Hilary Term
[2025] UKSC 2
On appeal from: [2023] EWCA Civ 695

JUDGMENT

Royal Bank of Canada (Respondent) *v* Commissioners for His Majesty's Revenue and Customs (Appellant)

before

Lord Lloyd-Jones
Lord Briggs
Lord Hamblen
Lord Leggatt
Lady Rose

JUDGMENT GIVEN ON
12 February 2025

Heard on 4 and 5 November 2024

Appellant
Kevin Prosser KC
Michael Ripley
(Instructed by HMRC Solicitors Office (Bristol))

Respondent
Jonathan Peacock KC
Sarah Black
(Instructed by Norton Rose Fulbright LLP)

LADY ROSE (with whom Lord Lloyd-Jones, Lord Hamblen and Lord Leggatt agree):

1. INTRODUCTION

1. The discovery of a substantial deposit of natural resources buried somewhere far below the surface of the land offers the prospect of a welcome boost to national revenues for any sovereign State. It also creates the challenge for that State as to how best to locate and extract those resources and then how the proceeds of sale of the resources once out of the ground should be shared among all those involved.

2. This appeal concerns the allocation of taxing rights between the United Kingdom and Canada in respect of income earned from the sale of oil found in the UK Continental Shelf in the North Sea. The Crown owns both the seabed and the oil but when the oil was discovered, the Government decided not to attempt to exploit all the oil itself. Instead, the United Kingdom has relied to some extent on international companies which already had the funds, expertise and experience to find the oil, extract it and bring it to the market. Those international companies are generally resident for tax purposes in other jurisdictions and those jurisdictions, broadly speaking, charge to tax the profits made by businesses which are resident there.

3. One of the international companies involved in exploiting North Sea oil was Sulpetro Ltd which was a corporation resident for tax purposes in Canada. Sulpetro set up a wholly owned subsidiary, Sulpetro (UK), which is incorporated and resident for tax purposes in the UK. In the early 1980s Sulpetro (UK) was granted a licence by the UK Government to participate with others in exploring a particular section of the North Sea Continental Shelf known as the Buchan Field. Under an agreement between Sulpetro and Sulpetro (UK), Sulpetro provided all the money and expertise needed to carry out the work. In exchange Sulpetro received all of Sulpetro (UK)'s share of the oil found. Sulpetro could then sell that oil to recoup its investment.

4. In 1986 BP Petroleum Development Ltd ("BP") acquired from Sulpetro both the share capital in Sulpetro (UK) and the rights that Sulpetro had under its agreement with Sulpetro (UK) to any oil acquired from the Buchan Field. In return, BP promised to make payments to Sulpetro calculated by reference to the volume of oil BP acquired once the price at which that oil could be sold by BP rose above a certain level ("the Payments"). Sulpetro had obtained a substantial loan of around CAD $540 million from the respondent in this appeal, the Royal Bank of Canada ("RBC") which Sulpetro was unable to repay. In 1987 RBC appointed a receiver and, by a court order made in 1993, the right to receive the Payments was assigned to RBC (to which Sulpetro remained indebted).

5. The issue in the appeal is whether the UK has a right to charge to tax those Payments made by BP first to Sulpetro and now to RBC. This depends on the application of the double taxation treaty entered into between Canada and the UK in September 1978 ("the UK/Canada Convention"). The provision which is relied on by the appellants ("HMRC") as entitling the UK to impose a charge to tax on the Payments is Article 6. This provides that income from immovable property may be taxed in the Contracting State in which such property is situated. Article 6(2) provides an expanded definition of what counts as "immovable property" for this purpose. That definition includes rights to variable payments "as consideration for the working of, or the right to work, … natural resources". That right to tax conferred by the UK/Canada Convention takes precedence over the other allocation of taxing rights between the Contracting States.

6. There are broadly three issues raised by the appeal:

a. What does the phrase "the working of, or the right to work" the Buchan Field mean and does it encompass the rights that BP was paying for when making the Payments first to Sulpetro and later to RBC?

b. If BP did acquire and so was making the Payments to Sulpetro for "the working of, or the right to work" the Buchan Field, are those Payments to be regarded as "as consideration for" the right to work the Buchan Field within the meaning of Article 6(2)?

c. If the Payments are covered by Article 6(2) so that the UK/Canada Convention conferred taxing rights on the UK in respect of the Payments, has the UK in fact exercised those rights and imposed a charge to tax in the domestic legislation? That turns on the proper interpretation of section 1313 of the Corporation Tax Act 2009 ("section 1313") and whether it catches the Payments.

7. The First-tier Tribunal held that the Payments were within Article 6 of the UK/Canada Convention and that they were also caught by section 1313. They held therefore that RBC had to pay tax on the Payments to HMRC. That decision was upheld by the Upper Tribunal. The Court of Appeal allowed RBC's appeal and held that the rights that BP acquired and for which it was paying Sulpetro did not amount to a "right to work" the Buchan Field. They held further that the Payments were not made "as consideration for" any right to work. Having decided that the UK did not have the right to tax the Payments under the UK/Canada Convention, the Court of Appeal did not have to consider the correct construction of section 1313. However, they cast doubt on the reasoning of the First-tier Tribunal and the Upper Tribunal as regards the interpretation of the domestic provision.

8. HMRC now appeal to this court.

2. FACTUAL BACKGROUND

9. Sulpetro was a Canadian company engaged in oil exploration and exploitation activities. RBC is a publicly owned company incorporated in Canada. RBC carries on a banking business in Canada and elsewhere and is tax resident in Canada. For the purposes of UK corporation tax, discussed further below, RBC has a permanent establishment in the UK carrying on banking business. But it is common ground in this appeal that the loan it made to Sulpetro in the 1980s was made by the Canadian head office and so is not attributable to any permanent establishment of RBC in this jurisdiction.

(a) The licence to exploit the Buchan Field and the Illustrative Agreement

10. In the 1980s, the UK Government granted a licence to Sulpetro (UK) Ltd, a wholly owned, UK-incorporated subsidiary of Sulpetro. The licence conferred on Sulpetro (UK) an undivided 12.7% interest to explore and exploit the Buchan Field in the North Sea.

11. It is assumed that the form of the licence followed the requirements set out in the Petroleum (Production) Regulations 1966 (SI 1966/898). Regulation 10 provided that every licence must incorporate the model clauses prescribed in the Schedule to the Regulations unless the Minister thought fit to modify them in any particular case. The model licence clauses include an agreement on the part of the licensee not to assign or part with any of the rights granted by the licence or to grant a sub-licence without the written consent of the Minister.

12. In 1982 Sulpetro (UK) and Sulpetro entered into two agreements to govern their respective responsibilities in respect of the licence. An agreement relating to onshore activity was entered into on 25 June 1982 and one relating to offshore activity was entered into on 19 November 1982. The offshore agreement is the one relevant to this appeal and it has been referred to throughout the proceedings as the "Illustrative Agreement". The parties have not been able to find a copy of the actual Illustrative Agreement between Sulpetro and its subsidiary, but it is agreed that it was in common form and a similar agreement between two different parties has been used as a proxy for the terms of the Illustrative Agreement entered into between these two parties, modifying the wording as appropriate.

13. HMRC explained that the practice of using illustrative agreements in these terms originated in the 1960s. The UK Government was concerned to ensure that all North Sea oil and gas produced under UK licences should be subject to UK tax. Petroleum production licences were therefore only granted to licensees incorporated in the UK so that they would be liable to corporation tax on the profits arising from the exploitation of the licence. However, this requirement proved difficult for overseas groups investing in the extraction of UK oil and gas since they wanted to deduct the expenditure they incurred

from their income when computing their profits in the jurisdiction where they were tax resident. The Illustrative Agreement was devised to solve this problem by ensuring that the licence was held by a UK subsidiary but that the overseas associated company provided the funds and received all the oil won under the licence.

14. The relevant terms of the Illustrative Agreement can be summarised as follows:

(a) Clause 2 provided that Sulpetro (UK) shall conduct exploration for petroleum in the licensed area and, if petroleum is discovered, shall develop the area and produce petroleum from it. Sulpetro (UK) was at all times responsible to the relevant Secretary of State for the discharge of all obligations under the licence and for the conduct of operations in accordance with the law.

(b) Clause 3 provided that Sulpetro (UK) would pay to the UK Government during the term of the licence the royalty set by the Secretary of State with the consent of HM Treasury and specified in the licence.

(c) Clause 4 provided that Sulpetro (UK) must ensure that all petroleum won and saved from the Buchan Field (other than that used for drilling and production operations) was delivered onshore in the United Kingdom.

(d) Clause 5 provided that Sulpetro would provide all the funds and equipment required for the exploration, development and operations under the licence and for all investment and expenses, including the payment of the royalty and any other payments called for by UK regulations. Sulpetro was also required to provide the budget and work programmes which had to comply with all relevant laws.

(e) Clause 6 provided that Sulpetro would own and receive all the petroleum won and saved to which the licensees were entitled under the licence. The effect of this in combination with clause 4 was that profits from the first sale by Sulpetro of the oil won from the Buchan Field would be taxed by the UK. Beyond that, Sulpetro would not receive any reimbursement of any kind for its investments and expenses incurred: Sulpetro must look solely to the income derived from the extraction of petroleum for the return of any capital so invested or expenses so incurred.

(b) The sale to BP and the novation of the Illustrative Agreement

15. The next step in the narrative is the sale and purchase agreement ("the SPA") entered into between Sulpetro and BP Petroleum Development Ltd in December 1986.

Under this SPA, Sulpetro agreed to sell and BP agreed to buy for the "Consideration" Sulpetro's Assets subject to certain conditions precedent: clauses 2 and 3. "Sulpetro's Assets" were defined as assets other than those held by Sulpetro (UK). These included the entire issued share capital of Sulpetro (UK), Sulpetro's interests in data, plant, equipment and machinery and such interest as Sulpetro held in the Buchan licence. "Consideration" was defined as the consideration referred to in clause 4.1. It was a total of just over £17 million split between the assets transferred, the shares in Sulpetro (UK) and the licence interests.

16. Clause 5 of the SPA listed "Other Payments" which were not part of the Consideration as defined for the asset sale. These included at clause 5.4 the Payments which are the subject of this appeal. BP promised to pay each quarter a royalty in respect of all production from the share of the Buchan Field which BP received from the exploitation of Sulpetro (UK)'s licence. The effect of this was that the obligation on BP to make the Payments only arose if the price of a barrel of oil produced from Buchan was more than US$20. Each Payment would then be half of the difference between the actual market value (less the royalty paid to the UK Government under the licence and any petroleum taxes) and US$20 for each barrel of oil. The SPA contained clauses designed to facilitate the making of the Payments. Clause 6.1.2 required BP to provide a statement of account to Sulpetro within 28 days of the end of each quarter showing, amongst other things, details relating to the Payments whether required to be made or not. Any Payments due would then be paid within 14 days: clause 6.2.1. Clause 6.3.1 required BP at Sulpetro's request to supply copies of sales receipts and details of production volumes relevant to the calculation of the Payments.

17. Clause 8 of the SPA provided that Sulpetro and BP would enter into novation agreements in respect of a number of agreements to which Sulpetro was a party. These included a draft of the agreement to novate the Illustrative Agreement between Sulpetro and Sulpetro (UK). It is agreed between the parties that the Payments should be regarded as the consideration given by BP to Sulpetro in return for Sulpetro agreeing to novate its Illustrative Agreement with Sulpetro (UK) in favour of BP, so that BP would be obliged to continue the funding and organisation of Sulpetro (UK)'s exploration of its share of the Buchan Field and would in return receive the oil won.

18. One of the conditions precedent to the obligations under the SPA coming into effect was the granting of all necessary approvals and consents by the Secretary of State, the Inland Revenue, and the regulatory or governmental authorities of the UK and Canada: clause 3.1 to 3.3. There was correspondence between BP and the Oil Taxation Office at the Inland Revenue in which BP sought certain assurances as to how the acquisition by BP of Sulpetro's interests would be treated for tax purposes. In a letter dated 19 November 1986, BP sent a copy of the draft SPA to the Inland Revenue, noting that the legal title to the Sulpetro (UK) licence was held by Sulpetro (UK) "but the economic benefits and burdens are passed to Sulpetro by way of Illustrative Agreement". The letter referred to the clause 5.4 Payments. BP sought assurance that the Payments

would be allowable as a trade expense against BP's profits, noting that if they were, then they would seem to be taxable in the hands of Sulpetro. The response from the Inland Revenue confirmed that the Payments would be deductible as a trade expense by BP but said:

> "It is agreed, following conversations with … Messrs Freshfields, that the question of Sulpetro's future liability to UK tax on royalties received under Clause 5.4 is to be the subject of further discussions in due course.
>
> It is also agreed that there will be further discussions with Sulpetro and Messrs Freshfields as to the treatment of the value of the right to future royalty payments in the computation on Sulpetro of the chargeable gains arising on the occasion of these disposals…."

19. Pursuant to the obligation in clause 8, the Illustrative Agreement was novated in December 1986, we assume by entering into an agreement in the form of the draft annexed to the SPA. The recitals in the Novation Agreement referred to the Illustrative Agreement as having been entered into "to clarify and formalise the relationship between Sulpetro (UK) and Sulpetro" with reference to Sulpetro (UK)'s obligations under the licences listed in the schedule to the SPA. The Novation Agreement provided that from the date of the agreement, BP would become a party to the Illustrative Agreement and Sulpetro would cease to be a party to it. BP agreed that it would perform and discharge all its obligations and liabilities under the Illustrative Agreement and that in return for that promise, Sulpetro (UK) agreed to release Sulpetro from those obligations and liabilities.

(c) Sulpetro's receivership and the assignment to RBC

20. Sulpetro went into receivership in 1987 in Alberta, Canada. The majority of its assets were sold and the proceeds used to pay its debts. By the end of that process, Sulpetro still owed RBC about CAD $185 million. Under the arrangements made by the Court of the Queen's Bench of Alberta when the receivership was discharged in October 1993, Sulpetro's right to the Payments from BP under the SPA was assigned to RBC for one Canadian dollar. Sulpetro was then dissolved on 4 October 1993. RBC wrote off the debt owed to it by Sulpetro as a bad debt in its accounts for that year.

21. It is accepted that though the Payments, broadly speaking, form part of the consideration for the overall package that BP acquired from Sulpetro, they are to be treated as income (rather than capital) in the hands of RBC. They have been charged to tax in RBC's hands in Canada.

(d) The making of the Payments

22. In 1996 BP transferred its interests in the Buchan Field to Talisman Energy Inc and the obligation to make the Payments to RBC transferred to Talisman Sinopec Energy UK Ltd. It is common ground that that does not affect the legal analysis in this appeal so I will continue to refer to the company liable to make the Payments to RBC as BP.

23. Although oil was discovered and extracted from the Buchan Field, for most of the years up to 2000 there were no Payments because the oil price did not rise above $20 per barrel. After that, the oil price was frequently above $20, and the Payments were made. No end date for the making of the Payments was set in the SPA, so Payments continued for as long as the Buchan Field was productive and the other conditions for making the Payments were satisfied. The Buchan Field ceased production in 2017 before the outstanding indebtedness of Sulpetro to RBC had been fully paid off.

24. In summary, therefore, this appeal concerns the Payments which BP agreed to make to Sulpetro in return for the "transfer" by Sulpetro to BP of Sulpetro (UK) and of the rights that Sulpetro had under the Illustrative Agreement. I have put "transfer" in quotes because the Illustrative Agreement was novated rather than assigned. It is accepted that nothing turns for our purposes on whether as a matter of law, a novation involves the transfer of rights from Sulpetro to BP or the termination of the rights that Sulpetro had under its Illustrative Agreement and the coming into existence of rights that BP had under its own Illustrative Agreement with Sulpetro (UK). The use of the term "transfer" is a convenient shorthand and is not intended to express any view on that issue.

3. THE UK/CANADA CONVENTION AND THE MODEL CONVENTION

(a) The UK/Canada Convention and the principles of interpretation

25. The original double taxation treaty between the UK and Canada was concluded in 1966 and given effect to in domestic law by the Double Taxation Relief (Taxes on Income) (Canada) Order 1967 (SI 1967/482). Article 5 of that treaty was in the same terms as Article 6 of the 1978 Convention, discussed below.

26. The UK/Canada Double Taxation Convention of 8 September 1978 came into force on 17 December 1980 and was implemented in UK law by the Double Taxation Relief (Taxes on Income) (Canada) Order 1980 (SI 1980/709). Both the French and the English language texts are equally authoritative. The preamble to the Convention states that it is entered into by the Contracting States: "desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains."

27. The UK/Canada Convention is to be interpreted in accordance with the 1969 Vienna Convention on the Law of Treaties ("the Vienna Convention").

28. Article 31 of the Vienna Convention provides that 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 lights of its object and purpose". Article 32 describes the supplementary means of interpretation including the travaux préparatoires when the meaning is ambiguous or obscure. Lord Reed summarised the effect of Articles 31 and 32 in *Anson v Revenue and Customs* [2015] STC 1777, [2015] 4 All ER 288 as follows at para 56:

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

29. Since there has been some comparison between the French and English wording of Article 6(2), Article 33 of the Vienna Convention may also be relevant:

> "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."

30. The UK/Canada Convention, like most bilateral double taxation treaties, is based on the OECD Model Tax Convention on Income and on Capital published by the Organisation for Economic Co-operation and Development ("the Model Tax Convention"). The Model Tax Convention states in its Introduction that its main purpose is to provide "a means of settling on a uniform basis the most common problems that arise in the field of international juridical double taxation":

> "As recommended by the Council of the OECD, Member countries, when concluding or revising bilateral conventions, should conform to this Model Convention as interpreted by the Commentaries thereon and having regard to the reservations contained therein and their tax authorities should follow these Commentaries, as modified from time to time and subject to their observations thereon, when applying and interpreting the provisions of their bilateral tax conventions that are based on the Model Convention."

31. The Commentaries on the Model Tax Convention are drafted and agreed upon by experts appointed to the Committee on Fiscal Affairs by the Governments of member countries. The Commentaries say at para 29.1 that they can be of great assistance "both in deciding day-to-day questions of detail and in resolving larger issues involving the policies and purposes behind various provisions". They are relied on by tax officials and by taxpayers in conducting their businesses and planning their business transactions and investments.

32. In *Fowler v Revenue and Customs Comrs* [2020] UKSC 22, [2020] 1 WLR 2227, Lord Briggs explained that guidance as to how a double taxation treaty is to be interpreted can be found in OECD Commentaries even where they post-date the treaty in question. The Commentaries should be "given such persuasive force as aids to interpretation as the cogency of their reasoning deserves" (see paras 16 and 18 of Lord Briggs' judgment).

33. Both parties were content to rely on the Commentaries that accompanied the 2005 version of the Model Tax Convention, which had been selected by RBC as the one closest to the tax years with which this appeal is concerned. Unless otherwise indicated,

references below to the "Commentaries" are to that version, rather than to the latest version which was published in 2017.

34. The primary provision of the UK/Canada Convention relating to the taxation of companies is Article 7. This provides that the 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. Where the enterprise does carry on business through a permanent establishment, then the profits that are "attributable" to that permanent establishment may be taxed in the State of that establishment. Article 7(2) describes when profits are regarded as attributable to a permanent establishment. Article 7(3) provides that the Contracting States should consult each other to ensure that there is no double taxation of those profits.

35. Article 5 provides that a "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on. Article 5(2) states that the term shall include especially "(f) a mine, quarry or other place of extraction of natural resources".

36. Article 27A was inserted into the UK/Canada Convention by a Protocol agreed between Canada and the UK in April 1980: see the Double Taxation Relief (Taxes on Income) (Canada) (No 2) Order 1980 (SI 1980/1528). This makes further provision deeming involvement in oil extraction to amount to a permanent establishment. It provides that, for example, a Canadian resident who carries on activities in the UK "in connection with the exploration or exploitation of the sea bed and sub-soil and their natural resources" situated in the UK shall be deemed to carry on a business in the UK through a permanent establishment in the UK provided they do so for more than 30 days in a year. This Article does not come from the Model Tax Convention so was included by the Contracting States in addition to Article 5.

37. If a company falls within Article 27A the consequence is that the profits from activities carried on in that deemed permanent establishment are taxed in the UK under Article 7. It is, however, common ground that Sulpetro's involvement with the Buchan Field did not give it a permanent establishment in the UK and so did not bring it within Article 7, despite the extended meaning given to the term "permanent establishment" by Articles 5 and 27A. Mr Prosser KC, appearing on behalf of HMRC, accepted that merely holding the rights of the kind with which this appeal is concerned does not amount to carrying on business here for the purposes of Article 7.

38. Other articles in the UK/Canada Convention deal with different kinds of activities including professional services (Article 14), artistes and athletes (Article 16), government service (Article 18) and estates and trusts (Article 20). One special provision that has been addressed by the parties is Article 12 dealing with royalties. Article 12 deals with

intellectual property rights and uses similar language to that used in Article 6(2) in referring to "payments of any kind received as a consideration for the use of, or the right to use" such rights.

39. Article 21 deals with the elimination of double taxation and provides, broadly, for payments of tax on profits, income or gains made to one Contracting State to be deducted from the tax due in the other or to be allowed as a credit against tax. Article 23 establishes a mutual agreement procedure under which a person who considers that he or she has been subject to double taxation inconsistent with the Convention can complain to the tax authority where they are resident; the two tax authorities must endeavour "to resolve the case by mutual agreement".

(b) Article 6 and Article 13 of the UK/Canada Convention

40. Article 6 provides as follows.

> "**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)

41. The definition of immovable property in Article 6(2) applies to all the provisions of the UK/Canada Convention where that term is used. The words underlined above have been referred to as the "fifth limb" of Article 6(2) and are the words on which HMRC rely to establish the UK's ability to tax the Payments. The fifth limb treats the right to receive the payment as being the immovable property rather than treating the right to work itself as being immovable property. HMRC contend therefore that RBC's rights under the SPA to receive the Payments were "rights to variable … payments as consideration for the working of, or the right to work," the Buchan Field.

42. The Commentaries explain the reasoning behind Article 6 as follows:

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

43. The Commentaries note further that:

> "4. It should be noted in this connection that the right to tax of the State of source has priority over the right to tax of the other State and applies also where, in the case of an enterprise, income is only indirectly derived from immovable property. This does not prevent income from immovable property, when derived through a permanent establishment, from being treated as income of an enterprise, but secures that income from immovable property will be taxed in the State in which the property is situated also in the case where such property is not part of a permanent establishment situated in that State. It should further be noted that the provisions of the Article do not prejudge the application of domestic law as regards the manner in which income from immovable property is to be taxed."

44. This acknowledges that the right to tax conferred by the Article is in addition to the general right to tax profits of a permanent establishment in the State of the source of the minerals.

45. There are some preliminary points to note about Article 6. Its application is not limited to oil or gas and it is also not limited to cases where the land and the resources are owned by the State. In a paradigm case where the land is privately owned, the owner will either exploit the minerals itself (in which case the UK is entitled to impose a charge to tax on those profits pursuant to Article 7 if the owner is not otherwise UK tax resident) or will grant the right to exploit in return for a royalty and that royalty will be within Article 6(2) and so can be taxed by the UK. In the present case, of course, the Crown received the whole royalty paid by Sulpetro (UK) for the licence, not just the tax on that royalty.

46. The French text of Article 6(2) reads:

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

47. Article 6(3) reflects a reservation that Canada made as recorded in the Commentaries. Canada reserved the right to include a reference in double taxation treaties that it signs to income from the alienation of immovable property. This, Mr Prosser told us, applies to a company which carries on a business of dealing in immovable property. If the taxpayer's business is buying and selling immovable property, the receipts from such sales are taxable as income rather than under the capital gains regime.

48. It is convenient to mention at this point that at para 54 of the leading judgment in the Court of Appeal, Falk LJ raised a problem about locating the situs of the right to receive the consideration referred to in Article 6(2). It is straightforward to treat the location of the actual land or the rights in the land as being in the State of source but it is more difficult to locate the situs of rights to payments in consideration of the right to work. Generally speaking, she noted, the situs of a contractual obligation is the country in which it can be enforced. That might not be the same country as where the land is situated.

49. I accept Mr Prosser's submission that there is no such difficulty created by Article 6. By deeming the rights described in Article 6(2) to be immovable property, the Article

also deems those rights to be located in the State where the immovable property is located. I did not understand Mr Peacock KC, appearing for RBC, to challenge that conclusion. If the rights are sufficiently closely connected with the land to be treated as immovable property themselves then they are sufficiently closely connected with the land to be treated as located where the land is located.

50. The other key Article of the UK/Canada Convention for the purposes of this appeal is Article 13 which deals with capital gains:

> "**Article 13: Capital gains**
>
> 1. Gains derived by a resident of a Contracting State from the alienation of immovable property situated in the other Contracting State may be taxed in that other State.
>
> 2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State … may be taxed in that other State.
>
> …
>
> 4. Gains from the alienation of:
>
> > (a) any right, licence or privilege to explore for, drill for, or take petroleum, natural gas or other related hydrocarbons situated in a Contracting State, or
> >
> > (b) any right to assets to be produced in a Contracting State by the activities referred to in sub-paragraph (a) above or to interests in or to the benefit of such assets situated in a Contracting State,
>
> may be taxed in that State.
>
> 5. Gains from the alienation of:—

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

51. Paragraphs (4), (5) and (6) of Article 13 do not come from the Model Convention but were bespoke provisions negotiated by the UK and Canada. They were not included in the earlier 1966 double taxation treaty between the UK and Canada.

4. THE DOMESTIC LEGISLATION

52. The accounting periods at issue in this appeal fall both before and after the enactment of the Corporation Tax Act 2009 ("CTA 2009"), the Corporation Tax Act 2010 ("CTA 2010") and the Taxation (International and Other Provisions) Act 2010. Prior to the enactment of these statutes, the relevant provisions were contained in the Income and Corporation Taxes Act 1988. It is common ground that there are no material differences in wording between the relevant provisions.

53. For our purposes, a non-UK resident company is generally within the charge to corporation tax only if it carries on a trade in the UK through a permanent establishment in the UK: see section 5(2) of the CTA 2009. The definition of permanent establishment found in section 1141 of the CTA 2010 is similar to that in the UK/Canada Convention and also provides that "a fixed place of business" includes a mine, an oil or gas well, a quarry or any other place of extraction of natural resources: see section 1141(2)(g).

54. In relation to natural resources, there are special rules for profits relating to exploration or exploitation activities or from exploration or exploitation rights. According to section 279 of the CTA 2010, those profits are treated as part of a separate ("ring fenced") trade carried on through a deemed permanent establishment in the UK. The profits are subject to a supplementary tax charge and the ring fence prevents the profits from being reduced by, for example, losses from other activities carried on by the company.

55. The domestic provision on which HMRC rely in this appeal is section 1313 of CTA 2009.

> "**1313: Activities in UK sector of continental shelf**
>
> (1) Any profits—
>
> > (a) from exploration or exploitation activities carried on in the UK sector of the continental shelf, or
> >
> > (b) from exploration or exploitation rights
>
> are treated for corporation tax purposes as profits from activities or property in the United Kingdom.
>
> (2) Any profits arising to a non-UK resident company—
>
> > (a) from exploration or exploitation activities, or
> >
> > (b) from exploration or exploitation rights, are treated for corporation tax purposes as profits of a trade carried on by the company in the United Kingdom through a permanent establishment in the United Kingdom.

> (3) In this section—
>
> 'exploration or exploitation activities' means activities carried on in connection with the exploration or exploitation of so much of the seabed and subsoil and their natural resources as is situated in the United Kingdom or the UK sector of the continental shelf,
>
> 'exploration or exploitation rights' means rights to assets to be produced by exploration or exploitation activities or interests in or to the benefit of such assets, and
>
> 'the UK sector of the continental shelf' means the areas designated by Order in Council under section 1(7) of the Continental Shelf Act 1964."

5. THE DISCOVERY ASSESSMENTS AND THE PROCEEDINGS BELOW

56. RBC treated the Payments it received from BP as income of its banking business in Canada and accounted for it as a partial recovery of the bad debt it had recognised in respect of its loan to Sulpetro. It did not report the Payments in its UK tax return.

57. In an HMRC internal memorandum dated 27 June 2014 a tax specialist in the "Large Business London – Oil & Gas" section drew his colleagues' attention to a debit of over $10 million made by Talisman in its computation of corporation tax. He described the history of the Payments and stated:

> "Our concern is that we have North Sea profits that are not subject to Ring Fence Corporation Tax and Supplementary charge (current combined tax rate 62%) and an income stream that has not been taxed in the UK at all. We have some work to do here to consider what challenges we might be able to make."

58. He estimated the value of the income in the UK between 2008 and 2013 as possibly $55 million, based on crude oil prices across the years. He later described it as looking like a "hole" in the ring fence.

59. In October 2014 HMRC sent RBC notices of assessment for the accounting periods ending 31 October 2008, 2009 and 2010. In subsequent years HMRC sent further

notices all of which were appealed by RBC to the First-tier Tribunal. The years in contention therefore run from 2008 to 2015. The notices of assessment assert in effect that the Payments are subject to UK corporation tax as profits of a "ring-fenced" oil trade under Part 8 of the CTA 2010.

(a) The First-tier Tribunal decision

60. The First-tier Tribunal (Judge Kevin Poole) ("the FTT") published its decision on 23 June 2020: [2020] UKFTT 267 (TC), [2020] SFTD 898. The FTT rejected RBC's argument that the natural meaning of the words in Article 6(2) was that it was concerned only with the grant of the right to work by the person who owned the natural resources and not with the transfer of a right to work: para 54. The judge saw no reason to limit the scope of Article 6(2) to cover only payments made directly to the owner of the rights in exchange for the grant of a right to exploit them. Such an interpretation could easily lead to tax avoidance by interposing the assignment of royalty rights after they had been granted.

61. The FTT also held, at para 59, that the rights vested in RBC were rights to variable payments as consideration for the right to work within the meaning of Article 6(2):

> "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."

62. The FTT held that the Payments fell within section 1313(2)(b) because RBC had rights to the benefit of the oil won from the Buchan Field: see paras 83–96.

(b) The Upper Tribunal decision

63. RBC appealed to the Upper Tribunal. The Upper Tribunal (Edwin Johnson J and Judge Rupert Jones) handed down its decision on 17 February 2022 dismissing the appeal: [2022] UKUT 45 (TCC), [2022] STC 406.

64. Before the Upper Tribunal, RBC criticised in particular the FTT's failure to take into account other Articles of the UK/Canada Convention when construing Article 6(2). RBC had argued that the presence of Article 13(4), expressly catching gains from the alienation of rights relating to exploration for or taking of oil showed that those rights were not immovable property for the purposes of Article 13 and so could not be

immovable property either for the purposes of Article 6(2). The Upper Tribunal rejected that argument, holding that such an argument would "result in a substantial hole in the scheme of taxation of income from oil" in the UK/Canada Convention. It was difficult to believe that either party to the Treaty intended to leave a gap of this kind: see paras 135 and 137. They were also unpersuaded by arguments based on comparing Article 6(2) with Article 12 which relates to the taxation of royalties paid for use of intellectual property rights: see paras 172–173.

65. The Upper Tribunal then addressed RBC's criticism that the FTT had disregarded the true contractual position between the various parties. They noted that Sulpetro (UK) was the wholly owned subsidiary of Sulpetro and acted under the direction of Sulpetro in working the oil. They held that they were "entitled to consider the reality of the transaction constituted by the SPA". That reality was that, prior to the date of the SPA, Sulpetro was, through its vehicle Sulpetro (UK), 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 Sulpetro (UK) 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. The fact that the licences stayed where they were, vested in Sulpetro (UK), did not, the Upper Tribunal held, alter this reality.

66. Turning to section 1313, the Upper Tribunal agreed with the FTT that the Payments fell within section 1313(2)(b). 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.

(c) The Court of Appeal's judgment

67. The Court of Appeal's judgment was handed down on 21 June 2023: [2023] EWCA Civ 695, [2023] STC 1205. The leading judgment was given by Falk LJ with whom Asplin and Nugee LJJ agreed.

68. The Court of Appeal allowed the appeal holding:

a. that the better interpretation of the fifth limb of Article 6(2) is that it is confined to rights to payments held by a person who has some form of continuing interest in the land in question to which the rights can be attributed: paras 44 and 92;

b. that the rights that the Illustrative Agreement between Sulpetro and Sulpetro (UK) conferred on Sulpetro did not amount to a right to work the oil in

the Buchan Field. That meant that the rights that BP acquired under the novated Illustrative Agreement between it and Sulpetro (UK), and hence the rights it acquired in return for making the Payments to RBC also did not amount to a right to work the Buchan Field. Therefore, the right to those Payments did not fall within Article 6(2): para 113;

c. since the court concluded that the Payments did not fall within the taxing rights allocated to the UK under the UK/Canada Convention, there was no need to decide whether they would have been caught by section 1313.

69. I discuss the detailed reasoning in Falk LJ's judgment when considering the submissions put forward by the parties before the court.

(d) The issues in this appeal

70. Permission to appeal was granted by this court to HMRC on four grounds, two of which provided alternative bases under the UK/Canada Convention under which it was said that the Payments could be taxed. In the event, only two grounds were pursued and so far as the UK/Canada Convention was concerned, HMRC pinned its colours exclusively to the mast of Article 6(2) as the taxing provision catching the Payments.

71. The issues are therefore:

a. Issue 1: Did the rights that Sulpetro acquired under the Illustrative Agreement with Sulpetro (UK) add up to the "right to work" the Buchan Field within the meaning of Article 6(2)?

b. Issue 2: If the answer to Issue 1 is yes, were the Payments that BP made to RBC "consideration for" those rights because they were made in return for Sulpetro agreeing to give up those rights so that BP could acquire those rights from Sulpetro (UK) under its own Illustrative Agreement?

c. Issue 3: If the Payments are within the scope of Article 6(2) of the UK/Canada Convention, are the profits earned by RBC from the Payments profits arising to RBC from rights to the benefit of assets to be produced by the exploitation of UK natural resources for the purposes of section 1313?

6. ISSUE 1: DID SULPETRO GET THE "RIGHT TO WORK" THE OIL IN THE BUCHAN FIELD UNDER THE ILLUSTRATIVE AGREEMENT?

72. HMRC rely on three clauses of the Illustrative Agreement as conferring on Sulpetro the "right to work" within the meaning of the fifth limb of Article 6(2). HMRC's case is that these provisions read in the context of the Illustrative Agreement as a whole have the result that Sulpetro acquired the right to work the Buchan Field for the purposes of Article 6(2) of the UK/Canada Convention. If that is correct, then that right to work was acquired by BP under the arrangements entered into between Sulpetro and BP and it was in consideration for that right that BP made the Payments first to Sulpetro and then to RBC.

73. The Court of Appeal considered the nature of Sulpetro's rights at paras 106 onwards of the judgment. If the rights held by Sulpetro under the Illustrative Agreement did not amount to the right to work the Buchan Field then the Payments could not be "consideration for" such a right.

74. Falk LJ analysed the terms of the Illustrative Agreement on which HMRC relied and acknowledged that Sulpetro's right to direct Sulpetro (UK)'s work was combined with its entitlement to the oil won and with the fact that the shares in Sulpetro (UK) were transferred to BP in addition to the novation of the Illustrative Agreement. She rejected the submission that taken together, these rights amounted to a "right to work":

> "113 … The right to work was held by [Sulpetro (UK)]. The structure reflected in the Illustrative Agreement was put in place to meet the UK's own requirements. That legal structure cannot simply be ignored on the basis of some broader concept of commercial or economic reality."

75. I agree with Falk LJ's conclusion and with her reasoning. It was always Sulpetro (UK) that held the licence to work the Buchan Field and not Sulpetro. That is clear from the Illustrative Agreement which notes in the preamble that the licensee – that is Sulpetro (UK) – expects to be granted a licence to conduct petroleum exploration, development and production activities in the UK. Sulpetro provided the funds and equipment necessary to enable Sulpetro (UK) to discharge its obligations under the licence, but it was not Sulpetro which discharged those obligations.

76. In challenging that conclusion, the first clause HRMC rely on is clause 2 which provides:

> "Subject to law, the Regulations, the license and this Agreement, Licensee shall conduct petroleum exploration operations in and in connection with all the areas covered by the license and, if petroleum is discovered, shall develop the areas and shall produce the petroleum therefrom. Licensee shall be and at all times remain responsible to the Secretary for (a) the full and proper discharge of all obligations under the license, and (b) the conduct of the operations in accordance with law and with the Regulations. Licensee may enter into contracts with others to perform on its behalf and under its responsibility such operations as Licensee may desire to be so performed."

77. The Regulations referred to in clause 2 are the Petroleum (Production) Regulations 1966 (SI 1966/898) and the Petroleum (Production) (Amendment) Regulations 1971 (SI 1971/814).

78. The second clause relied on by HMRC is clause 5 in the section of the Illustrative Agreement headed "Rights and Responsibilities of Sulpetro". This provides that Sulpetro shall provide all the funds and equipment required for the exploration, development and operation of the licence and for all the investment and expenses needed. Further, Sulpetro shall provide the budget and work programmes which will comply with all relevant laws and with the obligations of Sulpetro (UK) under the licence.

79. The third clause relied on by HMRC is clause 6 which provides that Sulpetro "shall own and receive" all the petroleum won to which Sulpetro (UK) is entitled under the licence. It goes on: "Sulpetro shall receive no reimbursement of any kind for any investment made or expenses incurred and Sulpetro must look solely to income derived from the extraction of petroleum for the return of any capital so invested or expenses incurred."

80. Mr Prosser put HMRC's case in two different ways. First, HMRC argue that under clause 2 of the Illustrative Agreement, Sulpetro obtained the right to oblige Sulpetro (UK) to carry out the exploration and development of the Buchan Field. Sulpetro (UK) thereby replicated the obligations that it already owed to the UK Government under the licence so that it also thereafter owed those same obligations to Sulpetro. Mr Prosser submits that Sulpetro, just like the UK Government, had the right to have the Buchan Field worked by Sulpetro (UK). That is the same for our purposes as having the right to work the field itself. This argument is not dependent on the parent/subsidiary relationship between Sulpetro and Sulpetro (UK).

81. I do not accept this argument. There is no direct legal relationship between Sulpetro and the UK Government so it cannot be suggested that the UK Government has conferred a right to work the Buchan Field on Sulpetro. The Illustrative Agreement is founded on the fact that it is Sulpetro (UK) which holds the licence; it was at all times the exclusive holder of the right to work that was conferred by the UK Government under the licence and it had all the rights and responsibilities that arose under that licence. Has Sulpetro (UK) in turn conferred on Sulpetro the right to work that it acquired from the Government or transferred that right to Sulpetro?

82. That legal reality is acknowledged in clause 2 which confirms that it is Sulpetro (UK) and not Sulpetro which is responsible for working the field. The wording of clause 2 seems to me to say the opposite of what HMRC need it to say if they are to succeed in an argument that Sulpetro (UK) conferred or transferred the rights the UK Government granted to it under the licence. The promise by Sulpetro (UK) to Sulpetro that it will do what it has already promised the Government to do under the licence does not change that. There is a legal difference between someone having a right to work natural resources and someone having a right to require another person to work those natural resources. Sulpetro has the latter but not the former.

83. As Falk LJ noted at para 107 of her judgment, that arrangement did not come about by accident. The Illustrative Agreement arose from the need to reconcile two vital requirements of the UK Government. These were the desire on the one hand to ensure that licences were granted to UK resident companies so that the royalties due under the licence were payable by UK resident companies and on the other hand the need to recognise that investment had to come from overseas resident companies and hence the return on that investment, in the form of oil won, had to go to overseas resident companies. The structure of the Illustrative Agreement was designed to square that circle by requiring Sulpetro both to create a UK subsidiary to be the licence holder (and royalty payer) and to land and sell the oil won in the UK.

84. Mr Prosser's second argument stresses that it is Sulpetro rather than Sulpetro (UK) which provides all the money and equipment, the budget and work programmes to explore and develop the Buchan Field. The Illustrative Agreement places all the burden of carrying out the exploration and development work on Sulpetro rather than on Sulpetro (UK) and it is Sulpetro rather than Sulpetro (UK) that bears all the risk of losing that investment if no oil is found. In those circumstances, the economic effect of the relationship is that it is Sulpetro rather than – or as well as – Sulpetro (UK) which is exercising the right to work the Buchan Field under the licence. The Illustrative Agreement only makes commercial sense because Sulpetro (UK) is a subsidiary of Sulpetro. No arm's length arrangement would strip out any chance of profit accruing to Sulpetro (UK) and give the right to all future revenues and profit to Sulpetro.

85. In support of the effect of the Illustrative Agreement, HMRC referred to a passage in *A Manual of UK Oil and Gas Law* by Daintith and Willoughby (1977) which describes the effect of such an agreement being "to vest the economic interest in the licence in the [investing entity] by means of a transaction which, by dealing in the fruits of the licence, does not involve an assignment of rights under the licence". The significance of that was that prior to 1976, such an agreement would not involve the assignment of rights and so did not require the consent of the Secretary of State. That position changed in 1976, after which consent was required. That is broadly the argument that persuaded the Upper Tribunal.

86. As Falk LJ recognised in para 113, this argument requires the court to ignore the separate legal personality of the subsidiary company and treat it as one person with its parent Sulpetro. One must not, of course, treat Sulpetro (UK) as being the same legal person as its parent for all purposes under the Illustrative Agreement because the licence could only have been granted to a UK resident corporate entity. Complying with that requirement precluded treating Sulpetro and Sulpetro (UK) as the same entity – the mechanism devised by the UK to achieve its goals depended on the two companies remaining distinct.

87. I agree with Falk LJ that it is not possible to ignore the legal structure for the purpose of applying the provisions of the UK/Canada Convention either.

88. The idea that an "artificial creation of the legislature", namely a company, has a separate legal personality from its shareholders has been protected and reaffirmed from *Salomon v A Salomon* & Co Ltd [1897] AC 22 onwards. It was essential, Lord Halsbury LC said in that landmark case, that "once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself". Generally speaking, the tax code is drafted and applied on the basis of legal rather than economic reality. Separate corporate entities within the same corporate group are taxed individually; a company's income and assets are not treated as "really" being those of its shareholder whether that shareholder is another corporate entity or an individual taxpayer. The tax code is drafted on the basis that a subsidiary of a corporate group may be and often is tax resident in a different jurisdiction from its shareholder. That is why the concept of the permanent establishment was created.

89. There are some statutory inroads to this general principle that the separate existence of different legal entities which can be tax resident in different jurisdictions is recognised and accommodated by the tax code. For example, the CTA 2010 provides for group relief whereby losses can be transferred between companies within the same group to offset profits made by a different company. But the companies are still treated as separate legal entities, and the surrendering company must consent to the claimant company using its losses. Where an exception is made to the principle that every person, legal or natural, is a separate taxable entity with its own tax residence, the circumstances

are carefully defined by the legislation without a general appeal to economic interests or to reality or to what is "actually going on".

90. Beyond that, it is true that there has been a greater tendency of the courts to neutralise the effect of tax avoidance schemes by looking at the reality of a transaction to see whether it is a transaction that was intended to be caught by a particular taxing provision. The court looks at the transaction as a whole, ignoring the fact that it was effected by a series of pre-ordained separate steps which, if analysed individually, may arguably have fallen outside the charge. The *Ramsay* principle, recently discussed by this court in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690, explains when a court can to that extent focus on the reality of what is happening combined with a purposive interpretation of the taxing provision. No one here has suggested that the *Ramsay* principle has any application to the present facts and nothing in this judgment casts doubt on the efficacy of those principles where they apply. If the conclusion of the Illustrative Agreement between Sulpetro and Sulpetro (UK) was pre-ordained once the licence had been granted to Sulpetro (UK), that was because the UK Government ordained it and not because it necessarily suited the Sulpetro group.

91. One of the criticisms levelled by RBC against the FTT and the Upper Tribunal decisions was that they assumed that all income derived from oil in the North Sea should be taxed by the United Kingdom, however indirectly that income related to the oil. That led to an assumption that the Articles had to be construed to prevent RBC "avoiding" the payment of tax. That, Mr Peacock submitted, was wrong; tax would not be avoided if the income fell outside Article 6(2). Any tax which was "foregone" by the UK if the Article was interpreted as RBC contended could be charged instead by Canada. Conversely a narrow construction of Article 6(2) would result in Canada "foregoing" tax on a UK-resident company's profits derived indirectly from Canadian oil and HMRC would instead be able to tax that profit as part of the profit of the UK resident company in the ordinary way. Talk of "holes" in the provision was therefore misplaced.

92. I accept Mr Peacock's submission that it is important to bear in mind that the UK/Canada Convention is not determining whether a particular stream of revenue should be taxed or tax free. Instead, it is identifying where the boundary lies between on the one hand Canada's power to tax the profits attributable to the Canadian business of a Canadian-resident company and on the other hand HMRC's power to tax profits which derive from the exploitation of the UK's natural resources. The requirement in Article 21 of the UK/Canada Convention that the Contracting States eliminate double taxation means that the application of its terms is intended, generally speaking, to be a zero-sum game, even where the Convention does not confer an exclusive right to tax on one of the Contracting States. I agree that there is no underlying presumption as to where that boundary should fall – it depends on the proper construction of the Convention.

93. RBC accepted that the concept of the "right to work" in Article 6(2) of the UK/Canada Convention is an autonomous concept. It is clear that the language of an international treaty must not be interpreted by technical rules of English law: see per Lord Diplock in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 281H–282B. However, the UK/Canada Convention is an instrument firmly in the taxing realm. The Contracting States must have agreed its terms on the understanding that those terms would then need to be reflected in their respective domestic laws and would impose tax charges which must be expressed, so far as possible, in precise terms so that it is reasonably clear who is subject to the taxing charge and who is not.

94. The question is therefore whether there is anything in the UK/Canada Convention which indicates that one must identify the right to work and attribute that right to the entity which invests its funds and sells the oil, even if that is not the entity which is licensed by the Government. I do not see that there is. The opening paragraphs of the Introduction to the Model Tax Convention emphasise that its main purpose is to eliminate double taxation:

> "1. International juridical double taxation can be generally defined as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods. Its harmful effects on the exchange of goods and services and movements of capital, technology and persons are so well known that it is scarcely necessary to stress the importance of removing the obstacles that double taxation presents to the development of economic relations between countries.
>
> 2. It has long been recognized among the Member countries of the Organisation for Economic Co-operation and Development that it is desirable to clarify, standardize, and confirm the fiscal situation of taxpayers who are engaged in commercial, industrial, financial, or any other activities in other countries through the application by all countries of common solutions to identical cases of double taxation."

95. Several provisions of the Convention assume that the respective tax codes of the Contracting States will operate on the basis of the separate legal personality and status as a taxpayer of entities within the same group. Article 13 makes special provision both for the alienation by the taxpayer of immovable property (Article 13(1)) and also for the alienation by the taxpayer of shares in a subsidiary where those shares derive their value directly or indirectly from immovable property situated in a Contracting State (Article 13(5)). This does not assume that the parent and subsidiary are generally treated as the same person.

96. Mr Peacock also drew our attention to Article 9 of the UK/Canada Convention which concerns associated enterprises. This addresses the risk of tax avoidance where an enterprise in one Contracting State which controls an enterprise in the other Contracting State arranges their commercial or financial relations in a way which ensures that more profits accrue to one member of the group which is resident in the more favourable jurisdiction than would have been the case if the two enterprises had been dealing with each other as independent enterprises. The Article enables the Contracting State of the enterprise whose profits have been artificially lowered to adjust those profits upwards and tax them accordingly. Where that occurs, the Contracting State of the enterprise whose profits have been artificially raised must make an appropriate adjustment to the tax it charges on those profits. In determining such adjustment "the competent authorities of the Contracting States shall if necessary consult each other". This is designed to put associated and independent enterprises on a more equal footing for tax purposes, and avoids the creation of tax advantages or disadvantages that would otherwise distort the relative competitive positions of either company. The Commentaries also note that the purpose of Article 9 is to deal with adjustments to profits that may be made for tax purposes where transactions have been entered into between associated enterprises on other than arm's length terms.

97. There are UK domestic provisions concerning the adjustment of transfer pricing which seek to ensure that profits and losses of individual companies are calculated for tax purposes "as if the arm's length provision had been made or imposed instead of the actual provision" made between them: see section 147 of the Taxation (International and Other Provisions) Act 2010. Again, these are carefully drafted provisions which acknowledge the separate legal entities involved and address this particular issue specifically rather than relying on a broad appeal to what is "really happening".

98. I would therefore reject HMRC's case on Issue 1. It is not open to HMRC to invite the court to leave aside why the Illustrative Agreement was put in place. The structure put in place was to ensure that the royalties payable under the licence to the Crown for the right to work were payable at all times by a UK based entity. It also ensured that the oil won was landed in the UK and that the first sale of that oil was subject to UK tax. No one is disputing that the Crown was entitled to receive those royalties and the tax on the sale of oil even though it was "really" a Canadian based company which provided all the money and made all the profit from the oil won and did so without having a permanent establishment in the UK. The policy behind the inclusion of Article 6(2) in the UK/Canada Convention (as well as Article 13 and Article 27A) is undoubtedly to shift some of the taxing rights that would otherwise belong to the jurisdiction where the company is resident to the jurisdiction where the oil is located. That has no doubt been achieved by those Articles to a very considerable extent even giving them the interpretation favoured by the Court of Appeal. Whether they go even further as HMRC contend depends on the meaning of the words and is not helped by appeals to the economic link between the UK and the North Sea, or to the purpose of the provisions or to the parent/subsidiary relationship between Sulpetro and Sulpetro (UK).

7. ISSUE 2: THE SCOPE OF ARTICLE 6(2)

99. If the rights that Sulpetro had been granted under the Illustrative Agreement and which had later been novated to BP had amounted to the right to work, the court would then need to consider whether RBC's right to the Payments under the SPA with BP amounted to a right to "consideration for" that right to work. As I would hold that Sulpetro did not acquire the right to work the Buchan Field, did not transfer that right to BP and so did not receive the Payments in consideration of the right to work, I can deal with this issue more briefly.

100. The application of Article 6(2) is very fact specific. It is not appropriate in these circumstances to attempt to identify the precise boundary between those arrangements which will in future be treated as falling within Article 6(2) and those which will not. Any definition which extends the meaning of a term such as "immovable property" beyond what would normally be included in it creates its own penumbra of uncertainty in a different place from the penumbra that exists around the ordinary meaning of the term. There must be a dividing line somewhere between what is caught and what is not caught and that has the inevitable consequence that some cases will fall on one side of the line and others on the other side even though they appear similar in economic terms.

101. Falk LJ held that the Payments did not amount to "consideration for" the right to work for a number of reasons. In my judgment, it is sufficient to construe Articles 6, 13 and 27A in a way which ensures that they operate in what Falk LJ described as a "coherent, and explicit, structure for the allocation of taxing rights in respect of natural resources, and in particular hydrocarbons, a resource of obvious practical significance to both States": para 68.

102. Her reasoning as regards Article 13 was as follows. Article 13 deals with capital gains. Article 13(1) follows the Model Tax Convention in providing that alienations of immovable property can be taxed in the State where that property is located. The definition of immovable property for this purpose is that set out in Article 6(2). Paragraphs (4) and (5) of Article 13 are not from the Model and were added by the UK and Canada to ensure that gains made from the alienation of, amongst other things, assets produced from the exploitation of oil, gas and related hydrocarbons could be taxed where those hydrocarbons were situated and that this could not be avoided by an indirect disposal of those assets through the sale of shares in a company. Since Article 13(1) covers alienation of immovable property, it must follow that all or at least some of the assets listed in Article 13(4) would not otherwise fall within the definition of "immovable property" in Article 13(1). Falk LJ continued:

> "77. … The rights described in Article 13(4) are conceptually much closer to the land than rights to payments within the fifth

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

103. Falk LJ made the further point that if HMRC are correct as to the breadth of Article 6(2) and hence of Article 13(1), it makes it difficult to see how Article 13 would apply to payments similar to the Payments in the present case but where the natural resources were something different from the hydrocarbons expressly covered by Article 13(4) and 13(5). If the concept of immovable property is given the very wide construction supported by HMRC, then the question would arise whether the rights mentioned in Article 13(4) specifically for hydrocarbons actually are caught by Article 13(1) regardless of what natural resource they relate to because they are immovable property and hence fall within Article 13(1).

104. I agree with that reasoning and hence with Falk LJ's conclusion at para 78:

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

105. At para 92 of the judgment, Falk LJ identified the limitation on the scope of the fifth limb of Article 6(2) as two-fold. She held that inherent in the concept of payments being "consideration for" the right to work is a requirement that the recipient of the payments must be the person who can confer on the payer the right to work the Buchan Field. That means that the recipient of the consideration must own an interest in the land

in which the natural resources are found. Since neither Sulpetro nor RBC ever held an interest in the Buchan Field and neither was ever in a position to confer a right to work the minerals in the North Sea, the consideration they received cannot have been pursuant to a right to receive consideration for the right to work their land. Secondly, she held that it is only payments made in return for the first grant of the rights by the landowner that fall within the definition of "consideration for" the right to work. Payments made for the assignment or transfer of rights conferred on someone by the owner of the rights are not "consideration for" the right to work.

106. HMRC criticised both these limitations as creating the potential for fine distinctions between for example, on the one hand the situation where an existing holder of rights grants a sub-licence and so continues to hold the rights itself and on the other hand where the holder disposes of the rights outright in return for a stream of income. HMRC argued that in the first situation, a right to income under the sub-licence would fall within the fifth limb (because the grantor still retains the rights as licensor), whereas a right to income under a disposal would fall outside because the assignor has given up its interest in the land and has no such interest at the time when the payments are received. Falk LJ acknowledged this possibility at para 93 but commented that fine distinctions regularly arise when dealing with immovable property and noted that the outright disposal would fall to be taxed under Article 6(3) (if it was to be treated as income) or as a capital gain under Article 13(1).

107. I agree that fine distinctions often need to be made when applying taxing provisions. As this court has said previously in the context of applying VAT regulations, decisions about the application of taxing provisions are highly dependent on the factual situations involved. "A small modification of the facts can render the legal solution in one case inapplicable to another": see *Revenue and Customs Comrs v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15, [2013] 2 ALL ER 719, para 68. I am less sanguine about whether the Contracting States are likely to have drawn the boundary between their taxing rights on that basis, or whether such a fine distinction has any equivalence in Canadian land law. As noted in para 11 above, the model licence clauses set out in the 1966 Regulations that had to be incorporated in the licences granted by the UK Government require the Government's consent to both the assignment and the sub-licensing of the rights.

108. To dispose of this issue in the appeal it is only necessary to decide that if the bundle of rights that Sulpetro acquired under the Illustrative Agreement and which it effectively surrendered to BP in return for the Payments had amounted to the right to work, those rights would still have been too remote to fall within the definition of immovable property within Article 6(1) of the UK/Canada Convention.

109. I agree that this interpretation derives some support from the similar wording of Article 12 of the UK/Canada Convention. Article 12(4) defines "royalties" as any

payment received "as a consideration for the use of, or the right to use, any copyright, patent, trade mark…". Para 8 of the Commentaries on Article 12 states that the Article includes both payments made under a licence and also payments made to compensate the owner for an infringement of the right. But it does not cover a payment that "whilst based on the number of times a right belonging to someone is used, are made to someone else who does not himself own the right or the right to use it". The Commentaries give as an example of the distinction being drawn a situation where an artist receives both a fee for performing and also, if the performance is recorded, a royalty for each sale of the recording. The performance fee would fall under Article 17 which deals with income of performers and athletes but royalties for each sale of the recording will fall within Article 12 where the artist is the holder of the copyright. But where the copyright in the sound recording belongs to a third party, the payments made under the contract fall under Articles 7 or 17 rather than under Article 12 even if the payments are contingent on the sale of the recordings. Further, the 2017 Commentaries make clear that where payments are made in exchange for an outright transfer of the rights, those payments do not fall within Article 12 because "the payment is not in consideration 'for the use of, or the right to use' that property and cannot therefore represent a royalty" (para 8.2). The payment will instead be a business profit within Article 7 or a capital gain within Article 13. The 2017 Commentaries go on to explain why this is, at para 16:

> "That follows from the fact that where the ownership of rights has been alienated, the consideration cannot be for the use of the rights. The essential character of the transaction as an alienation cannot be altered by the form of the consideration, the payment of the consideration in instalments or, in the view of most countries, by the fact that the payments are related to a contingency."

110. I agree that this Commentary on the wording of Article 12, which is very similar to that in Article 6(2), supports a narrower view of the scope of immovable property than that contended for by HMRC.

111. I found the comparison between the English and French texts of Article 6(2) less helpful. RBC relied particularly on the use in the French text of a different word, "les **droits** à des redevances" when referring to the right to receive royalties compared with the word used, "la **concession** de l'exploitation" when referring to the right to work. But from the materials the court was shown by Mr Peacock, it does not appear that the term "la concession" necessarily has a meaning in this context restricted to the initial grant or creation of a right or that it denotes only a right granted by the owner of an interest in the land.

112. Finally, on the issue of how indirect consideration may still be regarded as "consideration for" the rights referred to in the fifth limb, the parties disagreed about the

significance of the two alternatives in the fifth limb of Article 6(2) which refers to “the working of” as well as to “the right to work” mineral deposits. What is intended to be caught by the reference to the “consideration for the right to work” that is not caught by “consideration for the working of”? RBC argue that this wording is intended merely to catch a situation where the person making the payments is not yet actually working the mineral deposits though fully intends to do so. Before the mineral extraction gets underway, the payments are better described as payments for the right to work and then, when the extraction begins, they can be described as payments for the working of the minerals. HMRC argue that the alternative is a true alternative and not just a description of the same right at two points in time. They say that a payment for the right to work can be, as here, at one remove from the payment for the working of the minerals.

113. On this point I prefer RBC’s construction. What is caught by Article 6(2) and treated as immovable property is the contractual right to the variable or fixed payments. The right to be paid the consideration is undoubtedly held by Sulpetro but that is different from the rights for which that consideration is paid. Further, the right to the oil is clearly a right to be paid for the sale of the oil itself. That is not caught by Article 6 because the oil is a movable and not deemed to be immovable property. The purpose of the additional words is to ensure that the recipient of the payments could not escape the tax charge by saying that until it actually starts extracting the minerals, the payments it receives could not properly be described as payments “for the working” of the minerals. These additional words do not have the significance that HMRC seek to ascribe to them. They do not further extend the reach of Article 6(2).

8. ISSUE 3: THE DOMESTIC LEGISLATION

114. If the court decides that the UK does not have the right under the UK/Canada Convention to tax the Payments in the hands of the Canadian-based RBC, the question whether the income, if it fell within Article 6(2), would be taxable under section 1313 of the CTA 2009 does not arise.

115. However, Mr Prosser indicated in answer to a question from the court that HMRC’s concern in pursuing this appeal is in part the doubt cast by Falk LJ on the scope of section 1313(2)(b). We heard submissions on the domestic legislation from Mr Ripley on behalf of HMRC and Ms Black on behalf of RBC and as we heard full and helpful argument, I will consider this issue.

116. Section 1313(2)(b) provides that any profits arising to a non-UK resident company from exploration or exploitation rights are treated for corporation tax purposes as profits of a trade carried on through a permanent establishment in the UK. Because they are so treated, they fall within the tax charging provision in section 5(2) of the CTA 2009. The

term "exploration or exploitation rights" is defined as including rights "to the benefit of" assets to be produced by the exploration and exploitation activities.

117. The FTT and the Upper Tribunal both held that the Payments fell within section 1313(2)(b). The Payments gave rise to profits arising to a non-UK resident company (Sulpetro) from rights to the benefit of assets (the oil) produced by an activity carried on in connection with the exploitation of natural resources situated in the UK sector of the continental shelf (the Buchan Field). Because the Payments are such profits, section 1313(2) provides that they are treated for corporation tax purposes as profits of a trade carried on by Sulpetro in the UK through a permanent establishment in the UK.

118. The application of this provision does not turn on whether the rights count as immovable property or not.

119. On this point I do not share the doubts that Falk LJ expressed in para 116 of her judgment. She said that it was not clear that an interest in a proportion of sale proceeds from oil can properly be described as a benefit *of the oil*, as opposed to a benefit of *the proceeds of the sale of the oil* by BP or Talisman. However, given that a taxing charge can only be applied to money or money's worth, it is difficult to see what benefit a taxpayer can derive from millions of barrels of oil which might be susceptible to a taxing charge but which does not involve converting that oil into money by selling it.

120. Ms Black argued that section 1313 cannot be construed so broadly. There are many contracts under which payments have to be made where the money used to make the payment has been earned from a particular trade or business which involves selling things. That does not mean that the recipient of the payment is enjoying "the benefit of" those things. Similarly, there are many contracts under which a payment is calculated by tracking the price of a particular commodity such as oil. That does not mean that the recipient is benefiting from sales of oil.

121. I agree that payments of those kinds will not fall within section 1313(2)(b). Mr Prosser fairly accepted at the outset of his submissions to the court that it was not part of HMRC's case that the fifth limb applies to income that is merely computed by reference to the market value of oil extracted. However, the Payments here are much more closely related to the extraction of the oil than those two examples. The value of the Payments was not only dependent on the price of a barrel of oil but also on the actual volume of oil extracted and sold. For many years no Payments were made either because no oil was extracted or because the price did not rise above US$20 per barrel. Ms Black suggested that the reference to "the benefit of" the oil was intended to catch a situation where the recipient of the payment held some beneficial interest in the oil. Once Sulpetro's rights to the oil had been transferred to BP, Sulpetro had no interest in the oil. That cannot be what

"the benefit of" the assets is directed at since "interests in" the oil are referred to separately in subsection (3). "The benefit of" the oil is something in addition to that.

122. Therefore, if I had held that the Payments fell within Article 6(2) of the UK/Canada Convention, I would have held also that the UK had exercised its taxing rights in respect of those Payments and that they fell within the charge to corporation tax by virtue of section 1313. That does not, in my judgment, have the effect that any payments made to those financing oil-related projects are caught, simply because they are computed by reference to the price of oil or because the money which is used to make payments has been earned from the sale of oil.

9. CONCLUSION

123. In light of my conclusion on Issue 1, I would dismiss the appeal. The Illustrative Agreement did not confer on Sulpetro the right to work the natural resources in the Buchan Field, and hence the Payments made for the transfer by Sulpetro to BP of those rights when the Illustrative Agreement was novated, were not "consideration for" the right to work.

LORD BRIGGS (dissenting):

124. I find myself in lonely disagreement with the conclusion reached by Lady Rose, namely that this appeal should be dismissed because the right to the Payments made (initially) by BP to Sulpetro was not consideration for the right to work the Buchan Field within the meaning Article 6(2) of the UK/Canada Convention. In my view it was, as both the First-tier Tribunal and the Upper Tribunal had found. In the summary of my reasoning which follows I adopt with gratitude Lady Rose's full and careful description both of the Convention and of the relevant facts. I shall also use her definitions and abbreviations without further explanation. I agree with her conclusion on Issue 3: namely that the Payments were taxable under section 1313.

125. The issue which separates us is one about the construction of the Convention and its application to unusual facts. For this purpose the Convention may loosely be treated as analogous to a taxing statute, at least in relation to the effect of Article 6, which brings within a prior UK right to tax the income from immovable property situated in the UK, and then provides an extended definition of what immovable property is. As a double taxation treaty the Convention is of course to be construed in accordance with Articles 31 and 32 of the Vienna Convention, as explained by Lord Reed in *Anson v Revenue and Customs Comrs* [2015] STC 1777, para 56, cited by Lady Rose at para 28 of her judgment. The search is for the objective common intention to be ascribed to the parties by reference to the ordinary meaning of the terms of the treaty in their context and in the light of the treaty's object and purpose.

126. My starting point is to apply to this issue the principles memorably set out by Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46, para 35:

> "the driving principle in the Ramsay line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

This dictum has been approved by the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, [2005] 1 AC 684 and by this court in *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690. As Lady Rose explains, these principles have emerged from what may loosely be called the *Ramsay* line of cases, where the court is usually seeking to ascertain whether a complex transaction falls within the purview of a taxing statute, in circumstances where the parties have engineered its detail, but not necessarily its substance, with a view to tax avoidance. But as Ribeiro PJ makes clear, and the House of Lords emphatically confirmed in *Barclays Mercantile* at para 33, it involves no special principle limited to tax avoidance cases. On the contrary the effect of the *Ramsay* principle was to "[rescue] tax law from being 'some island of literal interpretation' and [bring] it within generally applicable principles" (per Lord Steyn in *McGuckian v Inland Revenue Comrs* [1997] 1 WLR 991, 999). The purposive approach to the taxing provision is a perfectly general rule of statutory construction, and is no different in substance from that to be applied to the interpretation of a treaty. The need to take a realistic view of the transaction simply reflects the intention which may reasonably be attributed, in the case of a statute to the legislature, and in the case of a treaty to its parties. It is not just some magic weapon with which to defeat tax avoidance.

127. I readily accept that tax avoidance played no part in the "transaction" in the present case (whether you view the transaction as the relationship between Sulpetro and Sulpetro (UK) defined by the Illustrative Agreement, or the relationship between BP and Sulpetro laid down in the SPA). But I cannot agree with Lady Rose that the task of deciding whether the Payments fall within the confines of Article 6(2) is not illuminated by taking a realistic view of the transaction pursuant to which they were made, merely because its parties were not engaging in tax avoidance. Nor do I agree that there is some legal view of the transaction separate and distinct from a realistic view of it, or that a realistic view somehow requires the separate legal identity of Sulpetro (UK) as the licence holder to be ignored. In my opinion the realistic view requires taking all the legal incidents of the transaction, and the separate legal personality of all its participants, fully into account, in order to reach a comprehensive understanding of the character and substance

of the transaction, viewed in the round, so as to see whether the fifth limb of Article 6(2) applies to the Payments.

128. So I start with an attempt to identify the relevant purpose of this part of the Convention. Of course its overall purpose is to lay down an agreed means of avoiding double taxation where the domestic tax legislation of each of its parties appears to enable both of them to tax the same profits or gains. Nonetheless the relevant purpose of Article 6 is more specific than that. Its purpose is to bring within the prior taxing right of one of the Contracting States the income derived from certain types of property which can fairly be described as affixed to the territory of that State. The label given to all of it is "immovable property", and that label automatically includes, without more, all property situated in that State which the law of that State treats as immovable.

129. But the so-called five limbs of Article 6(2) significantly expand that definition of immovable property so as specifically to include certain specified classes of property whether or not the law of that State would include them as immovable. Taken together they appear to be based upon a perception that the property in question has so close a connection with the use or exploitation of land within the Contracting State, including natural and mineral resources lying below the surface, that it is recognised as fair that the State in which the property is situated should have the prior right to tax income and profits arising from it. Thus no one would ordinarily describe livestock or agricultural equipment as immovable property (in the legal sense) but the income-producing potential of each is closely connected with the use and exploitation of farmland.

130. Limb five of Article 6(2) is plainly designed to identify property which has a sufficiently close connection with the exploitation (described as "working") of mineral deposits and sources, and natural resources such as hydrocarbons, regardless whether they lie under the dry land of the Contracting State or under its part of the adjacent continental shelf. That purpose does not of itself tell the reader how close that connection needs to be, nor does it necessarily warrant casting the immovable property net in the widest scope which the words will possibly bear. The precise closeness of the connection is to be derived from the ordinary meaning (in context) of the words used. But that purpose provides no warrant for a search for unexpressed limitations on the natural scope of the language.

131. The key words of limb five for present purposes are:

> "rights to variable…payments as consideration for the working of, or the right to work…natural resources."

The underlying concept behind those words is that someone ("A") has a right to a variable income stream from someone else ("B") as the quid pro quo for someone (usually but not

necessarily A) having conferred upon B a right to work the relevant natural resources. "Work" may have slightly different meanings depending upon the nature of the resources concerned. In relation to hydrocarbons it means getting them out of the ground (whether onshore or offshore), in a form capable of being put to profitable use, whether by sale, refining or consumption.

132. The following points are to be noted. First, there is nothing to suggest that A must be the original owner of the relevant rights to work the resources, or the owner of the ground on or under which they are situated ("O") or, as the Court of Appeal thought, that A must have some continuing interest in the land or resources. O may have assigned the relevant rights to its wholly owned subsidiary A for a peppercorn. It would be extraordinary if the A/B transaction giving rise to B's right to work could thereby so easily be removed from the purview of Article 6(2). As the Upper Tribunal observed, no rational purpose of Article 6 would thereby be served. The interposition of a wholly owned subsidiary in that way would not distance the right to payment from B to A from what was otherwise a sufficiently close connection with the relevant resources. There is in fact no express requirement that the income stream is payable to the former holder of the rights being made available to B, provided that they form part of the quid pro quo for B's enjoyment of them. A may simply be the person to whom the contract for B's acquisition of the rights requires B to make the payments.

133. Secondly there is no basis for interpreting limb five as applicable only to a right to payments as the quid pro quo for all the necessary rights to work the relevant resources. A may be only one of the persons from whom B has to obtain the relevant rights. B may have to make payments (variable or fixed) to some or all of a number of right-owning counterparties to be in a position actually to work the resources. They may include not only the owner of the land under which the minerals or resources lie, but also the owner of those resources (if different) and a neighbour entitled to the benefit of a restrictive covenant against relevant working, who has to be bought off. Similarly the payment stream need not be the whole of the relevant consideration. B may have to agree to pay a lump sum plus (as here) overage income. Part of the quid pro quo may consist of the transfer by B to A of other valuable rights.

134. Taken together those points suggest that the purpose of limb five of Article 6(2) is engaged wherever there is an income stream being received as of right as the quid pro quo for the ability of someone other than the recipient to work UK situated mineral deposits or sources, or natural resources. If that purpose is engaged, then the right to receive that income stream is deemed to be immovable property, on the income from which the Convention gives a prior right to tax to the Contracting State where the sources or deposits are situated.

135. Applying that interpretation of Article 6(2) to the facts of this case requires it first to be ascertained whether the SPA conferred upon BP the "right to work" the 12.7% share

of the hydrocarbons in the Buchan Field originally allocated to Sulpetro (UK) under its licence from the UK Government. It is common ground that the SPA transferred from Sulpetro to BP everything which Sulpetro had formerly enjoyed in relation to the working of that interest including, critically, 100% ownership of Sulpetro (UK) and (by novation) all the rights which Sulpetro enjoyed as against Sulpetro (UK) under the Illustrative Agreement. So it is necessary to ask what those rights were and whether, viewed realistically and in the round, Sulpetro had the right to work that share of the hydrocarbons in the Buchan Field by virtue of having those rights.

136. A realistic first question would be to ask whether, prior to the making of the SPA, Sulpetro was actually working that share of the Buchan Field. "Working" does not in that context necessarily mean doing the actual work involved in extracting the oil. Even before the making of the SPA, the actual work was being done by BP under an Operating Agreement to which Sulpetro (UK) was a party alongside the owners of the right to extract the other shares in the Buchan hydrocarbons. The Operating Agreement is not before the court, but typically it would have conferred upon Sulpetro (UK) a right to receive its 12.7% share of the hydrocarbons extracted in return for paying the same proportion of the Operator's charges and expenses, together with a right to play a proportionate part in the decision-making about the exploitation of the Buchan Field. Leaving aside the consequences of Sulpetro's ownership of Sulpetro (UK) and the terms of the Illustrative Agreement, no-one would doubt that each licensee of a share of an oilfield which it exploited jointly with others by means of an operating agreement would be "working" its share of the hydrocarbons in the field within the meaning of Article 6(2), and this would not depend upon whether the operator was doing the work as an agent or as an independent contractor.

137. The combined effect of Sulpetro's 100% ownership of Sulpetro (UK) and the terms of the Illustrative Agreement was, as Lady Rose describes in more detail, to confer upon Sulpetro all the risks and rewards of the extraction of that 12.7% share of the Buchan hydrocarbons (and therefore also the risks and rewards of decision-making about their subsequent retention or sale), to oblige Sulpetro to make all necessary payments for the extraction, and to confer upon Sulpetro all the decision-making about the project which would otherwise have rested with Sulpetro (UK). Although Sulpetro (UK) remained the holder of the relevant government licences, its role in the working of the hydrocarbons to which the licences related became nothing more than that of a not for profit (or loss) risk-free puppet, with all its relevant strings being pulled by Sulpetro, which thereby enjoyed the whole of the economic benefits and risks of the working of that share.

138. In my opinion, shared with the FTT and the Upper Tribunal, a realistic view of those arrangements meant that Sulpetro was "working" that share of the Buchan hydrocarbons. When the question arises who is conducting a particular extraction activity, the fact that a particular person is incurring all the risks and rewards, paying all the costs and expenses, providing all the expertise, making all the relevant decisions and receiving immediate ownership of all the material extracted for no further payment strongly

suggests that the person so identified is conducting that activity. And when the only other candidate for the role is its wholly owned subsidiary, acting as its puppet at no charge, at no profit or risk of loss, the impression that its parent is the person conducting the activity becomes irresistible. It might be said that in certain respects Sulpetro was working the 12.7% share of the Buchan hydrocarbons through its wholly owned subsidiary, but that would not detract from the reality that Sulpetro was working the relevant share within the meaning of Article 6(2).

139. Nor does the fact that Sulpetro (UK) was and remained the licensee under the government licencing scheme detract from that conclusion. Sulpetro's role, both as Sulpetro (UK)'s parent and under the terms of the Illustrative Agreement was fully disclosed to and apparently approved by the Government. It amounted to an outright transfer from Sulpetro (UK) to Sulpetro of the whole of the economic benefit (and burden) of the licence. If it fell short of a full legal assignment or sub-licence it did so only as a matter of legal form, and the shortfall did not disturb the substance of that transfer, viewed realistically.

140. Again, I consider that Sulpetro was not just working the share of the Buchan hydrocarbons de facto, but that it had the right to do so, in the form of contractual rights against the licensee Sulpetro (UK) which bestowed upon Sulpetro the right to perform the role in the terms which I have described. It was not just a case of a parent invading the business space of its subsidiary because the subsidiary could be compelled not to object.

141. In respectful disagreement with Lady Rose, none of the foregoing analysis involves ignoring the separate legal personality of Sulpetro (UK), nor the fact that it had obtained, and continued to hold the licence from the Government to extract the hydrocarbons. On the contrary the existence and detail of those facts, including the Illustrative Agreement by which the parent/subsidiary relationship was regulated in relation to working the Buchan Field, forms the bedrock of the examination of the substance and effect of the transaction, viewed realistically and as a whole.

142. It follows from my analysis thus far that following the making of the SPA and the transfer of ownership of Sulpetro (UK) BP was working the 12.7% share as a matter of right, just as Sulpetro had been doing previously. This is because the combined effect of the transfer of ownership and the SPA was to place BP precisely in Sulpetro's shoes vis a vis both Sulpetro (UK) and the continuing exploitation of that share of the hydrocarbons.

143. The only remaining question is whether the right to the Payments was "consideration for" the right to work that share of the hydrocarbons. In my view it plainly was. The Payments were part of the consideration (or price or quid pro quo) for what BP received under the SPA, the other part being a lump sum. I have struggled to understand how the contrary can be suggested. But both the Court of Appeal and Lady Rose have

been persuaded by a variety of elaborate arguments, including (in the Court of Appeal) reference to the French text of the Convention, that the concept of immovable property in Article 6(2) is somehow constrained by unstated restrictions, largely by reference to the use of the same concept in Articles 12 and 13. The supposed restrictions include that the recipient of the payments must retain some interest in the relevant land or resources, and that consideration arises only from the grant rather than the assignment of a right to work.

144. It would serve no useful purpose for me to grapple with those arguments in detail. Suffice it to say that I have not been persuaded that any of them are sufficient to displace the clear ordinary meaning of "consideration" in Article 6(2), i.e. price or quid pro quo. The result is that, in my view, if it is established that Sulpetro's rights as owner of Sulpetro (UK) and under the Illustrative Agreement did confer on Sulpetro a right to work the 12.7% share of the Buchan hydrocarbons, then the right to the Payments clearly constituted consideration for the conferral of the right to work on BP, so that the test for the extended meaning of immovable property in Article 6(2) is satisfied. In short summary, the test in limb five of Article 6(2) is one of the means by which a sufficient connection is established between an income stream and a Contracting State's land, natural or mineral resources to make it fall within the prior right to tax of the Contracting State in which the land or resources are situated.

145. I would therefore have allowed this appeal and restored the concurrent decisions of the First-tier and Upper Tribunals.