[2022] UKUT 00045 (TCC)

Appeal number: UT/2020/000371

CORPORATION TAX – income received by a Canadian bank from payments relating to oil produced by the Buchan oil field in the UK Continental Shelf – whether the UK has taxing rights as income from immovable property for the purposes of Article 6 of the UK / Canada Double Taxation Convention – whether the payments are liable to corporation tax under section 1313(2)(b) of the Corporation Tax Act 2009 as the right to benefit of exploration or exploitation activities

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ROYAL BANK OF CANADA **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: Mr Justice Edwin Johnson
Judge Rupert Jones

Sitting in public at The Rolls Building, 7 Rolls Buildings, London EC4A 1NL on 7-9 December 2021

Jonathan Peacock QC and Sarah Black, Counsel, instructed by Norton Rose Fulbright LLP, Solicitors, for the Appellant

Jonathan Bremner QC and Michael Ripley, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal concerns the liability of the Appellant (Royal Bank of Canada or "RBC"), a publicly owned bank incorporated and tax resident in Canada, to UK corporation tax on certain payments (the "Payments") received by it in its accounting periods ended 31 October 2008-2015 inclusive.

2. The appeal raises three broad issues:

   i) The first issue is whether the rights to the Payments were consideration for the right to work the Buchan oil field (the "Buchan Field") within the UK sector of the Continental Shelf. If so, the UK has the right to tax the Payments as income from 'immovable property' within the definition of Article 6(2) of the UK / Canada Double Taxation Convention of 8 September 1978 (the "Treaty").

   ii) The second issue is whether the rights to the Payments constitute *"rights to … the benefit of"* the oil for the purposes of section 1313(2)(b) Corporation Tax Act 2009 ("CTA 2009") because they give the recipient part of the commercial benefit of the oil won from the Buchan Field. If so, the Payments are chargeable to UK corporation tax.

   iii) The third issue is, even if the Payments are chargeable to corporation tax in principle, whether the Appellant is entitled to a deduction for the loss it made on the original loan to the Canadian company from whom it had inherited the right to receive the Payments.

3. In summary, RBC, acting through its head office in Canada, lent monies to a Canadian oil company, Sulpetro Ltd ("Sulpetro"), which, together with its UK subsidiary, had originally exploited oil from the Buchan Field. Sulpetro subsequently went into receivership, leaving an outstanding amount owed to RBC. By virtue of asset disposals entered in to by Sulpetro, with the UK resident and unrelated third-party, BP Petroleum Development Ltd ("BP"), Sulpetro was entitled to certain contractual payments (the Payments) from BP. In due course the right to those contractual payments passed from Sulpetro to RBC as creditor under the original loan made by RBC. On receipt of the Payments by RBC from BP (and, later, Talisman a party standing in BP's shoes), the Respondents (Her Majesty's Revenue & Customs or "HMRC") contended that RBC was taxable in the UK as the recipient of income from "immovable property" in the UK. HMRC issued RBC closure notices and assessments between 31 October 2014 and 3 October 2017 for the accounting periods 2008-2015.

4. The FTT dismissed the Appellant's appeal against the closure notices and assessments. The FTT agreed with the substance of HMRC's arguments on the three issues which are the subject of this appeal, in a decision released on 30 June 2020 ("the Decision") released as [2020] UKFTT 267 (TC). The FTT held on each of the three issues that are now in dispute that:

i) The Treaty confers taxing rights on the UK in respect of the Payments on the basis that they are income from "immovable property" for the purposes of Article 6(2) (FTT [54]-[66] and [169]);

ii) Section 1313(2)(b) of the Corporation Tax Act 2009 applies so as to charge the Payments to corporation tax because the Appellant had rights to the benefit of the oil won from the Buchan field (FTT [83]-[96] and [170]);

iii) The Appellant had no right to offset any losses incurred by it in its loan to Sulpetro against the Payments in the computation of the corporation tax chargeable (FTT [96]-[102]).

5. At the hearing before us, the Appellant was represented by Jonathan Peacock QC leading Sarah Black and HMRC was represented by Jonathan Bremner QC leading Michael Ripley. We are grateful to all counsel and their solicitors for the high quality of the presentation and preparation of this appeal.

Grounds of Appeal and issues to be determined

6. With the permission of the FTT, the Appellant appeals to the Upper Tribunal on five grounds (permission was also granted by the FTT for a sixth ground of appeal, which was not pursued):

(1) The FTT failed to address and give proper weight to the purpose of Article 6(2) of the Treaty and its correlation to other articles within the Treaty, particularly in light of other double tax treaties entered into by the UK or Canada ("Ground 1").

(2) The FTT wrongly dismissed arguments based on the equally authoritative French language version of the Treaty with insufficient, if any, consideration, resulting in a potentially contradictory interpretation. This is contrary to the Vienna Convention on the Law of Treaties (1969) ("the Vienna Convention") and established general principles of treaty interpretation ("Ground 2").

(3) The FTT's analysis of both the Treaty, and s.1313 CTA 2009, disregarded, or failed to appreciate, the true contractual position between the various parties ("Ground 3").

(4) The FTT failed properly to construe the reference to the "benefit of the oil" for the purposes of s.1313 CTA 2009 and failed properly to identify the nature of the rights held by RBC in this regard ("Ground 4").

(5) The FTT erred in holding that, if the Payments were within s.1313 CTA 2009, RBC could not deduct the costs it incurred in acquiring the contractual right to the Payments ("Ground 5").

7. Grounds 1-3 argue that the FTT erred in law in deciding the first issue and concluding that the UK had taxing rights over the Payments under the Treaty. The Appellant argues that the Payments do not represent income from immovable property for the purposes of Article 6(2) of the Treaty – income from 'rights to variable …

payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources'.

8. Grounds 3-4 argue that the FTT erred in law in deciding the second issue and concluding that the UK could exercise its taxing rights conferred by the Treaty over the Payments by virtue of section 1313 CTA 2009 in that they represented the benefit of the oil.

9. Ground 5 argues that the FTT erred in law in deciding the third issue and concluding that the Appellant could not deduct the losses it suffered in making the loan and acquiring the rights to the Payments from Sulpetro. This includes deciding whether the loss is an expense of the ring fence trade and, in any event, whether it is capital in nature.

Preliminary observations

10. It has been suggested, both in the submissions of Mr Bremner QC and in some of the materials put before us, that the correct way to approach the issues in this appeal is by considering first whether the UK had the right under its domestic law to tax the Payments, and then to consider whether the UK had the right to tax the Payments under the terms of the Treaty. We will however follow the course taken by both counsel in their grounds and arguments, and consider the Treaty first, and then UK domestic law.

11. We also record that the UK domestic legislation we are looking at has been through changes over the periods relevant to the appeal, but that it is common ground that we need only consider the modern versions of the legislation.

12. We have had the benefit of three days of detailed oral argument from counsel during the hearing, in addition to their helpful skeleton arguments. Both leading counsel referred to a wide range of treaties, statutory provisions (including Canadian legislation), case law (both from this and other jurisdictions), and other legal materials, which were collected into the joint bundles of authorities which were before us. We also had the benefit of a core bundle, comprising the Decision and the other principal documents in the appeal, and bundles of other documents.

13. In reaching our decision on this appeal we have taken into account everything drawn to our attention, in both the written and oral submissions. It is however inevitable, given the detail of the arguments and given the quantity of material before us, that not everything in the appeal can be given specific mention in this judgment. Where a particular fact or argument, or a particular authority or document is not given specific mention in this judgment, that does not mean that it has not been taken into account. We can assure the parties that it has.

The Background

The Agreed Statement of Facts

14. There was a statement of agreed facts before the FTT, which included the following terms:

‘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’).

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. [[1]*In 1996, BP transferred its interest in the Buchan Field to Talisman Energy Inc (Talisman). As of December 2012, Talisman ran its North Sea operations (including the Buchan Field) through a joint venture company called Talisman Sinopec Energy UK Limited, 51% of which was owned by Talisman Colombia Holdco Limited, a subsidiary of Talisman, and 49% of which was owned by Addax Petroleum UK Limited, a subsidiary of China Petrochemical Corporation (Sinopec Group). In 2015, Repsol SA acquired Talisman, including its 51% shareholding in Talisman Sinopec Energy UK Limited (and thus its rights to the Buchan Field) which was renamed Repsol Sinopec Resources UK Limited (Repsol Sinopec Resources) in July 2016*.] 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.

14. The SPA also provided for (what was described as) a royalty in respect of production from Humbly Grove, an onshore field in Hampshire. However, no payments have ever been made to the Appellant in respect of Humbly Grove.

15. On 31 October 2014, the Respondents sent the Appellant Notices of Assessment for the Accounting Periods ending 31 October 2008, 2009 and 2010. The Appellant appealed these discovery assessments to the Respondents on 24 November 2014.

16. On 29 October 2015, the Respondents sent the Appellant a Notice of Assessment for the Accounting Period ending 31 October 2011. The Appellant appealed this discovery assessment to the Respondents on 17 November 2015.

[1] The words in square brackets have been inserted from a footnote (as explained by footnote 7 to the FTT's decision)

17. On 2 October 2017, the Respondents sent the Appellant a Notice of Assessment for the Accounting Period ending 31 October 2012. The Appellant appealed this discovery assessment to the Respondents on 23 October 2017.

18. On 3 October 2017, the Respondents sent the Appellant a notice of amendment to its corporation tax returns for the Accounting Periods ending on 31 October 2013, 2014 and 2015. The Appellant appealed these amended assessments to the Respondents on 23 October 2017 (collectively referred to as the Assessments).

19. The Respondents made the Assessments on the basis that the Payments are subject to UK tax under the "ring fence" trade regime governed by Part 8 of the Corporation Tax Act 2010.

20. On 4 August 2017 the Appellant filed a notice of appeal with the Tribunal against the assessments identified in paragraphs 15 and 16 above.

21. On 10 November 2017 the Appellant applied to the Tribunal for the appeals against the assessment and closure notices identified in paragraphs 17 and 18 to be consolidated into this appeal. The Tribunal granted the Appellant's application on 15 December 2017.'

The Sample and Actual Illustrative Agreements between Sulpetro and SUKL

15. Paragraph 5 of the statement of agreed facts set out above refers to the Illustrative Agreement ('IA') agreed between Sulpetro, the Canadian parent company, and Sulpetro (U.K.) Ltd ('SUKL'), the UK subsidiary. SUKL was granted the licence from the Crown in respect of a percentage of the Buchan Field because only UK companies were permitted to be granted licenses to explore and exploit UK oil fields.

16. The actual Illustrative Agreement between Sulpetro and SUKL was said to have been entered into on 19 November 1982, by way of formalisation of a prior informal understanding. No copy of the actual agreement can now be found.

17. However, the parties to the appeal agreed that the actual agreement would have followed the pattern of a sample agreement which was included in the bundle of documents and which had apparently been sourced from the National Archives at Kew.

18. The sample Illustrative Agreement was made on 1 September 1971 between a UK company in the Signal Oil group ("the Licensee") which, together with unnamed others, had "applied for and expect to be granted a certain license… to conduct petroleum exploration, development and production activities in United Kingdom areas", and an obviously related American corporation ("Signal") which was willing to "provide a portion of the funds and equipment necessary to conduct all the operations under such license and necessary to discharge all the obligations of the Licensee thereunder as provided in this Agreement".

19. Therefore, instead of reading 'Signal' in the sample IA, the actual IA would have read 'Sulpetro'. Likewise, in reading 'the Licensee', defined as Signal Oil Group in the sample IA, one should read 'Licensee' in the actual IA to have referred to 'SUKL'.

20. The key provisions of the sample IA were in Articles 2 to 6, which provided as follows:

> Article 2
>
> Subject to law, the Regulations, the licence 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 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
>
> Signal shall provide nineteen percent of one hundred percent (19% of 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. Licensee shall

provide the remaining five percent of one hundred percent (5% of 100%) of all such funds and equipment. With respect to its interest, Signal 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

Signal shall own and receive nineteen percent of one hundred percent (19% of 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. Signal shall receive no reimbursement of any kind for any investment made or expenses incurred, and Signal 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 Signal of petroleum won and saved from the licensed areas shall be in accordance with law, the Regulations and the license. Licensee shall own and receive the remaining five percent of one hundred percent (5% of 100%) of all such petroleum.

21. In respect of Articles 5 and 6 of the sample IA, the FTT recorded further differences from the actual agreement at [12] of the Decision: 'The parties were agreed that this agreement was clearly tailored for a situation in which a number of companies were co-licensees in respect of a particular area, and the "Signal group" share in the license was 24%; and that 5% out of that 24% was to be reserved to the Licensee, with the remaining 19% effectively going to Signal. It was agreed that the situation in respect of Sulpetro and SUKL was more straightforward: whilst the underlying license only conferred on SUKL a 12.7% interest in the Buchan field…, Sulpetro would be entitled to the oil deriving from 100% of that interest and, in return, would provide 100% of the funds required to explore and exploit it. In consequence of this, it would "own and receive" 100% of the oil won by SUKL from its 12.7% share in the Buchan field.'

22. It is not in dispute that Article 5 of the actual IA did contain the same provisions for the direction of working which can be found in the last part of Article 5 of the sample IA so that it read: '[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 [SUKL], and such programs shall be carried out.'

The Sales and Purchase Agreement between BP and Sulpetro

23. Paragraph 7 of the statement of agreed facts referred to the Sale and Purchase Agreement ("SPA") which was entered into on 2 December 1986. The SPA was made between BP and Sulpetro. SUKL was not a party.

24. As the FTT recorded at [13-19]:

'13…The SPA recited as follows:

(A) Sulpetro owns directly or indirectly the whole of the authorised and issued share capital of Sulpetro (UK) Limited (hereinafter referred to as "Sulpetro (UK)");

(B) Sulpetro wishes to sell and BP wishes to purchase the whole of such issued share capital on terms hereinafter set out;

(C) Sulpetro and Sulpetro (UK) own interests in certain assets within the United Kingdom and on the United Kingdom Continental Shelf as are more fully described hereinafter;

(D) Sulpetro wishes to sell and BP wishes to purchase such assets on terms hereinafter set out;'

14. Completion of the sale agreed under the SPA was conditional upon a number of events, including "clearances having been obtained from the Inland Revenue satisfactory to BP and Sulpetro in respect of the letter dated 19th November, 1986 attached hereto…"

15. The SPA provided for the sale of "Sulpetro's Assets", which was defined as meaning "the Assets other than those held by Sulpetro (UK)". The associated definitions were as follows: "Assets" means the Tangible Assets, Sulpetro's Licence Interests, the Data and the Shares. "Tangible Assets" means the undivided percentage interests whether held legally or beneficially of Sulpetro and Sulpetro (UK) in the plant, equipment, machinery and other physical assets relating to the Licences which percentage interests are more fully described in Appendix B and which assets are more fully described in Appendix C. "Sulpetro's Licence Interests" means all beneficial rights and interests in the Licences held by Sulpetro; "Data" means all information of whatsoever nature relating to the Licences owned in whole or in part by Sulpetro or Sulpetro (UK); "Shares" means the whole of the issued share capital of Sulpetro (UK); "Licences" means all exploration, appraisal, development or production licences issued by the Secretary of State in respect of both the United Kingdom and the United Kingdom Continental Shelf and currently held by, inter alia, Sulpetro (UK) and which are more fully described in Appendix B;

16. Appendix B to the SPA was headed "Sulpetro UK Holdings" and listed a number of locations, including crucially "Buchan Unit", extending to 29.7 square kilometres (or 7,339 acres) in which the "Cost interest" and "Working interest" were both 12.706793 (I infer this is a percentage figure, as the "Net area acres" is then given as 933, which is 12.7% of 7,339). The "Expiry Date" was noted as "In Perpetuity".

17. Appendix C included a list of "Buchan Unit Tangible Assets", which included eight "production wells", the Buchan Alpha production platform and various associated equipment. I infer this was the letter referred to at [111] below.

18. The Consideration for the sale was stated as £16,866,176 in respect of Sulpetro's Assets (other than the Shares and Sulpetro's Licence Interests), £250,000 in respect of Sulpetro's Licence Interests and £10,000 in respect of the Shares, totalling £17,126,176. In addition, BP was required to pay to Sulpetro on 1 March 1988 the sum of £1,873,824, the amount of an Advance Petroleum Revenue Tax Credit which would be paid or credited to BP as the new operator of the Buchan field, by reference to payments made by Sulpetro before the sale. Normal balancing payments were to be made in respect of cash balances and stocks of oil as at the effective date of the transfer (which was intended to be retrospective to 1 November 1986) and by reference to subsequent income and expenses between that date and completion of the sale.

19. Finally, clause 5.4 of the SPA provided for [Royalty Payments ('the Payments')] in the following terms:

> 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…
>
> 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…
>
> '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", essentially as the "free into pipeline" price at the refinery or tankship, subject to a "floor" of the lowest spot price for comparable oil]
>
> 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.'

The Novation Agreements

25. As set out at paragraphs 5 to 9 of the statement of agreed facts, the SPA between Sulpetro and BP included an Illustrative Agreement Novation dated 1986, to which BP, Sulpetro and SUKL were parties. The purpose was to 'novate the Illustrative Agreement to take account of the Sale and Purchase Agreement', whereby BP replaced Sulpetro as a party and agreed to perform and discharge all Sulpetro's obligations and liabilities under the Illustrative Agreement. This included the obligation to make the Payments to Sulpetro under Clause 5.4.1 of the SPA.

26. There was a sale from BP to Talisman Energy Inc ('Talisman') in 1996 referred to in paragraph 12 of the statement of agreed facts and finalised on 5 May 1999. Under that Novation Agreement Talisman assumed BP's legal obligation to make the Payments under the SPA to RBC (which, as a creditor in the receivership, had been assigned the right to receive the Payments from Sulpetro by virtue of the Court Order in 1993).

The Law

Issue 1

The Treaty: The UK/Canada Double Taxation Convention of 8 September 1978

27. The Treaty – the UK/Canada Double Taxation Convention of 8 September 1978 - came into force on 18 December 1980 and was implemented in UK law by the Double Taxation Relief (Taxes on Income) (Canada) Order 1980) (SI 1980/709)) ("the Order"). Therefore, the Order incorporated the provisions of the Treaty into UK law.

28. The Order provided at Article 2:

> 2. It is hereby declared—
> (a) that the arrangements specified in the Convention set out in the Schedule to this Order have been made with the Government of Canada with a view to affording relief from double taxation in relation to income tax, corporation tax or capital gains tax and taxes of a similar character imposed by the laws of Canada; and
> (b) that it is expedient that those arrangements should have effect.

29. The Schedule to the Order was the English language version of the Treaty but not the French version.

30. Relevant Articles of the Treaty are as follows.

31. Article 3(1)(a) & (b) of the Treaty provide general definitions:

> ARTICLE 3 General Definitions
>
> 1. In this Convention, unless the context otherwise requires:
> (a)(i) the term "Canada" used in a geographical sense, means the territory of Canada, including any area beyond the territorial waters of Canada which is an area where Canada may, in accordance with its national legislation and international law, exercise sovereign rights with respect to the sea-bed and sub-soil and their natural resources;
> (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;
> b) the terms "a Contracting State" and "the other Contracting State" mean, as the context requires, the United Kingdom or Canada;

32. Article 3(2) provides:

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.

33. Interpretation of Article 6 of the Treaty is the focus of the first issue in the appeal and in particular, the definition contained in the 'fifth limb' of Article 6(2): '*rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources'*. Article 6 provides the following in relation to income from immovable property:

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 the 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.

[Emphasis Added]

34. Article 7 of the Treaty provides that a Contracting State (here the UK) may only tax the profits of an enterprise (here RBC) of the other Contracting State (here Canada) if that enterprise carries on its business in the first Contracting State through a permanent establishment ("PE") situated within it and the relevant profits are attributable to that PE. Here it is common ground that this is not so[2]. This is, however, subject to other provisions of the Convention by virtue of Article 7(4):

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…

[2] See the Decision at [5]. For completeness, RBC itself has no oil exploration or exploitation activities in the North Sea and thus has no 'deemed' PE in the UK within Article 27A.

…

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."

35. Article 12(1) & (4) of the Treaty on royalties provide:

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.

36. Article 13(1) & (4) of the Treaty on capital gains provide as follows:

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.

…

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.

…

37. Article 21(1) & (2) of the Treaty on double taxation provides:

ARTICLE 21 ELIMINATION OF DOUBLE TAXATION

1. In the case of Canada, double taxation shall be avoided as follows:
(a) subject to the existing provisions of the law of Canada regarding the deduction from tax payable in Canada of tax paid in a territory outside Canada and to any subsequent modification of those provisions — which shall not affect the general principle hereof — and unless a greater deduction or relief is provided under the laws of Canada, tax payable in the United Kingdom on profits, income or gains arising in the United Kingdom shall be deducted from any Canadian tax payable in respect of such profits, income or gains;
(b) subject to the existing provisions of the law of Canada regarding the allowance as a credit against Canadian tax of tax payable in a territory outside Canada and to any

subsequent modification of those provisions — which shall not affect the general principle hereof — where a company that is a resident of the United Kingdom pays a dividend to a company that is a resident of Canada that controls directly or indirectly at least 10 per cent. of the voting power in the first-mentioned company, the credit shall take into account the tax payable in the United Kingdom by that first-mentioned company in respect of the profits out of which such dividend is paid;
(c) where in accordance with any provision of this Convention income derived by a resident of Canada is exempt from tax in Canada, Canada may nevertheless, in calculating the amount of tax on other income take into account the exempted income.

2. Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom or, as the case may be, regarding the exemption from United Kingdom tax of a dividend arising in a territory outside the United Kingdom or of the profits of a permanent establishment situated in a territory outside the United Kingdom (which shall not affect the general principle of this Article):
(a) Canadian tax payable under the laws of Canada and in accordance with this Convention, whether directly or by deduction, on profits, income or chargeable gains from sources within Canada (excluding in the case of a dividend tax payable in respect of the profits out of which the dividend is paid) shall be allowed as a credit against any United Kingdom tax computed by reference to the same profits, income or chargeable gains by reference to which the Canadian tax is computed;
(b) a dividend which is paid by a company which is a resident of Canada to a company which is a resident of the United Kingdom shall be exempted from United Kingdom tax, when the exemption is applicable and the conditions for exemption under the law of the United Kingdom are met;
(c) the profits of a permanent establishment in Canada of a company which is a resident of the United Kingdom shall be exempted from United Kingdom tax when the exemption is applicable and the conditions for exemption under the law of the United Kingdom are met;
(d) in the case of a dividend not exempted from tax under subparagraph (b) which is paid by a company which is a resident of Canada to a company which is a resident of the United Kingdom and which controls directly or indirectly at least 10 per cent of the voting power in the company paying the dividend, the credit mentioned in subparagraph (a) shall also take into account the Canadian tax payable by the company in respect of its profits out of which such dividend is paid.

38. Article 27A of the Treaty is set out below. As indicated by Mr Peacock QC, its scope is limited because it only applies to producers engaged directly in the carrying on of exploration and exploitation activities. Mr Peacock QC described Article 27A as an embellishment of Article 7 but, as he put it, Article 27A only applies if, in effect, the relevant person is the oil company. It does not apply to RBC.

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 sub-soil 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.
For the purposes of this paragraph:
(a) where a person carrying on activities referred to in paragraph 2 of this Article is associated with an enterprise carrying on substantially similar activities, that person shall be deemed to be carrying on those substantially similar activities of the enterprise with which he is associated, in addition to his own activities;
(b) two enterprises shall be deemed to be associated if one enterprise participates directly or indirectly in the management or control of the other enterprise or if the same persons participate directly or indirectly in the management or control of both enterprises.
4. Salaries, wages and similar remuneration derived by a resident of a Contracting State in respect of an employment connected with the exploration or exploitation of the sea bed and sub-soil and their natural resources situated in the other Contracting State may, to the extent that the duties are performed offshore in that other Contracting State, be taxed in that other Contracting State.

39. Article 29 of the Treaty records that the English and French versions are equally authoritative and provides, in so far as relevant:

ARTICLE 29 Termination

This Convention shall continue in effect indefinitely but the Government of either Contracting State may, on or before 30 June in any calendar year after the year 1980 give notice of termination to the Government of the other Contracting State and, in such event, this Convention shall cease to be effective:
…
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.

The Vienna Convention

40. The Treaty is to be interpreted by applying the Vienna Convention which governs the interpretation of international treaties. Articles 27, 31, 32 & 33 of the Vienna Convention relevantly provide:

Article 27 Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

…

Article 31 General rule of interpretation

1. A treaty shall 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

    (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

    (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

    (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

    (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

    (c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

    (a) leaves the meaning ambiguous or obscure; or

    (b) leads to a result which is manifestly absurd or unreasonable.

Article 33 Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

41. Article 33(1) & (4) of the Vienna Convention are relevant here because the Treaty is authenticated in both English and French, with no prevailing language (see the closing provisions of Article 29 of the Treaty above). There was no provision within

the Treaty nor did the parties agree that, in case of divergence, that one language version was to prevail over the other. Therefore, as the Treaty provides, the English and French versions of the text have equal weight.

Case law on the Vienna Convention

42. The relevant approach to the interpretation of international treaties was summarised by Mummery J in *IRC v Commerzbank AG* [1990] STC 285 (Ch) at 297-98. This itself followed the approach to the interpretation of international treaties set out by the House of Lords in *Fothergill v Monarch Airlines Ltd* [1981] AC 251 (HL) ('*Fothergill*').

43. In interpreting treaties, courts and tribunals may have regard to a broad range of interpretative aids such as travaux préparatoires, international case law and the writings of jurists (*Fothergill* at p.294). The process of interpretation should take account of the fact that the language of an international convention has not been chosen by an English parliamentary draftsman: it should be interpreted unconstrained by technical rules of English law, or by English legal precedent, but instead on broad principles of general acceptation (*Fothergill* at p.281-282).

44. The correct approach to interpretation was most recently set out by the Supreme Court in *Anson v HMRC* [2015] UKSC 44, [2015] STC 1777, recently referred to with approval by the Supreme Court in *Fowler v HMRC* [2020] UKSC 22, [2021] All ER 97 at [18]. In short, the aim is to establish by objective and rational means the common intention which can be ascribed to the parties in light of the wording and purpose. In particular, courts are required to identify the purpose of the relevant provision and to consider it in its proper context, looking at the Treaty as a whole. Lord Reed, at [56] in *Anson*, stated:

> "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."

45. In light of the above, Article 6 of the Treaty needs to be examined in the context of (1) the purpose of the Article, (2) the text of both operative languages, (3) the Treaty as a whole and (4) in light of international tax principles.

46. We return to the correct approach to interpretation of the Treaty in the discussion section below.

Issue 2

47. If the UK has taxing rights under the Treaty, the next issue is whether the UK has asserted those rights by charging the Payments to UK corporation tax.

48. The accounting periods at issue in this appeal fall both before and after the enactment of CTA 2009, the Corporation Tax Act 2010 ("CTA 2010") and Taxation (International and Other Provisions) Act 2010 ('TIOPA'). Prior to the enactment of these statutes, the relevant provisions were contained in the Income and Corporation Taxes Act 1988 ("ICTA").[3] It is common ground that there are no material differences in wording between the relevant provisions of ICTA (on the one hand) and the rewritten provisions of CTA 2009 and CTA 2010 (on the other). In this decision, references are to the provisions of CTA 2009 and CTA 2010.

49. A non-UK resident company is within the charge to corporation tax only if (inter alia) it carries on a trade in the UK through a permanent establishment ("PE") in the UK (CTA 2009 s.5(2); formerly ICTA s.11(1)). The profits which are chargeable are (a) trading income arising directly or indirectly through or from the PE attributable to the PE, (b) income from property or rights used or held by the PE attributable to the PE, and (c) certain chargeable gains attributable to the PE (CTA 2009 ss.19(1) to (3); formerly ICTA ss.11(2) and (2A)).

50. In relation to natural resources, there are special rules for profits relating to exploration or exploitation activities or from exploration or exploitation rights. In outline, those profits are treated as part of a separate ("ring fence") trade carried on through a deemed permanent establishment in the UK (CTA 2010 s.279 (formerly ICTA s.492(1)). The profits are subject to a supplementary charge and the ring fence prevents the profits being reduced by losses from other activities or by excessive interest payments. In this way, Parliament has sought to ensure that the Exchequer shares in the value derived from the UK's natural resources.

51. For present purposes, the key provision is s.1313(2) of CTA 2009 (see formerly ICTA s.830(4) and FA 2003 s.153(2)), which provides that:

> "(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."

52. For these purposes s.1313(3) of CTA 2009 provides:

> (3) In this section-

[3] CTA 2009 came into force on 1 April 2009 and has effect for corporation tax purposes for accounting periods ending on and after 1 April 2009 (CTA 2009 s.1329(1)(a)). CTA 2010 and TIOPA both came into force on 1 April 2010 and both have effect for corporation tax purposes for accounting periods ending on and after 1 April 2010 (CTA 2010 s.1184(1)(a); TIOPA s.381(1)(a)).

> "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".
>
> "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".

53. It is common ground that the Buchan Field forms part of the UK sector of the continental shelf.

Issue 3

54. Section 53 of the CTA 2009 provides:

> 53 Capital expenditure
> (1) In calculating the profits of a trade, no deduction is allowed for items of a capital nature.
> (2) Subsection (1) is subject to provision to the contrary in the Corporation Tax Acts.

55. Sections 274, 279 and 304(1) of the CTA 2010 provide

> 274 Oil-related activities
> In this Part oil-related activities means
> (*a*) oil extraction activities, and
> (*b*) any activities consisting of the acquisition, enjoyment or exploitation of oil rights.
>
> 279 Oil-related activities treated as separate trade
> If a company carries on any oil-related activities as part of a trade, those activities are treated for the purposes of the charge to corporation tax on income as a separate trade, distinct from all other activities carried on by the company as part of the trade.
>
> 304 Losses
> (1) Relief in respect of a loss incurred by a company may not be given under section 37 (relief for trade losses against total profits) against that company's ring fence profits except so far as the loss arises from oil extraction activities or from oil rights.

The FTT Decision

56. References to numbered paragraphs in parentheses, (FTT [xx]) remain, unless stated otherwise, references to paragraphs in the Decision.

First issue – Article 6(2) of the Treaty on income from immovable property

57. The FTT decided that Article 6(2) of the Treaty, defining immovable property, applied to payments or income derived from the assignment or transfer of the right to

work natural resources (the Buchan Field) as much as the original grant of the right to work (FTT [54]):

> 54.Given that the purpose of the provision in the Treaty is clearly to focus on profit derived from the exploration for or exploitation of mineral resources, whether that profit is derived directly by working the resources or indirectly by letting out the right to do so, I see no reason for limiting the scope of Art 6(2) to cover only payments which are made directly to the owner of the rights in exchange for the grant of a right to exploit them. The apparent purpose of granting taxing rights on profits from natural resources to the state where the resources are situated would otherwise potentially be capable of avoidance by simply granting a licence to work those resources at a price equal to the cost of the works, then the grantee assigning that right to a third party in exchange for payment of substantial royalties…

First issue – Application of the Treaty to the contractual relationships

58. The FTT found that the Payments from BP to Sulpetro under Clause 5.4.1 of the SPA (and hence later paid to RBC by BP & Talisman) were created as part of the consideration for the right to work the Buchan Field and that the Payments could not be viewed in realistic terms as anything other than part payment for the assignment of that right to work (FTT [59]):

> 59.The question under the Treaty is whether the rights vested in the Bank [RBC] which gave rise to the Payments to it are "rights to variable… payments as consideration for… the right to work" the Buchan field. It is quite clear that on any realistic analysis, the royalty payment rights were originally 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 granted to BP by Sulpetro, and as part of the consideration for that right. Talisman then assumed the obligation to make the Payments as part of the contractual arrangements under which it obtained the right to work the Buchan field (and ownership of the oil won from it), but it is not possible in realistic terms to analyse the payments made by Talisman as being anything other than part payment for the assignment to it of the right to work the Buchan field, irrespective of how the original right to work the field arose.

59. It concluded at [65]:

> '65. The Payments fell due as part of the consideration given by BP (and subsequently Talisman) for the right to work the Buchan field. The oil actually won under the licence held by SUKL all became the property of BP (and subsequently Talisman) as a result of their agreeing to make the Payments. I do not consider the intricacies of the actual licensing arrangements affect this, or the natural conclusion that the royalty rights as originally created under the SPA between Sulpetro and BP (and subsequently novated so as to arise between Sulpetro and Talisman) were "rights to variable payments as consideration for the right to work mineral deposits" for the purposes of Article 6(2). The only

> question then is whether the assignment of the right to receive those payments from Sulpetro to the Bank, whether before or as a result of the assignment approved by the Court Order made in Sulpetro's receivership in October 1993, affects this analysis. I do not consider that it does, on the simple basis that the fundamental nature of the payment rights (as consideration for the right to work the Buchan field) remains unaffected by the identity of the holder of the rights or the history of how the rights came to be vested in it.'

Second issue – interpretation of section 1313 of CTA 2009

60. The FTT found that the Payments were not profits arising from exploration or exploitation activities for the purposes of s.1313 (2)(a) of the CTA 2009 (FTT [81]-[82]). However it found that they were profits within the meaning of s.1313(2)(b) of the CTA 2009 (FTT [83]-[96]). In particular, the FTT considered that they were taxable pursuant to subs.(2)(b) because "*exploration or exploitation rights*" extend to rights to the benefit of assets produced by exploration or exploitation activities and the Payments represented part of the commercial benefit of the sale of the oil from the Buchan Field (FTT [93]-[95]):

> 93. I also consider it clear that in addressing separately the situation where the putative taxpayer enjoys (i) "interests in" the relevant assets and (ii) "the benefit of" those assets, the draftsman was drawing a clear distinction between the two, and intended the "benefit" limb to cover situations where it could not fairly be said that an actual interest "in" the assets existed. The "benefit of" wording denotes an altogether broader and less legalistic approach to the question.
> …
> 95… In the present case, I consider the Bank does, by virtue of the royalty payments from Talisman, have rights to the benefit of the oil won from the Buchan field.

Third issue – deduction for losses incurred on the Appellant's loan to Sulpetro

61. RBC argued before the FTT that it was entitled to deduct "*the cost of acquiring the right to the Payments*" in calculating its liability to tax. In that regard, RBC contended that the outstanding debt owed to it by Sulpetro in 1993 was part of the cost of acquiring the Payments. The FTT rejected this on the ground that the only consideration for the assignment of the right to the Payments was CAD $1, as stipulated in the assignment agreement between Sulpetro and RBC. It further decided that the loss on the loan was capital in nature and hence not deductible from the Payments as income. The FTT therefore rejected RBC's contention that the losses which it had made on the loan to Sulpetro should be deducted in calculating the ring fence profits (FTT [98] & [101]):

> 98. It is clear that the Bank's deemed trade through a UK permanent establishment would have commenced at the time it acquired the "exploitation rights" falling within s 1313(2), i.e. the contingent right to receive the Payments. According to the agreed statement of facts, it did so in the course of realisation by Sulpetro's receivers of its assets in the course of its receivership. Included in

> the bundle of documents was a legal assignment to the Bank by Sulpetro dated 28 October 1993 of "all of [Sulpetro's] interest whatsoever in the Royalty and in the Agreement and of all its rights thereunder insofar as they relate to the Royalty." The stated consideration for this assignment was "the Bank crediting Sulpetro's indebtedness to it with the sum of one ($1.00) dollar." This was the formal assignment that was "approved" by the Court of Queen's Bench of Alberta on the same date (28 October 1993). The release of Sulpetro's outstanding debt owed to the Bank was not included as part of the consideration for the assignment, indeed the Payments have been applied towards the satisfaction of that debt in the Bank's books (even though Sulpetro itself has long since been dissolved and the debt has legally ceased to exist). I can see no proper basis for regarding any amount other than the stated figure of $1 as the consideration given by the Bank for the assignment of the royalty interest to it, accordingly if (as the parties have agreed) the Bank acquired its rights by virtue of the October 1993 assignment and not before, I consider the amounts of the Payments received by the Bank to represent pure income profit (except, possibly, to the extent of CAD$1).
>
> …
>
> 101. Even if the situation could be characterised as a purchase by the Bank of the royalty rights, I do not consider the situation here to be analogous to that in *Golden Horse Shoe*. There, the taxpayer had an existing trade of extracting gold from tailings and regarded the tailings as part of its stock in trade in doing so. Here, the Bank has acquired a right to a future contingent royalty, as part of a completely new deemed trade, in exchange for (at most) a nominal payment as part of an attempt to recover what it regarded to be a bad debt of its banking business. The situations could hardly be more different and even if the Bank could show it had given substantial consideration for the acquisition of the royalty rights, I would have regarded the expenditure as being capital rather than revenue in nature under the usual tests.

The Appellant's submissions

62. As we have noted in our preliminary observations, both parties made detailed written and oral submissions, all of which we have taken into account. The following is a summary of the submissions made by Mr Peacock QC in support of the grounds of appeal. We address further points made in our discussion section below.

Ground 1

63. Mr Peacock QC submitted that in order to be taxable in the UK, the Payments would first have to constitute income from *"immovable property",* that property here being "*rights to variable or fixed payments as consideration for the working of, or the right to work…natural resources"* under Article 6(2) of the Treaty but this did not apply to the Payments. The FTT erred in its interpretation or application of the Treaty, in failing to understand how Articles 6, 7 and 13 inter-relate.

64. In particular, he argued that the FTT failed to consider his argument on Article 13 of the Treaty and its impact on the interpretation of Article 6. The definition of 'immovable property' in Article 6(1) & (2) is stipulated to apply 'for the purposes of this Convention' to all Articles of the Treaty. Article 13(1) provides for the taxation by the in-situ state of gains from the alienation of "immovable property". Article 13(4) provides separately for the taxation of gains from the alienation of rights and licences (etc.) to drill for oil, or the right to assets to be produced by such activities. Mr Peacock QC submitted therefore that the terms of Article 13(4) cannot fall within the meaning of "immovable property", since otherwise Article 13(4) would be otiose (and see, in this regard, also Article 13(5) which recognises that Article 13(4) rights are not "immovable property" for the purposes of the Treaty).

65. He contended that it follows from the existence of Articles 13(4)(a) and (b) that rights to work the Buchan Field are different from rights to acquire the oil produced, and it follows from Articles 13(4)(a) and (b), and Article 13(5), that these two types of rights are different from the rights already defined as "immovable property" under Article 6 (i.e., natural immovables, and rights to payments as consideration for the right to work the field (or other natural resources)), which definition is applicable under Articles 13(1) and (5).

66. Mr Peacock QC argued that RBC's reading of Article 6(2) accords with, and respects, the scope and separate purpose of Article 13, which concerns the taxation of capital gains derived from the alienation of property (as opposed to Articles 6 & 7 which address income). He submitted that the FTT dismissed RBC's reliance on the remainder of the Treaty, particularly Article 13, without explanation (see FTT [38] where the argument is recorded and FTT [54]-[55] where it is not addressed). He submitted that the FTT erred in law in doing so; it should have concluded that once Articles 6, 7 and 13 are read as a whole, the sums received as income by RBC fall to be taxed by virtue of Article 7 and not Article 6.

67. He also relied upon the United States ("US") Treasury guidance on the UK-US Treaty and other relevant materials. He contended that there is a distinction between (on the one hand) "immovable property" as understood in the terms of Article 6(2) and (on the other) oil licences and rights to, interests in or the benefit of the oil can also be seen in the US Treasury Department Explanation on the equivalent provisions in the UK-US Treaty[4]. That Explanation makes clear that oil licences and rights to, interests in and the benefit of the oil are specifically dealt with so as to be "immovable property" in that Treaty, and only for the purposes of Article 13, as that would not otherwise be the case in general nor under the extended definition applicable to both Articles 6 and 13 of that Treaty.

68. Similarly he relied on Article VI of the US:Canada Convention with respect to taxes on Income and Capital (1980), another Treaty entered into by one of the relevant Contracting States. This specifically extends the meaning of "real property" so as to include not just "rights to explore for or to exploit mineral deposits" but also "rights to amounts computed by reference to the amount or value of production from such

[4] See Articles 3.1(m), 13(2)(a) of the United Kingdom-United States: Income Tax Treaty 1975

resources". This emphasises that, absent such words in the Treaty, the Payments are not income from "immovable property" in the hands of RBC. Specifically, Article 6(2) of the Treaty does not allow the taxation of income from payments that are merely "computed by reference to" the amount or value of production. Instead, and to reiterate, the payments must be made as "consideration for" working or the right to work the land.

Ground 2

69. Mr Peacock QC further submitted that the proper interpretation of Article 6(2) is that it only applies to income derived from the original grant of the right to work the natural resources rather than any payments made in respect of a transferred or assigned right. On any analysis, the Payments made by BP or Talisman to RBC did not represent consideration for the original grant of the right to work the Buchan Field (the right to work had never been granted to RBC but had been granted to SUKL – see Ground 3).

70. He argued that the FTT erred at [54] of the Decision in interpreting Article 6(2) ('*I see no reason for limiting the scope of Art 6(2) to cover only payments which are made directly to the owner of the rights in exchange for the grant of a right to exploit them'*). The FTT was required to consider the scope and meaning of the French text of the Treaty. He submitted that the French version of the Treaty was not only equally authoritative by virtue of Article 29 of the Treaty and Article 33(1) of the Vienna Convention but incorporated into English law by virtue of paragraph 2 of the Order.

71. Examining the French text of the fifth limb of Article 6(2) it states, "*les droits à des redevances variables ou fixes pour l'exploitation ou la concession de l'exploitation*". This language makes it clear that it is only concerned with a right to payments given as consideration for the grant of an oil exploration/exploitation right and not anything else. The equivalent of "*variable or fixed payments"* in the French text is "*redevances variables ou fixes"*, "*working*" is "*l'exploitation"*, and "*the right to work"* corresponds to "*la concession de l'exploitation".* That term "concession" is to be understood in the sense of 'grant', for the following reasons.

72. Looking at the Treaty itself, it can be seen that a distinction is drawn, in the French text, between a "right" (or "droit") in the opening words of the fifth limb of Article 6(2) and "concession" in the next line. The same distinction can be seen in the French text of Article 13(4)(a) where "droit" is used to mean "right", thereby emphasising that "concession" has a different meaning. In effect, a person can come to hold a right/"droit" by transfer; however, a person will only hold a "concession" by virtue of a grant of some right by the person owning the relevant asset. Mr Peacock QC submitted that the French text has no equivalent for the word "consideration" so that it reads simply as "payments for the working or the grant of the right to work", thereby demonstrating the direct relationship between the payments and the grant of the right to work.

73. In Canadian legislation, such as the Canada Revenue Agency Act s.78(1), where the English terms "grant" and "concession" or the verbs "to grant" and "to concede" are used the official French text of the legislation uses "concession" or the verb

"concéder". In English, the start to that subsection reads: "*Agency real property may be granted and Agency immovables may be conceded"* (emphasis added); the French reads "*L'Agence peut concéder le immuebles de l'Agence et les biens reels de l'Agence de l'une de façons suivantes"* (emphasis added)[5].

74. This distinction between a "right or "droit" which may arise in a number of ways and the grant (or "concession") by an owner of an asset in favour of another can also be seen in Canadian case law[6], where "*concession"* is treated as a "*bilateral or unilateral juridical act by which a person, the grantor, gives another, the grantee, enjoyment of a particular right or benefit. Cf. assignment, rental, licence".*

75. Likewise, Canadian legal dictionaries provide that a "concession" is a:

(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"*[7].

(b) "*contract by which a merchant, called a "concessionaire" (the grantee), obtains the right guaranteed exclusively, over a territory and for a determined period, the sale or distribution of products that he buys from a manufacturer, called a "concédant" (the grantor)"*[8].

76. He submitted that had the FTT given proper consideration to the Treaty as it is expressed in French, it would have correctly identified that in both language versions Article 6(2) is concerned with income received from a right to payment where that payment was made as "consideration for" a grant of the relevant right to work the oil.

77. Mr Peacock QC also relied upon a comparison between Articles 6 and 12 of the Treaty. He contended that the scope and application of Article 12 of the Treaty supports this analysis. Article 12 deals with income in the form of royalties and defines a "royalty" as a "payment of any kind received as consideration for the use of, or the right to use, any copyright etc", thereby matching, in relevant respects, the wording of Article 6(2), fifth limb. Paragraphs 8, 8.1 & 8.2 of the OECD Commentary (2010) on the equivalent article in the OECD Model Treaty (also Article 12) provides that the term

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[5] See other examples in s.95(1) of the Canadian Income Tax Act 1985 and Reg.1106 of the Canadian Income Tax Regulations. These reflect the fact that legislation in Canada is enacted in both English and French as equally authoritative texts by virtue of the Official Languages Act 1985.

[6] In *Capital Management Ltd v MNR*, 68 DTC 5041, the Supreme Court of Canada stated that "the words `franchise, concession or licence' in the [*Income Tax Act*] were used to refer to some right, privilege or monopoly that enables the concessionaire or franchise holder to carry on his business or that facilitates the carrying on of his business and that they were not used to refer to a contract under which a person was entitled to remuneration for the performance of specific services" (referring to *The Investors Group v MNR,* 65 DTC 5120 (Ex. Ct.)). See also *AG (Canada) v Imperial Oil Resources Limited et al*, 2009 FCA 325, where oil extraction rights under Crown leases are referred to in French as "concessions".

[7] See *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.

[8] See *Dictionnaire de droit québécois et canadien, 5e édition Avec table des abréviations et lexique anglais-français*, Reid, Hubert, Ad.E; Reid, Simon, Wilson & Lafleur, 2015.

'royalty' "does not… apply to payments that… are made to someone else who does not himself own the [intellectual property] right or the right to use it". It can thus be seen that the expression 'consideration for the use/working or the right to use/work' is understood, in treaty terms, as referring to the right conferred by way of grant, by the owner of the asset concerned, on the grantee/licensee. Again, this submission about the significance of Article 12 was made to the FTT but is not recorded anywhere in the Decision.

Ground 3

78. Mr Peacock QC submitted that the FTT erred in analysing the contractual relationships when deciding that the Payments represented income from variable payments for the right to work the Buchan Field. Specifically, in its application of Article 6(2) in the present case, the FTT wrongly accepted that there was a right (to certain sums) given as consideration for the right to work the oil because that right to certain sums was 'in substance' conferred on Sulpetro by BP under the SPA and/or the Novation of the IA. Such a contention is based on ignoring or discounting which entity actually held the oil licences and a misinterpretation of the effect of the contracts entered into by Sulpetro and BP.

79. Relevantly, SUKL held the licences as licensee from the Crown and Sulpetro did not. Sulpetro was a party to the IA which gave it the benefit of the oil won at a cost of its obligation to fund exploration and exploitation, which contractual position it transferred to BP by way of novation. BP paid Sulpetro (inter alia) for the shares in SUKL and for the novation. No part of the consideration passing from BP to Sulpetro was for the right to work the licensed area of the North Sea; SUKL was the only party which actually had the right to work the oilfield (and paid royalty to the Crown for such a right).

80. The effect of this basic contractual position was that neither Sulpetro, nor RBC, were ever able to grant or transfer a right to work the oilfield for which the Payments could be said to be in consideration. Equally, SUKL did not, as part of the sale to BP, assign or transfer that right to anyone. The right to work the oilfield remained at all times with SUKL.

81. The FTT's approach was (wrongly) to proceed from the fact that BP (and then Talisman) held, as against SUKL, the contractual entitlement to the oil extracted by SUK and were subject to the obligation to make the Payments to RBC, to the conclusion that the payments must on a "realistic analysis" (FTT [59]) be consideration for a right to work the oil field and therefore fall within Article 6(2). This was, with respect, to make a nonsense of the proper contractual analysis.

82. Mr Peacock QC submitted that, prior to the transaction with BP, SUKL held the licence interest and so the right to work the field and Sulpetro had a contractual right against SUKL to the oil. After the sale of SUKL's shares to BP, SUKL (now owned by BP) continued to hold the licence interests as licensee from the Crown. In terms of the Treaty, the sale of the shares in SUKL would be within Article 13(5)(a) as shares deriving their value from "*any right referred to in paragraph 4 of this Article"*. SUKL

had the rights referred to in Article 13(4)(a), however these were not disposed of. BP also acquired, by the Novation, Sulpetro's right to own and receive the oil won by SUKL. The disposal of this right would therefore fall within Article 13(4)(b), but, significantly, there is no equivalent of Article 13(4)(b) in Article 6.

83. As part of the consideration for the transaction between Sulpetro and BP, the contractual right to the Payments came into being when BP agreed to make the Payments to Sulpetro. The payments to be made by BP (and in fact later made by Talisman) were not "for" the right to work Buchan or "for" the assignment of the right to work Buchan. That right to work Buchan passed to the BP group on and by virtue only of the purchase of the shares in SUKL; significantly in legal terms the right itself did not move at all, whether by assignment or otherwise – it remained in SUKL.

84. The right to the Payments eventually passed to RBC by virtue of the Canadian Court Order. As a matter of contractual analysis, all that RBC ever held was a contractual right to a sum of money, computed by reference to oil production and oil prices, which was designed (by Sulpetro and BP) to be part of the overall consideration under the SPA and which later came to be held by RBC in light of the outstanding loan owed to it. As a result of the transaction between Sulpetro and BP, BP henceforth owned the shares in the company with the right to drill for oil, and itself held the contractual right to the oil produced. BP (and later Talisman) did not need to, and did not, pay consideration to anyone (let alone RBC) for the right to work Buchan.

Ground 4

85. Mr Peacock QC argued that the FTT erred in law in its interpretation and application of s.1313(2)(b) of the CTA 2009 at [93]-[95] of the Decision. The FTT's approach to the question of whether RBC had the "benefit" of the oil itself ignores the true contractual arrangement between the parties, and the nature of RBC's contractual rights as against BP/Talisman. He accepted that there must be a distinction between an "interest in" and the "benefit of" an asset (FTT [93]); however, this notion of the "benefit" of an asset is not open-ended and must still require some recognised legal claim on the oil itself (which RBC never had). A contractual right to a sum of money (i.e. a chose in action against a contractual counterparty) computed solely by reference to the price of the oil produced is not any kind of legal claim on, or to the benefit of, the oil itself.

86. Further, in the Decision at [90] the FTT misunderstood the point of *Re Euro Hotel (Belgravia) Ltd* [1975] STC 682 *("Euro Hotel"),* and RBC's reliance on it. The principle to be derived from that decision is not simply that the label placed on a transaction by the parties is not determinative of its nature (which is a trite point of law). Instead, RBC relies on *Euro Hotel* for the proposition that the substantive nature of the payment is not to be determined by the method of its computation.

87. He submitted that Clause 5.4 of the SPA creates a contractual right to the Payments and, in broad terms, provides that where the actual market value (as defined) of oil produced at the oilfields exceeds USD $20 per barrel, BP is contractually bound to pay Sulpetro a sum calculated *"in respect of"* oil produced and sold. Sulpetro, and

therefore RBC as assignee of this right, was granted no right in the oil, nor to, or in, the sale proceeds of that oil. Neither Sulpetro nor RBC could force the sale of the oil or demand payment if BP/Talisman were to store the oil and sell it at a later date when prices have increased or decreased. Instead, Clause 5.4 granted a limited contractual right to payments calculated by reference to the value of oil, and only where the value of oil sold exceeds a set amount (less certain expenses). The FTT erred in concluding that this contractual entitlement represented the benefit *of* the oil itself[9].

88. This can be tested in this way. RBC's contractual right was to a sum to be computed as and when the oil is sold, and the conditions for payment are met. If oil was routinely worth less than USD $20 per barrel, Sulpetro and then RBC would receive no payments, despite, clearly, oil still being produced. Depending on the fluctuating price of oil therefore, RBC could have no entitlement to a sum in a period (as has happened for a significant part of the period since 1986) or an entitlement to a significant sum. Equally, if BP/Talisman simply failed to pay, RBC's remedy would be a claim in contract for damages in respect of its chose in action and not any kind of proprietary claim in or over the oil itself (indeed, this is recognised by the FTT at [61]: "*Sulpetro originally obtained a chose in action (the contingent entitlement to future royalty payments)…*").

89. Mr Peacock QC contended that in holding that RBC had the benefit of the oil itself, the FTT therefore erroneously extended the scope of s.1313(2)(b) CTA 2009. Specifically, the right to a sum computed by reference to the price of oil was not intended to, nor does it, fall within the ambit of s.1313 CTA 2009; if it had been, the provision would have been drafted in much simpler terms so as to refer to "any payment directly or indirectly resulting from or arising out of exploration or exploitation activities" or (in the relevant terms of the US: Canada Treaty) "rights to amounts computed by reference to the amount or value of production from [natural resources]".

90. He submitted that the FTT correctly dismissed HMRC's argument that RBC's liability arose under s.1313(2)(a) CTA 2009 (exploration or exploitation activities) as clearly this provision is intended to focus on the oil activities themselves, and there is not a sufficient connection between RBC in Canada and the activities of Talisman in the North Sea for this to be satisfied (FTT [81]-[82]). There was also no question of the Payments arising from rights to assets to be produced, i.e. from rights to the oil itself (FTT [83]).

91. The FTT correctly concluded that an "interest" in the oil refers to "*some underlying legal interest in rem in the oil itself"* which (it was common ground) did not exist here (FTT [86]). However, the FTT then erred in holding that RBC had a right to the "benefit of the oil" and therefore was subject to UK corporation tax on the Payments for the reasons set out above.

[9] A key point here, said to have been missed by the FTT, is the exact wording of the provision. The provision in s.1313(2)(b) is focused on the benefit *of* the asset itself. It is not looking for any benefits that might be derived, indirectly, *from* the asset.

Ground 5

92. Mr Peacock QC submitted that the FTT also erroneously determined at [98]-[101] of the Decision that, at most, RBC's costs were CAD $1, and so the Payments should be taxable in the UK in full, with no ability to set-off the bad debt which was the true cost of acquiring the contractual right to the Payments. The FTT also erred in concluding that, beyond the CAD $1 on the assignment of the contractual right to the Payments to RBC under the Court Order, RBC was not able to deduct any costs incurred in earning the relevant Payments in calculating its liability to tax in the UK.

93. He contended that this was unrealistic. At this stage of the analysis, it must be assumed that RBC receives income, in the form of the Payments, which is taxable in the UK notwithstanding that they arise ultimately in commercial terms from the loan made by RBC to Sulpetro. At the time the contractual right to the Payments was assigned to it, RBC was still owed CAD $185m by Sulpetro and RBC wrote that sum off as a loss (and thus a debit) for Canadian tax purposes. To the extent that RBC received the Payments, such sums have been treated as income for Canadian tax purposes so that, overall, in Canada RBC has only paid tax on its true profit.

94. As a matter of principle, the same should be true in the UK. If, on this hypothesis, RBC is liable to tax in the UK on the "profits" of a deemed oil PE in the UK (per s.1313), those profits must reflect both the income received and the costs and losses incurred in earning those sums. In effect, once there is a deemed oil extraction permanent establishment the relevant profits must be computed in accordance with the principles in ss.19-32 CTA 2009.

95. Mr Peacock QC submitted that such principles require, that the income expenses and losses incurred by RBC in acquiring and then realising its deemed right to oil related payments are deducted from those payments to arrive at a net profit or loss (and the expenditure on the loan was not capital in nature as the FTT found in the alternative). To take account of income without recognising the costs incurred in generating that income offends the attribution rules in ss.19-32 CTA 2009; the FTT was wrong (at [98] of the Decision) to conclude otherwise.

HMRC's submissions

96. Mr Bremner QC's submissions can be summarised as follows.

Ground 1

97. The FTT did not err in its interpretation of the Treaty by reference to the relationship between Articles 6, 7 and 13. RBC placed particular emphasis on the terms of Article 13(4), which provides (inter alia) for the taxation of gains from (a) the alienation of a right or licence to drill for oil and (b) the rights to oil to be produced, interests in or the benefit of that oil. RBC contends that such rights/licences cannot fall within the meaning of "*immovable property*" because otherwise Article 13(4) would be otiose. That proposition was ill-founded for a number of reasons.

98. Article 13(4) is not seeking to define "immovable property" and cannot override the definition in Article 6(2). The inclusion in Article 13(4) of a specific rule for the alienation of those particular rights, licences or privileges merely makes express provision for the treatment of such property for the purposes of Article 13. It does not call into question the scope of the concept of *"immovable property"* in Article 6. HMRC's analysis does not render Article 13(4) "otiose": it is a more specific provision for these particular assets which removes any doubt as to their treatment. It is unsurprising that specific provision of that nature is contained in Article 13 given the asset-focused nature of a tax on gains.

99. In any event, Article 13(4) is clear evidence that the Contracting States considered that such amounts ought to be taxed in the place where the immovable property is situated. Given that is so for gains, it is inherently unlikely that the UK and Canada intended income from the same assets to be taxable in the country of residence only.

Ground 2

100. Mr Bremner QC submitted that the Appellant had no permission to pursue the ground of appeal regarding the French version of Article 6(2) and whether '*la concession*' only refers to the original grant of the right to work. He argued that the scope of permission to appeal granted by Judge Poole in the FTT was limited and that required the Appellant to apply successfully to admit fresh expert evidence as to the meaning of the French text of the Treaty. Further, he submitted that the case management decision of the Upper Tribunal dated 25 May 2021 refusing to the Appellant's application to admit fresh evidence also stated that the Appellant had no permission to pursue the ground without such evidence.

101. Even if the ground could be pursued, he submitted that the French version of the Treaty does not, and cannot, support RBC's contention that "*consideration for… the right to work*" is limited to consideration for a grant of that right. The term *"la concession"* in the French text, is not limited to grants of rights. The concept of *"la concession"* is (both generally and in this particular context) capable of referring to a transfer of the right to work natural resources and a grant of the right to work natural resources. More generally, the term *"la concession"* clearly does not have one fixed meaning which is limited to a grant of rights. Rather, in common with many legal terms, the precise meaning of "*la concession*" depends upon the context in which it is being used. Nor has RBC addressed the point that the French text uses the concept of *"l'exploitation"* (a concept which, if anything, directs attention more widely than the mere physical working of natural resources) and *"la concession de l'exploitation"*.

102. Further and in any event, Mr Bremner QC submitted that even if there is a tension between the English and French language versions of the Treaty as a matter of ordinary language (which he denied), it does not follow that the English text falls to be limited (or otherwise read down) so that it applies only to situations where there is a grant of the right to work.

103. The French and English texts are equally authoritative and presumed to carry the same meaning (per Article 33(1), (3) of the Vienna Convention). Accordingly, this case

is not comparable to *Fothergill v Monarch Airlines* [1981] AC 251 (where the French text was stipulated to prevail over the English text). Even if the Appellant's narrow interpretation of the French text is correct, there is no similar limitation on the face of the English language version.

104. Mr Bremner QC submitted that even if there is a difference of meaning which Articles 31 and 32 of the Vienna Convention do not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, must be adopted (Article 33(4) Vienna Convention). Here, the concept of *"la concession"* in French is best understood as reflecting the English concept of the *"right"* to work the relevant natural resources. That fits with rationale for Article 6 based on the closeness of the connection between the source of income and the Contracting State rather than any artificial legal constructs. There is no purposive reason for limiting Article 6(2) to a grant (in purported contradistinction to the transfer) of such rights. Indeed, a right to work natural resources in the UK is no less connected to the UK by virtue of being transferred by the grantee to another person.

Ground 3

105. Mr Bremner QC submitted that the FTT did not err in its application of Article 6(2) to the analysis of the contractual relationships between the parties. He argued that under the SPA the right to work the Buchan Field was acquired by BP from Sulpetro. The right to the Payments was (part of) the consideration for that acquisition such that they were income from immovable property for the purposes of Article 6(2).

106. He contended that it makes no difference, in this context, that the Licence from the Crown was held by SUKL, a wholly-owned subsidiary of Sulpetro. The reason for SUKL holding title to the Licence was evidently because at that time the Crown only granted licences of this nature to UK companies. Prior to the SPA, the Illustrative Agreement nevertheless gave Sulpetro an interest in the Licence. It was Sulpetro (not SUKL) which incurred all the development and exploitation costs in relation to the Buchan Field and enjoyed the oil won from the Buchan Field (see Article 6 of the Illustrative Agreement). SUKL was merely a repository for the title to the Licence.

107. Moreover, he submitted that Sulpetro was not a mere passive investor. In addition to providing the funds and equipment, under Article 5 of the Illustrative Agreement Sulpetro provided the *"budget and work programs"*, and Article 5 further specified that *"such program shall be carried out"*. Sulpetro thus had a contractual right to require its specified work programme to be carried out in the Buchan Field. In return, Sulpetro received ownership of the petroleum won from the Buchan Field with a responsibility to deal with that petroleum through contracts of sale concluded in the UK (Articles 6 and 8 of the Illustrative Agreement). The Illustrative Agreement expressly describes Sulpetro's income from doing so as "*income derived from the extraction of petroleum*" (Article 6 of the Illustrative Agreement). Thus, notwithstanding SUKL was the holder of the Licence, in both a legal and commercial sense Sulpetro (either on its own and/or through its ownership of the shares in SUKL) enjoyed (or, on any view Sulpetro together with SUKL enjoyed) the right to work the Buchan Field.

108. Those rights to work the Buchan Field were acquired by BP from Sulpetro under the SPA. Under the SPA, Sulpetro expressly disposed of its "Licence Interests" for the exploration and exploitation of the Buchan Field to BP, together with SUKL which held the title to the Licence. The "Licence Interests" were defined as "*that share attributable to Sulpetro and [SUKL] of any and all rights and interest whether legal or beneficial, and property, to and in the licences as set out in Appendix B*" (Clause 1.1 SPA).

109. The clear purpose and effect of the SPA was to transfer from Sulpetro to BP the whole of the Licence Interests in the Buchan Field, including not only ownership and control of SUKL but also Sulpetro's entitlement to the income from the oilfield's exploitation and its right to direct the "work programs" to be carried out in (inter alia) Buchan. Prior to the completion of the SPA, BP had no right to work that part of the Buchan Field or to enjoy the income from doing so. The very purpose of the SPA was for BP to acquire such rights.

110. In consideration, BP gave Sulpetro a cash payment (under Clause 4.1 of the SPA defined as the 'Consideration') plus the right to receive the Payments. That right to the Payments is a right to "*variable payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources"* within the meaning of Article 6(2) of the DTC.

111. As an alternative argument, Mr Bremner QC submitted that even if it were appropriate to treat the sale by Sulpetro to BP as a transaction which did not transfer the right to work the Buchan Field (which was denied), the income which BP received was nevertheless directly derived from the exploitation of the Buchan Field and the Payments represented a slice of that future income. On any realistic view, the Payments were sufficiently connected with the exploitation of the UK's sector of the continental shelf to represent income from immovable property under Article 6(1).

Ground 4

112. Mr Bremner QC submitted that the FTT was correct to find that the Payments are taxable by virtue of section 1313(2)(b) CTA 2009.

113. He submitted that the FTT's reasoning in relation to s.1313(2)(b) is correct (FTT [92]-[95]). Parliament has clearly defined *"exploration or exploitation rights"* so as to extend beyond "*rights to assets to be produced by exploration or exploitation activities*" so as to encompass *"rights to … interests in"* such assets and also *"rights to … the benefit of"* such assets. The *"assets to be produced by exploration or exploitation activities"* in the present case are the oil won from the Buchan Field. The parties to the arrangements plainly (and correctly) viewed the Payments as giving Sulpetro (and subsequently RBC) a commercial (or economic) interest in the Licence. Irrespective of whether RBC has an "*interest in*" or a "*right to*" the oil won, on any view, the Payments give RBC (at least some of) the benefit of the oil worked in the Buchan Field.

114. Accordingly, RBC's right to the Payments is a right to the benefit of assets produced by exploitation activities and it is within s.1313(2)(b). That accords with the

purpose of the legislation in ensuring that profits from the extraction of the UK's natural resources are subject to the UK's ring fence taxation regime.

115. While RBC contends that the Payments were not taxable under s.1313(2)(b) on the basis that in order for RBC to have had "*the benefit of*" the oil within the meaning of s.1313(3) it would have needed not just a contractual right to a sum of money, but also a legal claim on the oil itself. However, Mr Bremner QC submitted that the terms of s.1313(3) make clear that whether a taxpayer has "*the benefit of*" the oil is separate from (and not dependent on) having "*an interest in*" the oil. Therefore, it makes no difference that RBC has a chose in action rather than a proprietary claim to the oil itself. Plainly what RBC had was a right to (at least part of) the commercial benefit of the oil.

116. In the alternative, he submitted that, contrary to the FTT's Decision at [82] ('I do not consider however that the connection between the Bank and the exploration and exploitation activities of Talisman in the present case is sufficiently proximate for it to be fairly said that profits from those exploration or exploitation activities have arisen to the Bank'), the Payments fall within section 1313(2)(a).

Ground 5

117. Mr Bremner QC contended that RBC was not entitled to deduct "*the cost of acquiring the right to the Payments*" in calculating its liability to tax. Therefore, the outstanding debt owed to it by Sulpetro in 1993 could not be deducted as part of the cost of acquiring the Payments. This was for four reasons.

118. First, he submitted that the FTT correctly rejected this on the ground that the only consideration for the assignment of the right to the Payments was CAD $1, as stipulated in the assignment agreement between Sulpetro and RBC. The FTT was correct so to conclude. It makes no difference that the assignment arose in the context of the receivership of Sulpetro and the discharge of an outstanding debt owed to RBC. The parties to the assignment nevertheless agreed that only $1 would be allocated as consideration for the right to the Payments. RBC cannot go behind that agreement in order to alter the allocation of consideration for tax purposes (e.g. *E V Booth (Holdings) Ltd v Buckwell (Inspector of Taxes)* [1980] STC 578 at p.584).

119. Second, and in any event, he submitted that the loan was made in the ordinary course of RBC's banking trade in Canada, which is a separate trade for corporation tax purposes pursuant to s.279 CTA 2010 (formerly s 492(1) ICTA 1988). The loan was not an expense of RBC's ring fence trade.

120. Third he submitted that, even if the outstanding loan had been an expense of RBC's ring fence trade, as the FTT held, it was capital in nature (FTT [101]) and therefore specifically prohibited from deduction by ss.29(5), 53 CTA 2009.

121. Fourth, and in any event, Mr Bremner QC submitted that RBC had no relevant UK permanent establishment to which any trading loss could be attributed (as a deemed UK permanent establishment is not a "permanent establishment" within the meaning of the Treaty).

Discussion and analysis

122. We address each of the five grounds of appeal in turn.

Interpretation of the Treaty

123. Before we address the first two grounds of appeal, whether the FTT erred in interpreting Article 6(2) of the Treaty on the meaning of income from immovable property, we make it plain that the task of interpreting a treaty is not the same as the interpretation of an Act of Parliament that deals with purely domestic law - see Lord Diplock in *Fothergill*, at 281H-282C:

> '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 and Shipping (UK) Ltd.* [1978] A.C. 141. at 152, "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation ".'

124. We have set out above the relevant provisions of the Vienna Convention on the Law of Treaties 1969, namely Articles 27, 31, 32, and 33. We have also made reference to the guidance in the case law, provided by *Revenue and Customs Commissioners v Anson* [2015] UKSC 44 (at [56]), *Fowler v Commissioners for Her Majesty's Revenue and Customs* [2020] UKSC 22 ([18] and [19]). In short, the aim is to establish by objective and rational means the common intention which can be ascribed to the parties in light of the wording and purpose.

125. We also acknowledge our duty to consider the terms of the Treaty, both in English and French, by reason of the obligations of the UK to observe the Treaty; see Lord Diplock in *Fothergill*, at 283C:

> …an international convention where that text itself is ambiguous or obscure, an English court should have regard to any material which those delegates themselves had thought would be available to clear up any possible ambiguities or obscurities. Indeed, in the case of Acts of Parliament giving effect to international conventions concluded after the coming into force of the Vienna Convention on the Law of Treaties, I think an English court might well be under a constitutional obligation to do so. By ratifying that Convention, H.M. Government has undertaken an international obligation on behalf of the United Kingdom to interpret future treaties in this manner and since under our constitution the function of interpreting the written law is an exercise of judicial power and rests with the courts of justice, that obligation assumed by the United Kingdom falls to be performed by those courts.

126. We are able to consider a wide range of legal materials, when required to construe the wording of a treaty in a foreign language; see Lord Wilberforce in *Fothergill*, at 273F-274A and Lord Scarman in *Fothergill*, at 294B-295D, in particular 294E-H:

> We know that in the great majority of the contracting states the legislative history, the "*travaux preparatoires*", the international case law ('*la jurisprudence*'), and the writings of jurists ('*la doctrine*'), would be admissible as aids to the interpretation of the convention. We know also that such sources would be used in the practice of public international law. They should, therefore, also be admissible in our courts: but they are to be used as *aids* only.
>
> Aids are not a substitute for the terms of a convention: nor is their use mandatory. The court has a discretion. … the court must first look at the terms of the convention as enacted by Parliament. But, if there be ambiguity or doubt, or if a literal construction appears to conflict with the purpose of the convention, the court must then, in my judgment, have recourse to such aids as are admissible and appear to it to be not only relevant but helpful on the point (or points) under consideration. Mere marginal relevance will not suffice: the aid (or aids) must have weight as well…

Ground 1 - The FTT failed to address and give proper weight to the purpose of Article 6(2) of the Treaty and its correlation to other articles within the Treaty, particularly in light of other double tax treaties entered into by the UK or Canada.

127. Mr Peacock QC's primary argument on this ground was that rights to oil income are excluded from Article 6 in any event, on the basis that they do not qualify as immovable property by virtue of Article 13(4) of the Treaty.

128. The argument, which derives from an analysis of Article 13, is superficially attractive. Article 13(1) deals with the gains derived by a resident of a contracting state from the alienation of immovable property situated in the other contracting state. In such a case the state in which the immovable property is situated may tax the relevant gain.

129. The Treaty must be read as a whole, so that the provisions of the various Articles operate in a consistent and coherent manner. The reference to immovable property must also have the same meaning in Article 13 as it does in Article 6. The definition cannot change from Article to Article unless specific provision to this effect is made in the Treaty.

130. Given that Article 13(1) deals with immovable property, the question which arises is why there is a carve out, in Article 13(4), in respect of gains from the alienation of rights, licences, or privileges relating to the exploration for, drilling for, or taking of petroleum, natural gas or other related hydrocarbons. The carve out might be said to be unnecessary, if rights to income from these hydrocarbons are within Article 6(2), and thus within the definition of immovable property. Although Article 13 does contain provisions which modify the definition of immovable property for the purposes of Article 13, they do not affect this particular point.

131. The answer to this question, so Mr Peacock QC argued, is that rights to oil income are not within Article 6 at all, because they are not part of immovable property, as that expression is defined in Article 6(2).

132. There are however two problems with this argument.

133. First, this argument does not work, on close analysis of the text of Article 6(2) and Article 13(4). If the argument is correct, one would expect the description of the rights dealt with in Article 13(4) to match the rights described in the fifth limb of Article 6(2) (the 'Fifth Limb'). This is not however the case. While there may be some limited overlap between the description of the rights in Article 13(4) and the description of the rights in the Fifth Limb, the relevant wording is not the same. In particular, Article 13(4) refers only to petroleum, natural gas and other related hydrocarbons whereas 6(2) refers to all mineral deposits, sources and other natural resources.

134. If Article 13(4) was intended to have the effect of limiting the definition of immovable property in Article 6(2), one would expect this to be spelt out clearly, in Article 6(2) or, at the least, in Article 13. There is however no such limitation stated, either in Article 6(2) or in Article 13. In the absence of such an express limitation, it is difficult to read such a limitation out of the language of Article 13(4), which is not identical to the language of the Fifth Limb. In summary, the argument for the limitation places too much weight on the language of Article 13(4).

135. Second, this argument would, again, result in a substantial hole in the scheme of taxation of income from oil in the Treaty. In the case of a Canadian company having no permanent establishment in the UK, and thus outside the reach of Article 7(1), and not being directly engaged in exploration for or exploitation of oil, and thus outside the reach of Article 27A, the UK would have no ability to tax income realised from oil worked in the UK. The UK could only tax a gain derived from an alienation, within the terms of Article 13(4). The situation would be the same in the case of a UK company having no permanent establishment in Canada and realising income from oil worked in Canada. Again, it is difficult to believe that either party to the Treaty intended to leave a gap of this kind in the ability of that party to tax income from oil situated in the territory of that party.

136. If Article 13(4) excluded immovable property from being the right to drill for oil (13(4)(a)) and the oil produced (13(4)(b)) then income would only be taxed in the foreign state under Article 7 and would only be taxable when there are gains in the state it is located.

137. In 1978, when the Treaty was entered into, both the UK and Canada possessed, and were aware that they possessed very significant reserves of oil. One of the objects of the Treaty was for each state to be able to tax income realised by a company from that state's own natural resources, regardless of whether the company was located in that state or in the other contracting state. It seems unlikely that either state intended that income realised by a company from oil extracted in that state should fall outside the reach of Article 6 and be left to be taxed in the other contracting state. It is difficult to believe that either state would have been content to accept, in this context, the limited ability to tax such income pursuant to Article 7(1) and/or Article 27A. It is also difficult to believe that either the UK or Canada intended that there should be a hole of this kind in their ability to tax income realised on their own natural resources.

138. Furthermore, on the Appellant's interpretation, where a company with a foreign PE conducts the exploitation and receives the benefit of the natural resources, the state would be able to tax income under Article 6 and gains under Article 13 from potentially less profitable non-petroleum mineral deposits and resources (eg. tin, iron, clay etc.) where they are situated in that state. However, the state would not be able to tax income but only tax gains from petroleum (oil), natural gas and other related hydrocarbons which are likely to be some of the more highly abundant and profitable natural resources available to UK and Canada. This would not accord with the purpose of the Treaty – that the contracting states would want to tax income (in addition to gains arising) on oil located in their own state rather than cede it to the other state where the exploiting company has a foreign PE.

139. Mr Peacock QC sought to pray Article 13 in aid not only to argue that oil rights were excluded from the definition of immovable property, but also in support of his argument that the Fifth Limb was limited to the grant of rights (see Ground 2). The reference to alienation in Article 13 is however insufficient to support the argument that the Fifth Limb is confined to the grant of rights of working natural resources and does not include a transaction such as the transfer or assignment of rights of working. Article 13 is concerned with gains realised by transactions comprising the alienation of various forms of property. The Fifth Limb is not concerned with gains and is not, by its language, similarly confined to transactions comprising grants only.

140. At this point it is convenient to deal with an additional argument of Mr Bremner QC that the Revenue could still tax the Payments as income, even if they only became eligible for taxation in the UK as a gain within the meaning of Article 13. We reject this argument. It seems wrong that a sum of money which becomes eligible for taxation within the UK as a gain within the meaning of Article 13 can then be taxed in the UK in whatever way the Revenue wishes, regardless of the status of the relevant sum of money. Such an analysis seems to extend too far the flexibility given to the contracting parties, when it comes to the taxation of sums which are rendered eligible for taxation in one contracting state by a particular Article of the Treaty.

141. Mr Peacock QC also attempted to rely upon other treaty materials in support of his argument that oil rights were excluded from Article 6(2). We do not find the US Treasury Guidance on the US/UK Treaty to be helpful, nor do we find either the US/UK Treaty or the US/Canada Treaty to be helpful.

142. He placed reliance on the US Treasury guidance in relation to the capital gains article in the Double Taxation Convention between the UK and the USA. However, this material is irrelevant to the interpretative exercise before the UT and in any event does not assist RBC.

143. The aim of interpretation of a treaty is to establish, by objective and rational means, the common intention which can be ascribed to the parties. The unilateral view of a government department of the United States of America (a third party) in relation to the interpretation of a different instrument (the USA / UK treaty) is of no assistance in establishing a common intention which existed as between the UK and Canada in relation to the Treaty at the time that it was concluded (cf *Irish Bank Resolution Corp*

v HMRC [2020] EWCA Civ 1128, [2020] STC 1946 at [22]-[23] in relation to unilateral practice on the part of one of the contracting states to the same instrument – the present case is *a fortiori*).

144. Furthermore, the drafting of the US / UK treaty is in very different terms to that of the Treaty. Article 6 of the US / UK treaty (which uses a concept of *"real property"* rather than "*immovable property*") specifically excludes (in contrast to the Treaty) *"an interest solely as a creditor"* from the scope of the concept of real property for the purposes of the US / UK treaty (see Article 3(1)(m)). Given the differences in the treaty text, the US Treasury Guidance cannot provide any guidance as to the scope of the concept of *"immovable property"* in Article 6(2) of the Treaty.

145. In any event, even if the US Treasury Guidance were to be taken into account, the paragraph to which Mr Peacock QC refers "defines the term 'real property situated in the other Contracting State' to include assets that might not be considered real property" under the relevant definition. The Guidance further notes that for US purposes, the rights in question would be treated as real property "so the specific rule in Article 13 is not necessary". Thus, contrary to RBC's submissions, the Guidance confirms that the specific rule in Article 13(4) is included for the avoidance of doubt.

146. We dismiss this ground of appeal.

Ground 2 - The FTT wrongly dismissed arguments based on the equally authoritative French language version of the Treaty with insufficient, if any, consideration, resulting in a potentially contradictory interpretation. This is contrary to the Vienna Convention on the Law of Treaties (1969) ("the Vienna Convention") and established general principles of treaty interpretation.

Objection to the ground being pursued

147. Mr Bremner QC objected to the Appellant pursuing Ground 2 (which was originally Ground 3 in the application for permission to appeal before the FTT) on the basis of the conditional terms on which permission to appeal had been granted.

148. In his grant of permission to appeal to the Upper Tribunal dated 3 September 2020, Judge Poole stated:

> '6. On examination, the following specific instances are said to arise:
> (1) At [26], it is implied that the reasoning given for rejecting the Appellant's argument based on the French text of the Treaty was inadequate. I had accepted the Appellant's argument that reference could be made to the French text without recourse to expert evidence on its correct meaning in context. However, there was no such expert evidence before me and neither party applied for its admission. In the absence of such evidence, I was effectively asked to make a decision based on the English text of the Treaty, supplemented by a dictionary definition and some personal knowledge of the French language (as well as some submissions from the Respondents based on other French texts which were said to contradict the Appellant's position). As set out in the Decision, I considered the English text to carry a particular meaning in the present context and there was nothing to displace that conclusion from the evidence before me as to the French text and its meaning. In the circumstances, the Appellant now says I should

> have made a unilateral direction for the provision of expert evidence as to the meaning of the French text in context. If the Appellant wishes to persist with this point, it can only be on the basis of an application to the Upper Tribunal for permission to adduce new expert evidence on the point that was not before the Tribunal.
> …
>
> 8…In principle, therefore, I consider it appropriate to GRANT permission to appeal on these grounds, but subject to the caveat outlined at [6(1)] above with respect to Ground 3.
>
> [Emphasis Added]

149. In a case management decision dated 25 May 2021, Judge Jones refused an application by the Appellant to adduce expert evidence on the meaning of the French text of the Treaty, in particular, as to the use of the word 'la concession' within Article 6(2). In the course of refusing the application he stated, at [66] and [68]:

> '66. In addition to failing to establish proper grounds for the admission of new evidence, the Appellant's application is made more than seven months after the FTT indicated that it would need to apply to adduce expert evidence if it wished to pursue its argument based on the French language version of the Treaty. ..
> …
> 68. It would be unfair for the Appellant to have failed for over seven months to make the same application which the FTT expressly required it to make if it were to pursue this ground of appeal and then to gain any advantage by restricting the time available to HMRC to identify, procure and adduce appropriate expert evidence.'

150. We were satisfied that the Appellant does have permission to pursue this ground of appeal notwithstanding the objections of Mr Bremner QC and indicated this decision during the hearing. These are our reasons for that decision.

151. In our view, at [6(1)] and [8] of his grant of permission, Judge Poole did not require expert evidence to be adduced in order for this ground of appeal to be pursued. When he referred to requiring evidence to be admitted to pursue this 'point' in [6(1)] he was referring to the point made in the preceding sentence - as to whether he should have made a unilateral direction as to the provision of expert evidence before the FTT. The merits of deciding whether the FTT erred in failing to make such a direction could only be decided if there was such expert evidence now available that could establish whether such evidence would have made any difference to the strength of the Appellant's arguments. As such the Judge was not making the grant of permission to pursue the 'ground' conditional on the admission of expert evidence but was only making that 'point'.

152. Therefore permission to appeal on what was originally appeal Ground 3, now Ground 2, was not, on the proper construction of the Judge's decision on the permission to appeal application, granted subject to a condition that appeal Ground 3 could only be advanced if permission to call expert evidence should be obtained.

153. Likewise, there is nothing in Judge Jones's case management decision refusing the application to adduce expert evidence which constitutes a decision that the appeal

ground could only be pursued if permission to adduce expert evidence was obtained. The decision was simply to refuse the admission of expert evidence on the appeal to the Upper Tribunal when it had not been adduced before the FTT.

154. For the reasons we set out below, in the absence of any expert evidence on the French meaning of the text of the Treaty we must still have regard to the legal texts and other sources when considering whether there is any ambiguity in the English wording of the Treaty and whether the French wording casts any further light on the meaning of Article 6(2).

155. The legal materials relied upon by Mr Peacock QC as to the meaning of the French text of the Treaty have whatever weight in the argument they are found to have, in the absence of any expert evidence on the meaning of the French version of Article 6. There is no prejudice to HMRC in allowing Mr Peacock QC to pursue what is now Ground 2, on the basis of the legal materials which are relied upon. The absence of expert evidence may or may not be a difficulty for RBC in its pursuit of its case on the French text of the Treaty, but its absence does not preclude RBC from advancing this ground of appeal, and deploying such legal materials as it thinks appropriate in support of this ground of appeal.

156. We accept that it is our duty to consider the French text of the Treaty, independent of the argument over whether the French text of the Treaty has been incorporated into UK law by the Order (to which we shall return) because: (i) it is clear from *Fothergill* that it is our duty to consider both languages in which the Treaty is written, both of which have equal weight; and (ii) we accept that construction of the English version of the Treaty cannot fairly be carried out without considering the French text of the Treaty, which has equal weight. If there is any ambiguity, Article 33(4) of the Vienna Convention requires us to have regard to both translations.

157. The materials upon which Mr Peacock QC seeks to rely, in support of what is now appeal ground 2, qualify as legal materials; see the references to *Fothergill* above. As such they are materials upon which Mr Peacock QC is entitled to rely. The relevant materials are not evidence, and do not have to be introduced or supported by expert evidence. Their admissibility, notwithstanding that they may not have been referred to below, is confirmed by Lord Scarman in *Fothergill*, at 293E-H and 295B-D.

> 'First, the problem of the French text. Being scheduled to the statute, it is part of our law. Further, in the event of inconsistency, it shall, as a matter of law, prevail over the English text. It is, therefore, the duty of the court to have regard to it. We may not take refuge in our adversarial process, paying regard only to the English text, unless and until one or other of the parties leads evidence to establish an inconsistency with the French. We are to take judicial notice of the French. We have to form a view as to its meaning. Given our insular isolation from foreign languages, even French, and being unable to assume that all English judges are familiar with the language, how is the court to do its duty? First, the court must have recourse to the English text. It is, after all, the meaning which Parliament believes the French to have. It is an enacted translation, though not binding in law because Parliament has recognised the possibility

> of inconsistency and has laid down how that difficulty is to be resolved. Secondly, as with the English language, so also with the French, the court may have recourse to dictionaries in its search for a meaning. Thirdly, the court may receive expert evidence directed not to the questions of law which arise in interpreting the convention, but to the meaning, or possible meanings (for there will often be more than one), of the French. It will be for the court, not the expert, to choose the meaning which it considers should be given to the words in issue.
>
> …
>
> The same considerations apply to the international case law and the writings of jurists. The decision of a supreme court, or the opinion of a court of cassation, will carry great weight: the decision of an inferior court will not ordinarily do so, The eminence, the experience, and the reputation of a jurist will be of importance in determining whether, and, if so, to what extent the court should rely on his opinion.
>
> Nevertheless the decision whether to resort to these aids, and the weight to be attached to them, is for the court. However, the court's discretion has an unusual feature. It is applied not to a factual situation but to a choice of sources for help in interpreting an enactment. It operates in a purely legal field. An appellate court is not, therefore, bound by the lower court's selection of aids, but must make its own choice, if it thinks recourse to aids is necessary. This legal process is not unlike the use made by our courts of antecedent case law, though it lacks the inhibitions of any doctrine of precedent.'

158. Despite the submission of Mr Peacock QC, we are satisfied that the French text of the Treaty has not been incorporated into UK law by virtue of Article 29 of the Treaty and Article 2 of the Order. There is nothing within the terms of the Order that incorporates the French text into domestic law, nor was it contained as a Schedule to the Order. Article 29 does no more than state that the texts have equal authority. The position in respect of the Treaty and Order is markedly different from *Fothergill* which considered the Warsaw Convention 1929 (as amended in 1955). As referred to above, that Convention was incorporated into UK domestic law by the Carriage by Air Act 1961 and set out in Schedule 1 both an English translation and a French translation. Section 1 subsection 2 of the Act stipulated that the French version of the text was to prevail if there was any inconsistency between the two (*Fothergill* 272A-B).

159. Nonetheless, our conclusion that the French text of the Treaty has not in fact been incorporated into UK law, by reason of the wording of paragraph 2 of the Order itself does not make any practical difference to our approach to the French text, because we have already accepted that we are under a duty to consider, and should consider the French text.

Does the Fifth Limb of Article 6(2) only apply where the relevant payments are in consideration of the grant of the right to work the relevant natural resource?

160. Mr Peacock QC relies on the use of the words 'la concession' in the French text to limit the application of Article 6(2), so as to limit income to that derived from the original grant of the right to work the natural resource.

161. We are not satisfied that there is merit in this argument. We are satisfied that the FTT did not err in concluding at [54]-[55] of the Decision that the scope of Article 6(2) was not limited to cover only payments which are made directly to the owner of the rights in exchange for the grant of a right to exploit them but could cover a transfer or an assignment of the rights. This is for the following reasons.

162. As a matter of simple language, there is no reference to *"grant"* in the English wording of the Fifth Limb of Article 6(2). There is simply a reference to rights to variable or fixed payments as consideration for the working of, or the right to work natural resources. This wording is capable of encompassing a number of different types of transaction, including the transfer of rights to work natural resources. To read the Fifth Limb as confined to the grant of rights involves reading a word, namely *"grant"* into the Fifth Limb which does not appear there.

163. This conclusion is not altered by resort to, and comparison with the French text of the Treaty. The legal materials put before us as an aid to the construction of the French version of the Article 6(2) are, at best, ambiguous. They do not establish, let alone clearly establish that the word *"la concession"* in the French text means, and only means the grant or the original grant of the right to work natural resources. We are unable to say whether the position would have been different if expert evidence had been called to assist us in our consideration of the French text. The position in that respect is settled by the earlier case management decision to refuse permission to call expert evidence.

164. Accordingly, Article 33(4) of the Vienna Convention is not brought into play in the process of interpretation of Article 6(2).

165. There are two other related reasons why it seems most unlikely that the scope of the Fifth Limb was intended to be confined to payments made in consideration of the grant, and only the grant of rights of working.

166. First, the oil within the Buchan Field was owned by the Crown. Licences to work the oil were therefore granted by the Crown, in exchange for payment for those licences. Since those payments were being made to the Crown, the question of the ability of the UK to tax those payments would not have arisen. If therefore the Fifth Limb was confined to the grant of rights to work oil it would have been rendered of no effect within the UK, at least so far as the grants of original licences by the Crown were concerned. It seems unlikely that the Fifth Limb was intended to have such a limited effect.

167. Second, the answer to this first point might be that the UK had the ability to tax such oil income under some other Article of the Treaty. Save to a limited extent however, this is not the position. Article 7(1) allows the taxing of profits of an enterprise of one contracting state in the other contracting state, but only where the

relevant enterprise carries on business through a permanent establishment in the other contracting state. The reach of Article 7(1) is therefore limited. It does not catch Canadian companies such as Sulpetro, which had no permanent establishment situated in the UK. Nor would it catch UK companies operating in Canada who had no permanent establishment in Canada.

168. This position is not significantly altered by Article 27A, which catches only those companies directly engaged in exploration or exploitation of the sea-bed and subsoil and their natural resources.

169. As we addressed above in relation to Ground 1, nor is the position altered by Article 13 which is concerned with the taxation of gains, not income such as the Payments.

170. We do not know whether the implications in Canada of the Fifth Limb being confined to the grant of rights only would have been as limiting as they would have been in the UK. It is reasonable to assume that this reading of the Fifth Limb would have had a significant limiting effect in Canada and, even if this was not the case, there was at least a significant limiting effect in the UK, sufficient to justify the assumption that this result was not what the parties to the Treaty intended.

171. The conclusion that the Fifth Limb is not limited to the grant of rights is not altered by the other materials upon which Mr Peacock QC sought to rely in the context of this argument. Neither the Canadian legislation nor the Canadian cases cited by Mr. Peacock pointed clearly to the words *"la concession"* in the French version of the Fifth Limb meaning the grant, and only the grant of rights of working. The same was true of the Canadian legal dictionaries cited by Mr Peacock QC.

172. We should also deal with Mr Peacock QC's argument based on Article 12. The terms of Article 12, and the commentary on article 12 in the OECD Model Treaty do not justify reading the Fifth Limb as being restricted to the grant of rights. We were referred at some length by both parties to the OECD Commentary which was relied upon by both counsel. We did not find the OECD Commentary, or the various overseas decisions relied upon by counsel to be particularly helpful.

173. Mr Peacock QC relied on the OECD Commentary in relation to Article 12 of the Model Convention, which deals with copyright royalties. That also does not assist RBC for two reasons:

(1) The Payments in the present case are not *"royalties"* within the meaning of Article 12 of the OECD Model Convention. The OECD Commentary relating to royalties as defined in Article 12 of the OECD Model Convention does not assist in the different context of Article 6(2).

(2) Further, paragraphs 8.1 and 8.2 of the OECD Commentary on Article 12 referred to by RBC are <u>not</u> dealing with a situation where a person who holds a licence transfers that licence and obtains a right to payments in return for that transfer. There is therefore no analogy between those passages in the Commentary and the present case.

174. We dismiss this ground of appeal.

Ground 3 - The FTT's analysis of both the Treaty, and s.1313 CTA 2009, disregarded, or failed to appreciate, the true contractual position between the various parties.

175. We are satisfied that the Payments fall within the Fifth Limb of Article 6(2) of the Treaty and constituted income from immovable property: income from 'rights to variable … payments as consideration for the working of, or the right to work' the oil in the Buchan Field in the UK Continental Shelf. In deciding so at [59] & [65], the FTT did not disregard the true contractual position between the various parties.

176. It is important to identify, at the outset, how this question falls to be answered. There are three related points to make in this context:

(1) The answer to this question depends upon an analysis of the relevant facts in this case.

(2) The key facts comprise, or at least principally comprise, the transaction between Sulpetro and BP constituted by the SPA. This is the starting point of any analysis.

(3) The question is not answered by considering the position of RBC, when it was in receipt of the Payments. In this context Mr Peacock QC accepted that RBC stood in the shoes of Sulpetro, when considering the status of the Payments. So, one must consider the status of the rights to the Payments which Sulpetro held, at the point of completion of the SPA and at the point of the coming into existence of the rights to the Payments.

177. It is also important to begin by identifying the relationship which existed between Sulpetro and SUKL pursuant to the actual Illustrative Agreement they entered into.

178. As found above, we are satisfied that clause 5 of the actual IA did contain the same provisions for the direction of working which can be found in the last part of clause 5 of the sample IA so that it read: '[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 [SUKL], and such programs shall be carried out.'

179. SUKL was the wholly owned subsidiary of Sulpetro. SUKL was wholly financed by Sulpetro in working the oil in the Buchan Field. SUKL was responsible for working the oil because Sulpetro, as a non-resident company, did not qualify for the required licences to work the oil. SUKL therefore had to be set up as a UK based subsidiary to work the oil. The oil extracted from the Buchan Field became the property of Sulpetro (see Article 6 of the actual IA).

180. SUKL also acted under the direction of Sulpetro in working the oil. This can be seen from the provisions of the final part of clause 5 of the actual IA but, even in the absence of these provisions, it would still be reasonable to infer that this was the position from the fact that SUKL was the wholly owned subsidiary of Sulpetro, and from all the other evidence we have of the relationship between Sulpetro and SUKL.

181. With this preliminary analysis in place, the question becomes whether Sulpetro's rights to the Payments, as created by clause 5.4 of the SPA, qualified as *"rights to variable or fixed payments as consideration for the working of, or right to work"* the oil in the Buchan Field.

182. The answer to this question is yes. We are entitled to consider the reality of the transaction constituted by the SPA. The reality is that, prior to the date of the SPA, Sulpetro was, through its vehicle SUKL, conducting the operation of working the oil in the Buchan Field. By the SPA, Sulpetro sold to BP the package of assets and rights, including SUKL itself, which constituted that operation. As such, Sulpetro did sell to BP the right to work the oil. Without the package of rights and assets which were sold to BP by the SPA, BP could not work the oil.

183. Part of the consideration for the sale of the package of rights and assets which were sold to BP by the SPA was the obligation undertaken by BP to make the Payments, the amount of which was directly tied to the price achieved by the oil to be extracted from the Buchan Field in the future. As such the rights to the Payments, which Sulpetro acquired pursuant to clause 5.4 of the SPA were, and are correctly described as *"rights to variable.….payments as consideration for the….right to work"* the oil in the Buchan Field, within the meaning of the Fifth Limb. As such, the Payments qualified as immovable property, within the meaning of Article 6(2). As such, the Payments continued to qualify as such immovable property, when the right to their receipt was assigned by Sulpetro to RBC. Equally, the further disposal of the package of rights and assets by BP to Talisman did not alter the status of the Payments.

184. In conducting this analysis it is not necessary to pierce the corporate veil, and treat SUKL as the same person as Sulpetro in order to arrive at this result. It is simply necessary to look at the reality of the transaction between Sulpetro and BP, and to ask whether the rights acquired by Sulpetro to the Payments fall within the wording of the Fifth Limb, as they clearly do.

185. It is true, as Mr Peacock QC submitted, that the licences held by SUKL did not move as part of the transaction between Sulpetro and BP. This is however to ignore the realities of the transaction between Sulpetro and BP. In reality, the licences held by SUKL were part of the package of rights and assets sold by Sulpetro to BP, the consideration for which included the Payments. The fact that the licences stayed where they were, vested in SUKL, does not alter this reality.

186. We should also address the argument of Mr Bremner QC that Sulpetro can actually be treated, prior to the SPA, as having worked the oil itself. We accept this argument, to the extent that it is consistent with our analysis above. Sulpetro was, in effect, conducting the operation of working the oil, through its financing of the oil operation, through its receipt of the oil extracted, and through its use of its subsidiary, SUKL, to hold the required licences and carry out the required extraction work. As such, it is the case that, by the SPA, Sulpetro sold to BP its own rights to work the oil; being rights which existed by virtue of the operation which Sulpetro had set up for Sulpetro's own working of the oil.

The alternative argument of the Revenue based on Article 6(1)

187. Mr Bremner QC's alternative argument is that the Payments can be treated as income from oil and thus as income from immovable property within the terms of Article 6(1), without resort to the definition of immovable property in the Fifth Limb. This was a new argument, raised by Mr Bremner QC in his skeleton argument for the appeal hearing. The argument was not run in the FTT nor was the argument raised in the Respondent's Notice in this appeal. Mr. Peacock QC did not object to the new argument being raised but submitted that it was wrong.

188. In the light of our decision that the rights to the Payments fell within Article 6(2), as immovable property, we do not need to decide this point, and we do not think that we should do so, given that a decision on Article 6(1) may have wider implications, which should be reserved for consideration in a case where Article 6(1) is directly in point.

189. Our conclusion is that the Payments qualified as income from immovable property because the rights to the Payments qualified as immovable property within the meaning of Article 6(2), specifically within the meaning of the Fifth Limb. We are satisfied that the FTT did not err in disregarding the true contractual position between the parties.

190. Likewise, the same analysis applies in relation to its interpretation of section 1313(2)(b) of the Corporation Tax Act 2009. The FTT did not disregard the true contractual position of the parties. Examining the position of Sulpetro following the completion of the SPA unlocks the position because it explains the legal relationship of RBC to Talisman in receiving the Payments. As Mr Peacock QC submitted, RBC stands in the shoes of Sulpetro.

191. Sulpetro initially owned the oil and the benefit of the oil under the actual Illustrative Agreement with SUKL and then sold the oil and the package of rights to work the oil to BP under SPA as we have set out above. Thereafter the Payments received by Sulpetro (and then RBC) were part of the consideration from BP for assets to be produced by exploration or exploitation activities (ie. the oil extracted) and the commercial benefit obtained therefrom. Thus, the Payments represented profits arising from the benefit of those assets for the purposes of section 1313(2)(b) CTA 2009. We expand on this analysis below.

192. We dismiss this ground of appeal.

<u>Ground 4 - The FTT failed properly to construe the reference to the "benefit of the oil" for the purposes of s.1313 CTA 2009 and failed properly to identify the nature of the rights held by RBC in this regard.</u>

193. We are satisfied that the Payments represent profits arising from exploration or exploitation rights carried on in the UK sector of the continental shelf, within the meaning of paragraph (b) of section 1313(2) CTA 2009. For the purposes of s. 1313(2)(b), s.1313(3) provides that "*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".

194. We are satisfied that at [93]-[95] of the Decision the FTT properly construed the phrase 'the benefit of the oil' within s.1313(2)(b) - thus the Payments were taxable as a matter of UK domestic law because they represented profits arising from the rights to the benefits of assets, the oil, to be produced by exploration or exploitation activities from the Buchan Field in the UK Continental Shelf.

195. Examining the definition of exploration or exploitation rights in section 1313(3), the rights to the Payments which were created pursuant to clause 5.4 of the SPA are not easily seen as rights to assets. The assets in the present case comprised the oil, and clause 5.4 gave Sulpetro no right to the oil produced by BP.

196. Equally, the rights to the Payments are not easily seen as interests in such assets; namely the oil. Clause 5.4 of the SPA did not confer on Sulpetro any interest in the oil by reference to which the Payments fell to be calculated.

197. Nonetheless, we are satisfied that the rights to the Payments do qualify as rights *"to the benefit of such assets"*. The rights to receive the Payments were rights to the benefit of the oil because, provided that the oil was sold at a sufficiently high price to generate a Payment, Sulpetro would thereby benefit from the oil produced by BP. The final limb of the definition of exploration or exploitation rights in section 1313(3) is sufficiently wide enough to accommodate rights such as the rights to the Payments.

198. Mr. Peacock QC sought to persuade us that the reference to *"the benefit of such assets"* required some kind of proprietary interest in the oil, as opposed to a bare contractual right to payments calculated by reference to the price achieved for the oil. This reading of the last limb of the definition of exploration and exploitation rights in section 1313(3) is however difficult to reconcile with the express reference to *"an interest in…such assets"*, in the previous limb of subsection (3). This strongly suggests that the reference to *"benefit"* is not confined to a proprietary interest and has a wider meaning. This would be consistent with the point that the word *"benefit"* is not specific in any event. It is capable of including a wide range of arrangements, whether proprietary or contractual or otherwise, giving rise to a benefit, including a commercial benefit.

199. The decision in *Re Euro Hotel (Belgravia) Ltd* [1975] STC 682 does not bear on this question at all (as the FTT concluded at [90]). It is not controversial to say that the substantive nature of a payment is not necessarily determined by the method of its computation. In the present case however the contractual obligation to make the Payments depended upon the price realised for the oil extracted from the Buchan Field. The link between the oil and the Payments is direct and obvious, and the Payments constituted a benefit (to the recipient of the Payments) of the oil, within the meaning of subsection (3).

200. As the FTT correctly decided, at [82] and contrary to the alternative submissions of Mr Bremner QC, the Payments do not however represent profits from exploration or

exploitation activities, within the meaning of paragraph (a) of section 1313(2). The definition of exploration or exploitation activities under s.1313(3) is: *"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"*.

201. This implies a closer and more direct relationship between the relevant profits and the relevant exploration and exploitation activity than existed between the Payments and the actual working of the oil in the Buchan Field. The Payments were generated by the price realised for the oil, once extracted. The Payments were not, directly, profits from the actual working of the oil.

202. We dismiss this ground of appeal.

Ground 5 - The FTT erred in holding that, if the Payments were within s.1313 CTA 2009, RBC could not deduct the costs it incurred in acquiring the contractual right to the Payments.

203. Having decided that the Payments are taxable under Section 1313 CTA 2009, we are satisfied that the Appellant was not entitled to deduct the losses which it made on the Loan from the Payments. The FTT did not err in coming to this conclusion at [98]-[101] of the Decision.

204. We rely on the four reasons advanced by Mr Bremner QC, the first and third of which were relied upon by the FTT, as follows.

205. First, the consideration expressed for the assignment of the rights to the Payments by Sulpetro to RBC was $1 (Canadian); see the order of the Court of Queen's Bench of Alberta, dated 28th October 1993 and the assignment agreement of the same date. This nominal sum was the agreed cost of the assignment of the rights to the Payments. It is not open now to RBC to claim that the actual consideration for the assignment was any unpaid part of the Loan. The making of the Loan and the assignment of the rights to the Payments were two separate transactions.

206. Second, the Loan was made in the ordinary course of RBC's business as a bank. The acquisition of the rights to the Payment constituted a separate transaction which was part of Sulpetro's oil-related activities, within the meaning of Section 274 of the Corporation Tax Act 2010. As such, the income from that transaction, in the form of the Payments, was ring fenced by Section 279 of the Corporation Tax Act 2010. Losses incurred outside the ring fence, such as the unpaid element of the Loan, cannot be set off against that ring fenced income.

207. Third, even if the unpaid amount of the Loan had qualified as an expense of the ring-fenced trade, that expense was capital in nature and was excluded from deduction by Section 53 of the Corporation Tax Act 2009.

208. Fourth, RBC had no permanent establishment in the UK to which any trading loss which otherwise qualified for deduction could be attributed. The Loan was made in Canada, and any loss in respect of the Loan fell to be dealt with in Canada. In fact that

is what has happened because, as Mr Peacock QC has explained, RBC was able to write off the entire loss on the Loan, for tax purposes, in Canada. RBC was also required to give credit against this write off, in Canada, for the monies it received by way of the Payments, on the basis that the Payments reduced the amount of the Loan which RBC had been entitled to write off for tax purposes. The loss on the Loan was therefore dealt with, in Canada, as part of RBC's taxable banking trade in Canada. None of this is linked to the creation of the rights to the Payments, which was part of Sulpetro's oil-related activities. Nor did this change when the rights were assigned to RBC.

209. As Mr Bremner QC explained, at the close of his submissions, the Commissioners are, in taxing the Payments, taxing profits arising from the UK continental shelf, as required by UK domestic legislation. There is no warrant for bringing into the computation RBC's banking losses on its banking business in Canada. If RBC ends up being taxed twice on the same income, its remedy lies in the provisions against double taxation in Article 21 of the Treaty.

210. We dismiss this ground of appeal.

Disposition

211. For the reasons set out above we have rejected each of the Appellant's grounds of appeal and conclude that the FTT did not err in law in making the Decision.

212. The appeal is dismissed.

Signed on Original

MR JUSTICE EDWIN JOHNSON

JUDGE RUPERT JONES

RELEASE DATE: 17 February 2022