.

74. It is also important to bear in mind that Article 13(1) captures gains on the alienation of "immovable property", a concept defined for the purposes of the entire Treaty by Article 6(2). In order for Article 13(4) to have meaningful effect, it must therefore follow that all or at least some of the assets listed in it would not otherwise fall within the definition of immovable property.

75. It is well established that a conclusion that a treaty provision is otiose should be avoided if that is reasonably possible. In *Anson v HMRC* Lord Reed said this at [94]:

> "Following the jurisprudence of the International Court of Justice (eg *United Kingdom v Albania (Corfu Channel)* [1949] ICJ 4 at 24), the court would be reluctant to conclude that a provision in an agreement made between two governments was otiose, if that conclusion could reasonably be avoided."

76. The point was also discussed by Mummery J in *IRC v Commerzbank AG* [1990] STC 285, 299, where he referred to the earlier decision of *Avery Jones v IRC* [1976] STC 290 in which Walton J had said (at pp.299–300):

> "… I think that the courts would always be very slow to refuse to give any meaning at all to a provision in an agreement made between two governments if any sensible construction at all could be placed on it."

Mummery J also referred to *IRC v Exxon Corporation* [1982] STC 356, where Goulding J departed from the plain meaning of the words in question because, unless he did so, the provision "would fail of effect".

77. In response to Mr Peacock's submission that HMRC's interpretation would render Article 13(4) otiose, Mr Bremner submitted that this was not the case because the fifth limb deals specifically with rights to payments, whereas Article 13(4) deals with rights

to drill etc and to assets to be produced. However, I agree with Mr Peacock that this does not address the substance of the point and that it results in incoherence. The rights described in Article 13(4) are conceptually much closer to the land than rights to payments within the fifth limb as that is construed by HMRC (that is, as not requiring the holder of the right to hold any continuing interest in the land). The notion of the parties choosing to spell out in Article 13(4) that rights to explore, drill for and take hydrocarbons, and rights to assets produced from those activities, are within the scope of Article 13, no doubt on the basis that it at least might not otherwise be the case that they comprise immovable property in any event, while being content to leave it to a rather obscure provision in Article 6(2) to catch rights to payments that relate in some way to those activities but are further removed from the land itself, seems to me to be rather extraordinary. The need for clarification would be greater with the latter rather than the former.

78. In my view, properly construed, Articles 13 and 27A, and in particular Article 13(4), support a narrower construction of the fifth limb than that for which HMRC contend. They provide a specially agreed, and coherent, set of provisions allocating taxing rights in respect of profits from offshore activities and gains on onshore or offshore hydrocarbon-related activities. Article 13(4) and (5) notably reflect the sort of split ownership structure in place between Sulpetro and SUKL, with Article 13(4)(b) expressly catching gains on rights to oil won. They do not extend to more remote forms of right.

79. It is worth noting that, if HMRC were correct, there would be further incoherence in respect of rights to work non-hydrocarbon related mineral resources. Article 13(4) would not apply, resulting in at least some doubt as to whether it was intended that the sort of rights described in Article 13(4) in respect of those other kinds of resources would otherwise fall within the definition of immovable property, because if they did then gains in respect of them would fall within Article 13(1) in any event and Article 13(4) would be unnecessary. However, on HMRC's interpretation of the fifth limb any gains from the alienation of <u>rights to receive payments</u> for rights to work such resources would fall within Article 13(1), even where they are held by an entity that has no interest at all in the land. In order to avoid incoherence it would be necessary to determine that Article 13(4) was in fact not required, because the sorts of rights referred to there are immovable property in any event. That would appear particularly problematic as regards Article 13(4)(b), because once minerals are extracted they are in principle movable, not immovable, property.

80. Thus, on HMRC's approach, a right to receive payments in respect of natural resources extracted under a right to work would fall within the fifth limb, such that a gain on its alienation would fall within Article 13(1) whether the resources were hydrocarbon-related or not. However, a gain made by the person holding the right to work and directly alienating the right to the resources to be produced would not fall within either provision, unless the right was either hydrocarbon-related and the gain was therefore within Article 13(4)(b), or Article 13(4)(b) was unnecessary because the gain fell within Article 13(1) in any event.

The French text

81. Returning to Article 6(2), there was no dispute that we should consider the French text of the Treaty on the basis that the attestation provision, which forms part of the text of

the Treaty set out in the schedule to SI 1980/709, expressly states both versions to be "equally authoritative". (There was a debate below as to whether the effect of the Order in Council was to incorporate the entire French text into English law. That debate is unnecessary to resolve given that there is no issue about the approach that we should apply, namely that we should follow the clear instruction that both texts have equal authority.)

82. The French text of Article 6(2) reads as follows:

> "Au sens de la présente Convention, l'expression "biens immobiliers" est définie conformément au droit de l'État contractant où les biens considérés sont situés. L'expression englobe en tous cas les accessoires, le cheptel mort ou vif des exploitations agricoles et forestières, les droits auxquels s'appliquent les dispositions du droit privé concernant la propriété foncière, l'usufruit des biens immobiliers <u>et les droits à des redevances variables ou fixes pour l'exploitation ou la concession de l'exploitation de gisements minéraux, sources et autres richesses du sol</u>; les navires, bateaux et aéronefs ne sont pas considérés comme biens immobiliers." (emphasis added)

83. RBC relies in particular on the reference to "la concession", and the contrast between the use of that term and the use of "droits" to mean "rights" in the first part of the underlined passage, where what is referred to is rights to payments ("redevances"). In contrast, in the English text the reference in both places is to "rights". Mr Peacock submitted that this supports the argument that the fifth limb is confined to grants.

84. Mr Peacock drew our attention to various Canadian sources, including legal dictionaries, which indicate that the term "concession" is generally used in a sense that would correspond to the English word grant, rather than to an assignment or transfer. In particular, in the *Dictionnaire de droit privé et lexiques bilingues – Les biens, Private Law Dictionary and Bilingual Lexicons – Property*, Centre Paul-André Crépeau, de droit privé et comparé, Éditions Yvon Blais, 2012, "concession" is defined in the English version of the text either as a juridical act by which the State confers rights in respect of land or (relevantly here) a:

> "Juridical act by which a person grants a right to another person with respect to property which belongs to him or her. For example, a right of enjoyment, a right of exploitation…"
>
> The following observations are then added:
>
> "Obs. 1º By contrast to assignment, a concession implies that the concessor continues to have rights, often ownership rights, in the property he or she conceded to the concessee. 2º In this sense, the French term concession is more commonly conveyed in English by the term grant (grant of an interest in copyright, grant of a right of use) as well as variety of terms which are more specific to a particular legal context..."

85. The French version of the text (which is more strictly relevant given that we are considering the French text of the Treaty) defines "concession" in a manner that corresponds to the English version, but in the relevant private law alternative adds a specific reference to the creation of exclusive licences of copyright and the distinction between income from alienating intellectual property and income from granting rights of use. The observations in the French version are also longer. They cover similar

ground to those in the English version but also expressly state that the term concession has no perfect equivalent in English, sometimes being rendered as grant, sometimes as concession and sometimes by a variety of specific terms.

86. We were also referred to s.78 of the Canada Revenue Agency Act 1999, the language of which draws distinctions between grants or concessions (those expressions being used to mean the same thing) and transfers.

87. In my view, and again in respectful disagreement to the Tribunals below, the language used in the French text of the Treaty does support a narrower construction of the fifth limb than that contended for by HMRC. Obviously the French text does not prevail over the English text – they are equally authoritative – but it is highly relevant that the French text uses a term that, at least in its ordinary sense, connotes the creation rather than the transfer of a right.

Other Treaties

88. Mr Peacock submitted that RBC's approach was also supported by examples of other treaties that make specific provision which could extend to income in the nature of the Payments. He referred us to the current version of the UK/US double tax convention, which has a definition of real property that corresponds in material respects to Article 6(2) of the Treaty, but when dealing with gains from the alienation of property in Article 13 expressly extends the definition to "rights to assets to be produced by the exploration or exploitation of the sea bed and sub-soil…". He also referred us to the Canada/US treaty, Article VI of which includes in the definition of real property not only "rights to explore for or to exploit mineral deposits, sources and other natural resources" but also "rights to amounts computed by reference to the amount or value of production from such resources".

89. Mr Bremner submitted that these other treaties could not be used as aids to interpretation, because they are not bilateral agreements between the parties to the Treaty. He relied on the judgment of Patten LJ in *Irish Bank* at [22]-[23], where he approved the view expressed by the Upper Tribunal in that case that a unilateral practice of the Inland Revenue was an inadmissible aid to construction.

90. In my view there is a difference between the practice of an individual taxing authority, which I agree with Patten LJ is irrelevant, and how the relevant Contracting States have approached the issue in other treaties that are based on the MTC. It seems to me that it is not irrelevant to consider examples of how other treaties entered into by the UK or Canada, being treaties that are similarly based on the MTC, modify the MTC definition of immovable property or otherwise make specific provision for income related to natural resources. Those other treaties are of course not determinative in interpreting Article 6(2) of the Treaty, and I accept that they do not fall within the list of sources in Article 31 of the Vienna Convention. However, particularly given the common source of the MTC I consider that they may form a legitimate supplementary reference point because they demonstrate that, where it has been considered appropriate to do so, each party has agreed to include specific wording.

91. In this case, however, I am not convinced that the UK/US or Canada/US treaty adds much to what can be derived from the terms of the Treaty with which we are concerned. The approach in Article 13 of the UK/US treaty is similar in substance to

Article 13(4) of the Treaty. The Canada/US Treaty extends the reach of Article VI to amounts "computed by reference to" production, but that is part of wording that replaces the entirety of the fifth limb in the MTC version of the definition.

Is the fifth limb confined to grants?

92. Drawing the various strands together, in my view the better interpretation of the fifth limb is that it is confined to rights to payments held by a person who has some form of continuing interest in the land in question to which the rights can be attributed (a "landowner"). This would obviously cover a situation where the right in question is granted by the relevant landowner, but it is not necessarily so confined. For example, just as an incoming landlord would be taxable on rental income from a pre-existing lease, there would be little doubt that a landowner who acquired an interest in land subject to and with the benefit of an arrangement that conferred rights to payments for working or for the right to work the land, could fall within the fifth limb. Similarly, the right to tax would not fall away simply because the obligation to make the payments passed to someone other than the original grantee. A landowner that received payments for working or for the right to work in his capacity as such could be taxed under the fifth limb, however those payments were derived.

93. Mr Bremner pointed to the scope for avoidance if the fifth limb were restricted in the way contended for by RBC, and to the possibility of fine distinctions between (for example) an existing holder of rights granting a sub-licence, which might create a right to income that fell within the fifth limb, and an outright disposal which would not. I am not convinced by this. Apparently narrow distinctions regularly arise when dealing with immovable property, a classic example being the distinction between granting a long lease out of an existing interest and selling that interest outright. Any income profit or capital gain accruing on an outright disposal of an interest in immovable property would be taxable as arising on an alienation of that property under Article 6(3) or Article 13(1). In contrast, if some interest in the land were retained then there is at least a basis to link the right to receive future income with the land itself, so addressing the difficulty over situs referred to at [54.] and [55.] above.

94. This approach is consistent with the approach taken in the Commentary to the very similar language in Article 12, noting that the 2017 version of the Commentary also recognises the possibility of fine distinctions being drawn and the need to decide each case on its facts (see [66.] above). The approach also takes appropriate account of the French text, and produces a more coherent result when the Treaty, including in particular the provisions of Article 13(4) and (5) and Article 27A, is read as a whole.

95. Mr Bremner referred to the fact that, on RBC's approach, the fifth limb might have no application to UK oil licences, because they are granted by the Crown. I have already made the point that the Treaty includes specific provisions dealing with hydrocarbons and offshore activity. Further, the position in Canada is not necessarily the same as that in the UK. And in any event there are other forms of natural resources where rights to work may be granted under private law.

96. Mr Bremner also submitted that HMRC's position is consistent with the language of the fifth limb, whereas a more restrictive approach requires words to be read in. I do not agree. The words used should be given their ordinary meaning, but in their context and in the light of the object and purpose of the Treaty: Article 31(1) of the Vienna

Convention. Article 6(2) is definitional, and the elements of the definition must make sense when applied to the Treaty provisions in which the defined term is used, including in particular Article 6(1). As already discussed, the rationale of Article 6(1) is clear. The necessary link is between the property in question and the State in which it is located. In my view clearer words would be needed to establish that a right of a personal nature, held by a person who has no link to the physical land in question, and comprising a chose in action owed by a person who might also have no link to the State in which the land is situated, falls within Article 6(1).

Application to the facts

97. Applying this conclusion to the facts of this case, RBC does not hold, and indeed has never held, an interest in the Buchan field. It cannot therefore be taxed under the fifth limb. What it acquired was a contractual right to receive payments calculated by reference to the sale proceeds derived from sales of oil, to the extent that the price obtained exceeded $20 a barrel. Although RBC accepted that it "stood in the shoes" of Sulpetro as regards its entitlement to the Payments, that cannot alter the fact that it has at no stage held an interest in the Buchan field.

98. In contrast, Sulpetro would have been within the scope of UK tax on its disposal of its interest in the Buchan field under Article 13, and in particular under the express provisions of Article 13(4) and (5). Under domestic law principles it would have been taxed on its chargeable gain by reference to the consideration received for the assets disposed of, including (applying the principle established by *Marren v Ingles* [1980] 3 All ER 95, [1980] STC 500) the value at the time of the sale of the right to receive the Payments. Further, any subsequent receipts of the Payments by Sulpetro would have given rise to gains to the extent (broadly) that the amount received exceeded the value brought into account at the time of sale. Correspondingly, it would ordinarily be expected that the consideration paid, including the Payments, would form part of BP's acquisition cost for chargeable gains purposes.

99. For whatever reason, HMRC appear to have taken a different approach and to have treated the Payments made, initially by BP and then by Talisman, not as part of their acquisition cost of Sulpetro's interest in the Buchan field but as deductible revenue payments. I cannot comment on the possible basis for that, but what is clear is that the fact that a particular tax treatment has been afforded to the payer, and has subsequently given rise to a concern about the impact of those deductions on the UK tax take (see [7.] above), cannot determine the tax treatment of the payee.

Respondents' Notice

100. This leads conveniently to the second of the two points raised in the Respondents' Notice, which is that the Payments are taxable in RBC's hands pursuant to Article 13(4)(b) and (5)(a), as gains from the alienation of UK oil-related interests or shares deriving their value therefrom.

101. I disagree. Unlike the position of Sulpetro, Article 13 provides no basis to tax RBC on the Payments. First, the Payments could not sensibly be regarded as giving rise to capital gains in RBC's hands, an issue determined in accordance with UK tax principles pursuant to Article 3(2) of the Treaty: see [51.] above. They are simply receipts of RBC's banking trade.

102. Secondly, and more fundamentally, RBC never held a relevant asset which it alienated, namely one within Article 13(1), (4) or (5). I do not accept Mr Bremner's argument that Article 13 does not require the gain to be received by the alienator of the asset. The natural interpretation of Article 13(1) ("Gains derived by a resident of a Contracting State from the alienation of immovable property…") is that it is the resident in question who is alienating the property. Further, Article 13(2) can only sensibly be interpreted as relating to the enterprise that has the relevant permanent establishment ("Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State"). There is no indication that a different approach is intended under Article 13(4) or (5). This is further supported by express references to the alienator in Article 13(6)(a), which has a carve-out from Article 13(5)(a) where the "alienator" owned less than 10% of each class of shares immediately before the "alienation", and in Article 13(8).

103. The first point raised in the Respondents' Notice was that, even if the right to the Payments did not fall within the fifth limb, the Payments were sufficiently connected with the exploitation of the UK's sector of the continental shelf to constitute income from immovable property within Article 6(1) in any event. I also reject that argument. The test is not whether income is connected with immovable property in some way. It must be "from" immovable property. The source of the Payments is the contractual right originally created by BP in favour of Sulpetro as part of the transaction under which it acquired Sulpetro's interest in the Buchan field. Further, the Payments are in any event calculated by reference to the sale price of a movable asset, being the oil extracted from the Buchan field. Any link to immovable property is insufficiently direct for the Payments to be treated as derived from immovable property. The source is not land or any interest in land.

104. In his written submissions, and initially in oral argument, Mr Bremner submitted that because the concept of immovable property is generally defined in accordance with the law of the Contracting State in which the property is situated (see the first sentence of Article 6(2)), it is appropriate to have recourse to s.1313 CTA 2009, on the basis that income falling within that provision should be treated as deriving from UK immovable property. Effectively, s.1313 represented an exercise of the UK's right to determine what amounted to immovable property. That cannot be right. Section 1313 says nothing about the concept of immovable property under English (or Scottish) law. It simply establishes a domestic tax charge in respect of profits from certain activities. To the extent that it is necessary to spell out that the UK sector of the continental shelf comprises UK immovable property, that is addressed by Article 3 of the Treaty.

Summary

105. In summary, therefore, I consider that the Tribunals below erred in concluding that the Payments fell within the fifth limb. I would therefore allow Ground 1 of the appeal. I would also reject the alternative arguments in the Respondents' Notice.

Discussion: Ground 2 – nature of Sulpetro's rights

106. To recap, Ground 2 of the appeal is that the UT erred in its application of the Treaty by wrongly proceeding on the basis that Sulpetro rather than SUKL had the right to extract oil. RBC's position is that, irrespective of the outcome of Ground 1, the Payments

could not be consideration for a "right to work" within the fifth limb because Sulpetro never held that right.

107. It is common ground that it was SUKL, and not Sulpetro, that held the licence in respect of Buchan. It is also common ground that this reflected the regulatory, or at least governmental, requirements at the time, namely that licences to explore for and exploit oil and gas offshore were granted by the Secretary of State (on behalf of the Crown) only to UK incorporated companies. The Illustrative Agreement documented a commonly used structure under which a non-UK group (typically US based, but here Canadian) would establish a UK incorporated company to hold the licence, but would provide the funding and direct the work in exchange for an entitlement to the oil won.

108. Article 2 of the Illustrative Agreement stated:

> "Licensee shall conduct petroleum exploration operations in and in connection with all the areas covered by the license and, if petroleum is discovered, shall develop the areas and shall produce the petroleum therefrom."

It therefore expressly provided that it was SUKL as "Licensee", and not Sulpetro, that would conduct the exploration and exploitation activities, and would produce the oil.

109. Article 2 went on to make clear that it was also SUKL that remained responsible to the Secretary of State under the terms of the licence and for the conduct of operations. The last sentence of Article 2 permitted SUKL to contract for others to perform on its behalf and under its responsibility, but it was not suggested that Sulpetro took that role. Rather (and bearing in mind that SUKL held only a 12.7% interest in the Buchan field), that provision envisaged the appointment by Buchan licence holders of an operator to explore and exploit the field on behalf of all of them. As mentioned above the operator was BP.

110. Articles 3 and 4 placed further obligations on SUKL, namely to pay the royalty under the licence and to ensure that oil won would be delivered onshore. (This last point no doubt reflected a concern that disposals of it might otherwise escape UK tax. Consistently with this, Article 8 expressly required contracts for sale of the oil to be concluded in the UK.)

111. Articles 5 and 6 addressed Sulpetro's position. In summary, and as already explained, Sulpetro provided the funds (including for the payment of royalties) and equipment, and also provided the budget and work programs, which the parties agreed "shall be carried out" (Article 5). In exchange Sulpetro would "own and receive" the oil won (Article 6).

112. Thus, Sulpetro had the sole right to direct the work and to receive the benefit of it. As already discussed, those were potentially valuable rights, and in due course BP's agreement under the SPA to make the Payments reflected that. But it is clear from Article 2 that Sulpetro was not itself carrying out the work and had no right to do so. That remained the responsibility and right of SUKL or another person acting on its behalf (in practice, BP as the operator). BP acquired the right to work previously held by the Sulpetro group only by acquiring the shares in SUKL.

113. I cannot accept Mr Bremner's submission that Sulpetro's right to direct the work, in combination with its right to oil won (when combined with the fact that the shares of SUKL were also transferred), are sufficient to amount to a "right to work". The right to work was held by SUKL. The structure reflected in the Illustrative Agreement was put in place to meet the UK's own requirements. That legal structure cannot simply be ignored on the basis of some broader concept of commercial or economic reality.

114. It is also relevant that the terms of the Treaty itself recognise the existence of the sort of structure used in this case. Article 13(4)(a) would capture the licence interest held by SUKL, and Article 13(4)(b) would apply to Sulpetro's "right to assets to be produced", namely the oil. Article 13(5) would ensure that any gain made on the disposal of shares in a subsidiary owning a licence would also be taxable. Unsurprisingly, it appears that the Contracting States were well aware of the sorts of structure in use and catered for them by express provision where they considered that to be appropriate. No such provision was made in Article 6.

115. I would therefore also allow the appeal on Ground 2.

Ground 3: s.1313 CTA 2009

116. It follows from the discussion above that I would allow the appeal on the basis that the Treaty does not permit HMRC to tax the Payments in the hands of RBC. In those circumstances I would prefer not to express a concluded view on Ground 3 of RBC's appeal, relating to s.1313 CTA 2009. This should not be understood as an endorsement of the conclusions reached by the Tribunals below. While I understand their reasoning, it is not clear to me that an interest in a proportion of sale proceeds from oil of the kind in issue here can properly be described as "the benefit of" the oil, as opposed to being a benefit deriving from proceeds of sales of oil made by BP or Talisman. I would prefer to leave the question of the scope of s.1313 to a case where it is necessary to decide it.

Conclusion

117. In conclusion, I would allow the appeals on Ground 1 and Ground 2 and set aside the decision of the Upper Tribunal. On that basis the assessments should also be set aside.

Lord Justice Nugee:

118. I agree.

Lady Justice Asplin:

119. I also agree.