Neutral Citation: **[2026] UKUT 00329 (TCC)**

Case Number: UT/2025/000016

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

CORPORATION TAX – double taxation arrangements between the United Kingdom and the Isle of Man – Isle of Man resident company carrying on trade of acquiring, developing and selling land in the United Kingdom – profits accepted to be trading profits and income in nature under domestic law – whether profits fall within Article 6 ("income from immovable property") of the 2018 United Kingdom-Isle of Man Agreement and corresponding provisions of the 1955 Agreement as amended in 2016 – meaning of "income derived from immovable property" – relationship between Article 6(1), (3) and (4) – relevance of OECD Commentary, reservations and foreign authorities – whether Article 6 limited to income derived from use or exploitation of property – held: Article 6 not so limited and profits from development and sale of land fell within Article 6 – whether profits alternatively fell within Article 13 ("gains derived from the alienation of immovable property") – meaning of "gains" in treaty context – relevance of Article 3(2), Article 7(4) and Royal Bank of Canada v HMRC – held: Article 13 concerned with capital gains and not trading profits – appeal dismissed.

Heard on: 14 and 15 May 2026
Judgment date: 25 August 2026

Before

MR JUSTICE NICHOLAS THOMPSELL
JUDGE SWAMI RAGHAVAN

Between

KNIGHTS DEVELOPMENTS LIMITED

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Hui Ling McCarthy KC, Counsel, instructed by Joseph Hage Aaronson & Bremen LLP

For the Respondents: Mark Fell KC and Harry Winter, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This appeal concerns the allocation of taxing rights between the United Kingdom and the Isle of Man in respect of profits realised by Knights Developments Limited ("**KDL**"), an Isle of Man resident company, from the acquisition, development and sale of land in the United Kingdom. The issue arises under the treaties negotiated between the United Kingdom and the Isle of Man regarding the avoidance of double taxation, as amended in 2016 and subsequently replaced by a 2018 agreement which reflected the corresponding provisions of the OECD Model Tax Convention. HMRC contends that the profits fall within the treaty provisions dealing with income from immovable property or, alternatively, gains from the alienation of immovable property. KDL contends that they fall within neither provision and, in the absence of KDL having a United Kingdom permanent establishment, are taxable only in the Isle of Man. It is common ground that, if HMRC's interpretation is correct, the profits are chargeable to United Kingdom corporation tax, whereas, if KDL's interpretation is correct, no tax is payable in the Isle of Man under the applicable Isle of Man corporate tax regime.

2. HMRC issued closure notices seeking additional corporation tax of approximately £5.4 million in respect of KDL. The parties informed the Tribunal that KDL's appeal is being treated as the lead appeal for a number of related companies within the wider corporate group to which KDL belongs and whose appeals raise materially the same issues and have been stayed pending the determination of this case. The amounts potentially affected by the outcome of those appeals and more widely in relation to other companies in a similar position are substantial (HMRC estimate possible historic refund claims from similarly affected parties of up to £1bn and future lost revenue of up to £230m per year).

3. KDL's appeals against the closure notices were initiated in the First-tier Tribunal (Tax and Chancery) ("**FTT**"). The appeals have, however, pursuant to a direction of the FTT, been transferred to the Upper Tribunal for determination[1]. We are grateful for the clear and comprehensive submissions from counsel, both oral and written.

FACTS

4. The facts are not materially in dispute and are drawn from the Statement of Agreed Facts and Issues prepared by the parties dated 5 September 2024 together with additional facts agreed by the parties filed on 29 June 2026 subsequent to the hearing before us.

5. KDL was incorporated in the Isle of Man on 27 November 2001 (originally under the name Invertay Limited). It is and has at all material times been resident in the Isle of Man for tax purposes. It is not and never has been resident in the United Kingdom.

6. During the periods relevant to this appeal KDL was a member of the wider Dandara group of companies. Until 1 February 2021 it was a wholly owned subsidiary of Dandara UK South Residential Holdings Limited and thereafter a wholly owned subsidiary of Dandara UK Property Holdings Limited. Both parent companies were incorporated and resident in the Isle of Man. The ultimate controlling party was Tynan Family Trust Co Limited as trustee of the Tynan Family Trust 1419.

7. The Dandara group was founded by Mr Daniel Tynan. Mr Tynan is an Irish national who moved from Ireland to the Isle of Man in the tax year 1986/1987 and has remained resident and domiciled there since that time. Following his relocation he commenced property development activities on the Isle of Man. Dandara Limited was incorporated in 1988. By 1990 the business

[1] Under Rule 28 of the FTT Rules

was constructing more than 400 houses annually and was the largest housebuilder on the Isle of Man.

8. The group subsequently expanded into other jurisdictions. Property development commenced in Guernsey in 1993 and Jersey in 1995. In 1999 the group opened its first United Kingdom office in Manchester. Although activity was reduced following the financial crisis of 2008-2009, housebuilding activity in the United Kingdom resumed in 2011. Throughout the relevant period the group remained headquartered in Braddan, Isle of Man. In addition to Mr Tynan, the heads of the group's legal, tax, marketing, finance and operational functions were based in and resident in the Isle of Man.

9. The trade carried on by KDL was property development. The parties specifically agree that during the relevant periods KDL carried on a trade of dealing in and developing United Kingdom land. The parties further agree that KDL's profits for the relevant periods were trading profits and were revenue or income in nature rather than capital in nature under United Kingdom tax law.

10. The developments giving rise to the present appeal concerned land at Knights Wood (also referred to as Knights Park) in Tunbridge Wells, Kent. KDL contracted to acquire that land from Kilmartin Properties (TW) Limited by agreement dated 12 March 2010. The contractual purchase price was £9 million exclusive of VAT.

11. In its accounts KDL treated the Knights Wood land as trading stock and work in progress. Turnover reflected the sale of completed properties developed on the site.

12. KDL did not itself undertake physical construction activities on the site. Instead, for each development phase, it entered into design and build contracts with Dandara Limited, an Isle of Man company within the same group. Dandara Limited operated in the United Kingdom through permanent establishments. Under those arrangements Dandara Limited agreed to design and construct specified residential dwellings together with associated infrastructure at Knights Wood.

13. Development activities at the site were carried out by Dandara Limited on behalf of KDL. KDL paid Dandara Limited for those services pursuant to the relevant design and build contracts.

14. On 6 May 2014 KDL entered into a (so-named) agency agreement with Dandara Limited concerning the marketing and sale of completed units. Under that agreement Dandara Limited agreed to advise KDL on market prices, market completed units, negotiate with prospective purchasers, liaise with other sales agents and agree terms for particular sales subject in every case to KDL's specific written approval. However, Dandara Limited was not an agent in the sense that it had authority to enter into legal relations on behalf of KDL.

15. In return for those services KDL agreed to pay Dandara Limited commission equal to 1.5% of the sale price of each completed unit upon completion of the transaction.

16. Completed properties were sold to third-party purchasers through those agency arrangements. However, the parties agree that strategic decisions relating to those sales were taken by KDL in the Isle of Man and communicated to Dandara Limited.

17. The scope of those strategic decisions included decisions whether to acquire a site, whether and on what basis to proceed with a development, approval of feasibility studies and financial appraisals, expenditure parameters, professional appointments, construction agreements, financing arrangements, the setting and revision of sales values and price lists, the approval or rejection of offers received from prospective purchasers, approval of departures from agreed sales parameters and approval and execution of sale documentation. Each offer

received from a prospective purchaser required approval from KDL's Isle of Man officers or directors before legal documentation was issued or contracts exchanged.

18. KDL maintained its own accounts in the Isle of Man. The accounts were prepared in accordance with FRS 102 as applicable to Isle of Man companies. They showed annual turnover derived from property sales and recorded profits from those sales on revenue account.

19. The parties also agreed certain matters regarding KDL's costs. By way of example, KDL's cost of sales included land acquisition costs together with associated legal fees, stamp duty land tax and costs charged by Dandara entities in connection with development activities. Administrative expenses included KDL's allocated share of group costs such as staff costs, finance, business systems, payroll, information technology, head office expenditure, group insurance and legal and professional fees.

20. The periods under appeal are KDL's accounting periods ending 30 June 2017, 30 June 2018, 30 June 2019, 30 June 2020 and 30 June 2021. In its United Kingdom corporation tax returns KDL disclosed profits arising from its property development trade but claimed exemption from United Kingdom taxation pursuant to the relevant arrangements between the United Kingdom and the Isle of Man. The profits returned/adjusted were:

(1) Year ended 30 June 2017: £4,685,123

(2) Year ended 30 June 2018: £6,552,444

(3) Year ended 30 June 2019: adjusted profits chargeable to corporation tax £2,692,084

(4) Year ended 30 June 2020: £2,126,996

(5) Year ended 30 June 2021: £12,286,921

21. The closure notices which are the subject of these appeals were issued on 28 July 2022 in respect of the periods ending 30 June 2017 to 30 June 2020 and on 1 September 2022 in respect of the period ending 30 June 2021. The additional corporation tax liabilities assessed for those periods were £924,946.80, £1,244,964.36, £511,495.96, £404,129.24 and £2,334,514.99 respectively. KDL does not challenge the procedural validity of those closure notices.

22. Two further matters should be noted.

(1) HMRC do not contest the appellant's case that KDL did not have a permanent establishment in the United Kingdom.

(2) The parties agree that the only issue in the appeal concerns the allocation of taxing rights under the relevant arrangements between the United Kingdom and the Isle of Man. Subject to the treaty issues, KDL falls within the domestic corporation tax provisions applicable to a non-resident company carrying on a trade of dealing in and developing United Kingdom land (s5(2)(a) Corporation Tax Act 2009 ("**CTA 2009**")).

LAW

Domestic tax background

23. At all material times KDL was resident in the Isle of Man and not in the United Kingdom. The parties agree that the profits in issue arose from a trade of acquiring, developing and selling land in the United Kingdom and that, as a matter of United Kingdom domestic tax law, those profits were trading profits and therefore income in nature rather than capital gains. It is also common ground (for the purposes of this appeal) that KDL did not have a permanent establishment in the United Kingdom.

24. The domestic charge to tax relied upon by HMRC arises principally through s5 CTA 2009. Following amendments introduced by Finance Act 2016 ("**FA 2016**"), s5(2)(a) provides that a non-UK resident company is within the charge to corporation tax if it carries on "a trade of dealing in or developing UK land". Section 5(2A) further provides that a non-UK resident company carrying on such a trade is chargeable to corporation tax on all profits of that trade wherever arising.

25. Section 5B CTA 2009 explains what is meant by a "trade of dealing in or developing UK land". So far as relevant, the provision includes activities consisting of: "(a) dealing in UK land", and "(b) developing UK land for the purpose of disposing of it".

26. The parties agree that KDL carried on precisely such a trade.

27. The parties also referred us to Part 8ZB CTA 2010. These provisions apply in certain circumstances to profits or gains arising from disposals of UK land and deem those amounts to be profits of a trade of dealing in or developing UK land. Section 356OC provides that specified profits or gains are treated as profits of such a trade, whilst section 356OC(5) expressly provides that the regime applies to "gains which are capital in nature as it applies in relation to other gains". The significance of these provisions for present purposes is limited. The parties agree that KDL was carrying on an actual trade of dealing in and developing UK land and that the profits in issue were income profits arising from that trade. Accordingly, as the Appellant emphasised, the deeming provisions in Part 8ZB are not engaged on the facts of this appeal. Nevertheless, HMRC relied upon those provisions later in the argument as illustrating that domestic tax legislation frequently uses the language of "gains" in a context that is not confined to gains of a capital nature.

28. Accordingly, viewed solely as a matter of domestic law, KDL's profits fall within the charge to corporation tax. The significance of the present appeal lies in the interaction between that domestic charge and the arrangements between the United Kingdom and the Isle of Man.

29. The domestic effect of those arrangements is provided through Part 2 Taxation (International and Other Provisions) Act 2010. Section 6 provides, so far as material, that double taxation arrangements have effect "despite anything in any enactment" and may determine both the taxation of income and the taxation of chargeable gains of non-resident persons. The parties were therefore agreed that the existence or non-existence of a domestic charge is not determinative. The outcome of the appeal depends upon whether the relevant treaty provisions allocate taxing rights to the United Kingdom in respect of the profits in issue.

UK/Isle of Man Double taxation arrangements before 2016

30. Before 2016, the arrangements for the avoidance of double taxation between the United Kingdom and the Isle of Man contained no provisions equivalent to the new paragraph 3A or paragraph 3B of the 1955 arrangements ("the 1955 DTA"), or Articles 6 and 13 of the 2018 arrangements ("the 2018 DTA"). Business profits were dealt with under provisions corresponding broadly to the present business profits article.

31. The parties differed as to the significance of that background. It is sufficient at this stage to note that, prior to the amendments introduced in 2016, the arrangements did not contain specific provisions dealing with income from immovable property or gains from the alienation of immovable property in the form now material to this appeal.

The 2016 Protocol

32. In 2016 the parties entered into a protocol amending the 1955 DTA. Amongst other changes, the protocol inserted new paragraphs 3A and 3B. Paragraph 3A dealt with income

derived from immovable property and paragraph 3B dealt with gains from the alienation of immovable property and certain interests deriving value from such property.

33. The material provisions introduced by the 2016 Protocol were paragraphs 3A and 3B, which conferred taxing rights in relation to income from immovable property and gains from the alienation of immovable property:

> "**Paragraph 3A**
>
> (1) Income derived by a resident of one of the territories from immovable property (including income from agriculture or forestry) situated in the other territory may be taxed in that other territory.
>
> (2) The term "immovable property" shall have the meaning which it has under the law of the territory 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 subparagraph (1) shall apply to income derived from the direct use, letting, or use in any other form of immovable property.
>
> (4) The provisions of subparagraphs (1) and (3) shall also apply to the income from immovable property of a United Kingdom enterprise and a Manx enterprise."
>
> **"Paragraph 3B**
>
> (1) Gains derived by a resident of one of the territories from the alienation of immovable property referred to in paragraph 3A and situated in the other territory may be taxed in that other territory.
>
> (2) Gains derived by a resident of one of the territories from the alienation of shares, other than shares in which there is substantial and regular trading on a Stock Exchange, or comparable interests, deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other territory may be taxed in that other territory."

34. We address the circumstances in which these amendments were introduced, and the materials which accompanied them, when considering the parties' submissions on interpretation.

The UK / Isle of Man 2018 DTA

35. The 2018 DTA replaced the amended 1955 DTA with effect for accounting periods beginning on or after 1 April 2018. For present purposes there is no material difference between the wording of paragraphs 3A and 3B and the corresponding provisions contained in Articles 6 and 13 of the 2018 DTA. The parties were therefore agreed that the substantive interpretative questions are the same under both instruments and that it is convenient to refer principally to the 2018 DTA.

36. Article 3(2) provides:

> "As regards the application of the Agreement at any time by a Territory, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Territory for the purposes of the taxes to which this Agreement applies, any meaning under the

applicable tax laws of that Territory prevailing over a meaning given to the term under other laws of that Territory."

37. Article 6 provides:

> "1. Income derived by a resident of a Territory from immovable property (including income from agriculture or forestry) situated in the other Territory may be taxed in that other Territory.
>
> 2. The term "immovable property" shall have the meaning which it has under the law of the Territory 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.
>
> 4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise."

38. Article 7 provides:

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

39. Article 13 provides:

> "1. Gains derived by a resident of a Territory from the alienation of immovable property referred to in Article 6 and situated in the other Territory may be taxed in that other Territory.
>
> 2. Gains derived by a resident of a Territory from the alienation of shares, other than shares in which there is substantial and regular trading on a recognised stock exchange, or comparable interests, deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Territory may be taxed in that other Territory.
>
> 3. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Territory has in the other Territory, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise), may be taxed in that other Territory."

40. Paragraph 1 of the Protocol to the 2018 DTA recorded their understanding that the arrangements would be applied, stating:

> "In relation to the whole [2018 DTA]: …It is understood that both [contracting parties] will apply [the 2018 DTA] in the light of the Commentaries on the

> OECD Model Tax Convention as they may read from time to time, having regard to any observations or other positions that they may have expressed thereon".

41. The parties agreed that this provision makes OECD materials part of the relevant interpretative context. However, as we come on to discuss, they disagreed as to the significance of the OECD Commentary, OECD reservation practice and associated academic materials in the interpretation of Articles 6 and 13.

ISSUES

42. The issues are as follows:

(1) Do KDL's trading profits fall within paragraph 3A of 1955 DTA (p/e 30 June 2017 and 30 June 2018) and Article 6 (income from immovable property) under 2018 DTA for p/e 30 June 2019 to 30 June 2021 ("**the Article 6 issue**")? (As already mentioned, as there are no material differences between the 1955 (as amended) provisions and 2018 DTA, for ease of reference we will refer to the relevant articles of the 2018 DTA (Article 6 and Article 13).)

(2) Do KDL's trading profits fall within 3B of 1955 DTA for those periods / Article 13 (capital gains) of the 2018 DTA ("**the Article 13 issue**")?

43. In broad terms, KDL's case is that the trading profits in issue (which it is agreed are trading profits and therefore income in nature) do not constitute income from immovable property within Article 6 because they arise on <u>disposal</u> rather than <u>use</u> of the land. Nor, it submits, do they fall within Article 13 because that Article is concerned with <u>capital</u> gains and not trading profits. On that basis, the profits fall within Article 7 (business profits)[2] and, in the absence of a United Kingdom permanent establishment, are taxable only in the Isle of Man.

44. HMRC contends that the profits fall within Article 6. Alternatively, it contends that they fall within Article 13. On either basis, HMRC submits that the United Kingdom is entitled to tax the profits and that the closure notices were correctly issued.

TREATY INTERPRETATION PRINCIPLES

45. The parties were broadly agreed as to the legal principles governing interpretation of the arrangements. Those principles may be summarised shortly.

(1) The object of the exercise is to identify the objective common intention embodied in the treaty. In *Anson v HMRC* [2015] UKSC 44, Lord Reed stated that "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" ([56]).

(2) That intention is to be ascertained from the treaty as a whole, having regard to its text, context and purpose. As Lord Reed observed, the context of a treaty includes "the legal position existing when the treaty was concluded" ([58]).

(3) Whilst context and purpose are important, interpretation remains rooted in the language which the parties chose to employ. As Lord Reed explained the common intention of the parties is ascertained by considering "the ordinary meaning of the terms used in their context and in the light of the treaty's object and purpose" ([56]).

(4) OECD Commentaries are legitimate aids to interpretation. As Lord Briggs explained in in *Fowler v HMRC* [2020] UKSC 22 the Commentaries should be "given such persuasive force as aid to interpretation as the cogency of their reasoning deserves" ([18]).

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[2] In relation to periods to which the 1955 DTA applies the corresponding provision is paragraph 3

(5) The same approach applies to academic commentary and foreign decisions. Such materials may assist in understanding the operation of OECD-based treaty provisions and in promoting international consistency. They are, however, persuasive authorities only (*HMRC v GE Financial Investments* [2024] EWCA Civ 797 at [39]). Their weight depends upon the cogency of their reasoning, the similarity of the treaty language under consideration and the extent to which they address the interpretative question before the court. (Mr Fell for HMRC submitted that particular weight should be attached to decisions of foreign supreme courts. We accept that the status of the foreign court is a relevant consideration: per *Fothergill v Monarch Airlines Ltd* [1981] AC 251 but we do not understand Lord Diplock (at pg 284) to have laid down a general rule that foreign supreme court decisions must be accorded special weight as a matter of law; rather, he considered that the status of the court is one factor bearing upon persuasive value).

(6) Finally, the authorities emphasise the importance of the structure of the treaty as a whole and the relationship between its constituent provisions. In *Fowler*, Lord Briggs considered it necessary to identify first the treaty category into which the relevant receipts properly fell before determining the allocation of taxing rights ([25]-[34]). Likewise, in *Royal Bank of Canada*, both the Court of Appeal and Supreme Court analysed the interaction of Articles 6, 7 and 13 as part of determining the proper characterisation of the receipts in issue (CA [50]-[51], [93]-[101]; SC [102]-[104]). The present appeal similarly requires the Tribunal to construe Articles 6, 7 and 13 as part of a coherent scheme rather than in isolation from one another.

46. The parties were also agreed that the interpretative principles reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties provide the appropriate framework for the exercise. In broad terms, Article 31 requires a treaty to be interpreted in good faith according to the ordinary meaning of its terms in their context and in light of its object and purpose. Article 32 permits recourse to supplementary materials, including preparatory materials and the circumstances of the treaty's conclusion, in order to confirm that interpretation or to resolve ambiguity.

Applicability of principles to the UK/ Isle of Man arrangements given the Isle of Man's status as a Crown Dependency

47. Although the arrangements in issue are not, strictly speaking, treaties between sovereign states in the sense contemplated by international law, because the Isle of Man is a Crown Dependency and the United Kingdom remains responsible for its international relations, there is no dispute between the parties that the established principles applicable to the interpretation of double taxation treaties fall to be applied. (HMRC referred in this context to *R (Barclay) v Secretary of State for Justice* [2014] UKSC 54, in which the Supreme Court described the Isle of Man as a Crown Dependency which is not part of the United Kingdom but possesses its own constitutional and legislative autonomy ([9]-[16])).

48. We consider the parties' common position to be correct. The arrangements perform the same function as a bilateral double taxation treaty, namely the allocation of taxing rights between two distinct fiscal jurisdictions. Moreover, in matters of taxation, the United Kingdom and the Isle of Man each exercise autonomous taxing powers and have entered into the arrangements by mutual agreement for the purpose of regulating the allocation and exercise of those powers. In those circumstances, there is no principled basis upon which the well-established interpretative approach applicable to double taxation treaties should be disregarded merely because the arrangements are not treaties between sovereign states in the strict public international law sense. That conclusion is reinforced by the Protocol to the 2018 DTA, in which both Territories expressly acknowledged that the 2018 DTA would be applied "in the light of the Commentaries on the OECD Model Tax Convention". Accordingly, we proceed on

the basis, common to both parties, that the principles reflected in Articles 31 and 32 of the Vienna Convention, together with the relevant OECD materials, provide the appropriate framework for interpretation.

THE ARTICLE 6 ISSUE

Parties' submissions in outline

49. The issue is whether the profits realised by the Appellant from the acquisition, development and sale of land in the United Kingdom fall within Article 6 of the relevant arrangements, namely "income derived… from immovable property". It is common ground that those profits are, as a matter of domestic law, trading profits and therefore income, and that the land in question constitutes immovable property situated in the United Kingdom. The dispute is as to whether Article 6 extends to such profits or is confined, as the Appellant contends, to a narrower class of income derived from the use or exploitation of land.

50. The Appellant's case was that Article 6 is concerned only with income derived from the use or exploitation of land. It submitted that paragraph (3) of Article 6 exhaustively defines what is meant by "income derived" for the purposes of paragraph (1). On that basis, the Appellant contended that profits from the sale of land, involving no continuing use or exploitation, fall outside Article 6.

51. That submission was said to be supported by: the structure of the treaty, in particular the distinction between Articles 6 and 13; OECD commentary and academic writing; and observations in *Royal Bank of Canada*, which emphasise a requirement of a continuing connection with land through its use.

52. HMRC submitted that the natural meaning of paragraph (1) is wide and unqualified, and that it encompasses profits derived from dealing in land. They rejected the Appellant's attempt to confine the provision to income from use. They argued that paragraph (3) is not exhaustive but clarificatory, and that paragraph (4) confirms that the Article applies to income of an enterprise, including business profits derived from land. HMRC also highlighted the context of the 2016 amendments and associated materials as supporting a construction which allows the United Kingdom to tax income derived from UK land by non-resident developers.

Discussion

Introductory comments on approach

53. As mentioned, the parties were broadly agreed as to the applicable principles of treaty interpretation but differed materially as to their application. KDL placed emphasis upon the text and structure of the arrangements, read in the light of the OECD model and commentary. HMRC placed greater emphasis upon the contextual materials surrounding the 2016 amendments and the purpose which those amendments were intended to achieve.

54. Despite those differences, there appears to us no real dispute that the interpretative exercise remains anchored in the language chosen by the contracting parties. The authorities do not support the proposition that treaty language may be displaced merely because it is thought to frustrate a perceived legislative objective. Nor is there any presumption that taxing rights must be allocated so as to ensure taxation in one jurisdiction rather than another.

55. The words used by the parties therefore provide the starting point. Those words must then be read in their context and in light of the treaty arrangements as a whole. We therefore turn first to the language and structure of Article 6 before considering the wider contextual materials relied upon by the parties.

The Structure of Article 6

56. The issue is whether the profits realised by KDL from the acquisition, development and sale of land in the United Kingdom fall within Article 6 as "income derived ... from immovable property".

57. As we have mentioned, it is common ground that the profits in issue are trading profits and therefore income in nature and that the land in question constitutes immovable property situated in the United Kingdom. The dispute is whether Article 6 extends to such profits or is confined, as the Appellant contends, to income arising from the use or exploitation of land.

58. Article 6 comprises four paragraphs. Paragraph (1) contains the operative rule. Paragraph (2) defines "immovable property". Paragraph (3) applies the Article to income derived from the direct use, letting or use in any other form of immovable property. Paragraph (4) provides that paragraphs (1) and (3) shall also apply to income from immovable property of an enterprise.

59. The parties were agreed that paragraph (1) is the starting point. The principal issue is whether, and if so how, paragraphs (3) and (4) affect the scope of that provision.

Paragraph (1)

60. The Appellant submitted that, although expressed in general terms, the phrase "income derived from immovable property" must be understood in its treaty context and carries a specialised meaning informed by the OECD model. For the Appellant, Ms McCarthy KC submitted that Article 6 is concerned with income from the use or exploitation of property and that "use is fundamentally distinct from alienation". On that analysis, profits realised upon disposal are not derived from the property itself but from the wider development and trading activity of the taxpayer.

61. HMRC submitted that the language of paragraph (1) is broad and unqualified. Mr Fell KC's submission was that "income derived from immovable property" naturally encompasses any income possessing a sufficient connection with the property and that, where the source of the profit is the property, "that is enough".

62. We prefer HMRC's construction. The language of paragraph (1) is expressed in general terms and contains no express limitation to income arising from use or exploitation. As a matter of ordinary language, income may be said to be derived from property where it arises from rights inherent in ownership of that property, including the right of disposal. We accept that the phrase "derived from" imports a requirement of sufficient nexus between the income and the property. However, we do not accept that such a nexus is limited to income arising during the period in which ownership is retained. A trader who acquires land, improves it and realises a profit upon sale derives that profit from the property in a direct and substantial sense.

63. Accordingly, viewed in isolation, paragraph (1) is capable of encompassing the profits in issue. The question is then whether the remainder of Article 6 requires those words to be read more narrowly.

Paragraph (3)

64. The central dispute concerns paragraph (3). The Appellant's case was that paragraph (3) identifies, exhaustively, the forms of income capable of falling within Article 6. The common characteristic of "direct use, letting or use in any other form" is that each involves the retention and exploitation of property. None involves outright alienation.

65. In support of that construction, the Appellant relied upon the language "shall apply to", the absence of words such as "includes", the structure of the Article and the proposition that

paragraphs (2), (3) and (4) each perform distinct functions. It was submitted that HMRC's interpretation leaves those provisions doing substantially overlapping work.

66. HMRC submitted that paragraph (3) is neither definitional nor exhaustive. Rather, it confirms that particular forms of income from immovable property fall within the broader rule stated in paragraph (1). Mr Fell submitted that, had the drafters intended to define exhaustively the income within Article 6, one would expect clear limiting language, which is absent.

67. In agreement with Mr Fell, we do not consider that paragraph (3) operates as an exhaustive definition of the income capable of falling within Article 6.

68. First, paragraph (3) is not framed in definitional language. It does not state that income from immovable property "shall have the meaning" or "shall…include" the identified activities. That stands in stark contrast to the kind of language used in paragraph (2) which plainly performs a definitional function. As HMRC submitted, where the drafters intended to define a concept expressly they signalled this with clear language.

69. Second, the language relied upon by the Appellant does not compel an exhaustive reading. The words "shall apply to" are equally capable of extending a general rule to specified situations without defining its outer limits. Nor does the absence of the word "includes" carry the weight placed upon it by the Appellant. It is not straightforward to see how the formulation chosen could incorporate the word "includes". It could equally be said that it is significant that the formulation omitted to say "shall apply *only* to…".

70. Third, the phrase "use in any other form" is itself expressed in broad and open-textured language. It points away from the existence of a closed category.

71. Fourth, we see force in HMRC's submission that the Appellant's interpretation leaves paragraph (1) doing very little work. If Article 6 were intended to apply only to income from "direct use, letting or use in any other form", it is difficult to see why the drafters began with the broader expression "income derived from immovable property".

72. Finally, we do not accept the Appellant's submission that a non-exhaustive reading renders paragraph (3) redundant. It performs a useful clarificatory function by confirming that income arising from the direct use or letting of immovable property is income derived from the property itself for the purposes of paragraph (1). In that way, paragraph (3) identifies cases which unquestionably fall within the Article without purporting to define its outer limits.

73. We therefore conclude that paragraph (3) identifies and confirms particular applications of paragraph (1) rather than defining or restricting its scope.

Paragraph (4)

74. The parties also differed as to the significance of paragraph (4). The Appellant submitted that it merely ensures that income otherwise falling within Article 6 does not cease to do so because it is earned by an enterprise and therefore might otherwise be regarded as falling within Article 7. HMRC submitted that paragraph (4) reinforces the breadth and independent operation of paragraph (1).

75. We consider HMRC's interpretation to be the correct interpretation.

76. The express reference in paragraph (4) to both paragraphs (1) and (3) is difficult to reconcile with the proposition that paragraph (3) exhaustively defines all income capable of falling within Article 6. If that were correct, the separate reference to paragraph (1) would be difficult to explain. It tends instead to support the conclusion that paragraph (1) has independent content.

77. Likewise, the language "shall also apply" is naturally language of extension rather than restriction. It indicates that an existing rule is being applied in an additional context rather than being redefined.

78. We also note HMRC's submission that both paragraphs (3) and (4) employ the phrase "shall apply". Yet the Appellant does not contend that paragraph (4) itself provides an exhaustive code. That tends to weaken the argument that the same phrase in paragraph (3) necessarily denotes a closed class.

79. Paragraph (4) performs a coherent function under HMRC's construction. It confirms that income from immovable property remains within Article 6 notwithstanding that it forms part of the profits of an enterprise and might otherwise be thought to fall within the business profits article.

80. It follows that paragraph (4) is more consistent with an independently operative paragraph (1) than with the Appellant's proposed construction.

Subsidiary points on drafting

81. The Appellant advanced three further drafting points.

82. First, it relied upon the reference in Article 6(1) to income from agriculture and forestry, submitting that these are paradigm examples of income arising from the use of land and therefore support a use-based interpretation of Article 6. We do not regard that reference as materially advancing the argument. The examples identify obvious cases falling within the Article, but they do not purport to define its limits or justify reading into the general language of paragraph (1) a restriction which is not otherwise expressed.

83. Second, the Appellant relied upon the United Kingdom-Canada Convention, which refers expressly to profits from the alienation of immovable property. Whilst that comparison is relevant and demonstrates that express alienation language was available, it does not determine the meaning of the language adopted in the present arrangements.

84. Third, the Appellant asserted that paragraphs (2), (3) and (4) perform distinct functions whereas HMRC's construction results in a degree of overlap between them. We do not agree that there is any presumption that the drafter of the Treaty must have intended each sub-paragraph to have a distinct function. Treaty provisions commonly operate by way of clarification or reinforcement and some overlap does not compel the conclusion that paragraph (3) is exhaustive or that paragraph (4) performs only the limited role for which the Appellant contends.

85. None of those points causes us to depart from the conclusion reached above as to the meaning and interaction of paragraphs (1), (3) and (4).

Conclusion on the textual analysis

86. The parties' textual arguments ultimately turn on whether paragraph (3) defines and limits the scope of paragraph (1). The Appellant reads paragraph (3) as an exhaustive statement of the income falling within Article 6 (or at least as creating a *sui generis* class of types of income relating to the exploitation of property and excluding the alienation of property). HMRC treats paragraph (1) as the operative rule, with paragraph (3) performing a clarificatory function and paragraph (4) confirming its application to enterprise income.

87. For the reasons set out above, we prefer HMRC's construction. The natural reading of the Article is that paragraph (1) states the operative rule, paragraph (3) confirms particular applications of that rule and paragraph (4) confirms that the rule applies equally where the income is earned through an enterprise. The Appellant's construction requires the general words of Article 6(1) to be read down almost entirely by reference to Article 6(3). We see no

sufficient textual basis for treating the broader language chosen in Article 6(1) as having such limited independent content.

88. Accordingly, considering the language and structure of Article 6 as a whole, we conclude that paragraph (3) does not cut down the ordinary meaning of paragraph (1) and does not exclude trading profits realised on the disposal of immovable property.

89. Whilst the language and structure of Article 6 point in our view clearly towards the conclusion set out above, the parties devoted substantial attention to the OECD Commentary, reservation practice and academic materials. We therefore turn to those materials to consider whether they provide any reason to depart from, or further support, that interpretation.

OECD Commentary

90. The full commentary to Article 6 appears in the Annex. For present purposes it is sufficient to note the following. 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. Although income from agriculture or forestry is included in Article 6, Contracting States are free to agree in their bilateral conventions to treat such income under Article 7."

91. At paragraphs 3 and 4 of the Commentary it is explained that:

(1) Paragraph 3 of the Model Convention indicates that the general rule applies irrespective of the form of exploitation of the immovable property.

(2) Paragraph 4 makes it clear that the provisions of paragraphs 1 and 3 apply also to income from immovable property of industrial, commercial and other enterprises. We also note that paragraph 4 of the Commentary makes clear that Article 6 is intended to operate independently of the permanent establishment requirement.

92. The Reservations to the Article include that:

> "Canada and Latvia reserve the right to include in paragraph 3 a reference to income from the alienation of immovable property…"

93. The Appellant submitted that the OECD materials support a materially narrower interpretation of Article 6 than that advanced by HMRC. Its argument was not simply that the Commentary contains examples of exploitation-based income. Rather, it was that the structure and language of the Commentary reveal a particular understanding of what Article 6 is for. The Commentary repeatedly describes Article 6 as dealing with income produced by, or arising from, immovable property and explains that paragraph (3) ensures that the Article applies irrespective of the form in which the property is exploited. The Appellant submitted that the focus throughout is upon the derivation of income whilst the property is retained and exploited by its owner. On that analysis, Article 6 is concerned with enjoyment, use and exploitation of property rights, not with their extinction through alienation. That submission was reinforced by the Appellant's reliance on the OECD Commentary to Article 12 and the reasoning in *Royal Bank of Canada*, which it said reflects a broader OECD distinction between use and alienation. The Appellant therefore submitted that the Commentary consistently treats alienation as conceptually distinct from exploitation and that Article 6 should be interpreted accordingly.

94. We accept that the Commentary forms part of the relevant interpretative context. Indeed, the Protocol to the 2018 DTA expressly records the parties' understanding that the Agreement will be applied "in the light of the Commentaries on the OECD Model Tax Convention".

However, we do not accept the Appellant's characterisation of what the Commentary establishes. The Commentary certainly identifies exploitation of property as the paradigm case to which Article 6 applies and explains that paragraph (3) extends to different forms of such exploitation. But HMRC was correct to submit that the Commentary is principally explanatory rather than definitional. It describes common applications of Article 6 and the reason for the inclusion of paragraph (3). It does not purport to provide an exhaustive statement of the circumstances in which income may be said to be derived from immovable property. Nor does it state in terms that Article 6 is confined to situations in which ownership of the property continues after the income is realised. We therefore do not consider that the Commentary resolves the question presently before us.

Reservations

95. The Appellant also relied upon the reservation practice of certain OECD member states, in particular Canada and Latvia, which reserved the right to extend Article 6 expressly to income from the alienation of immovable property.

96. In the UK-Canada bilateral treaty, the interpretation of which featured in the decisions of the Court of Appeal in *Royal Bank of Canada* discussed further below, the UK-Canada DTA equivalent provisions to Article 6(3) were worded:

> "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."

97. The Appellant relied upon the discussion of OECD reservations in the academic materials before the Tribunal, including *Reimer and Rust* (eds.), *Klaus Vogel on Double Taxation Conventions* (5th ed., 2022), Article 6, m.n. 24-25, 72-74 and 154-231, and *Lang and Brugger*, "The role of the OECD Commentary in tax treaty interpretation" (2008) 23 Australian Tax Forum 95, at 101. It submitted that reservations are significant precisely because they identify points at which a state considers the Model Convention not to achieve a desired result. The Appellant argued that the Canadian and Latvian reservations are therefore strong support for the proposition that income from alienation was understood to fall outside Article 6 as ordinarily drafted; otherwise the reservations would have been unnecessary.

98. We accept that the reservations are relevant and lend some support to the Appellant's argument. They show that the reserving states wished to place beyond doubt that Article 6 should extend to income from alienation. However, as HMRC submitted, a reservation records only the position adopted by the reserving state. It does not establish a common understanding amongst non-reserving states that such income necessarily falls outside Article 6. Nor does it reveal whether the additional wording was regarded as necessary, clarificatory or simply desirable in order to avoid uncertainty or future interpretative disputes. The reservations are therefore capable of supporting more than one inference and cannot determine the meaning of the treaty language viewed in its context as a whole. Whilst they form part of the relevant context, they do not cause us to depart from the interpretation which we derive from the text, structure and wider context of Article 6.

Academic Commentary

99. The Appellant also relied upon the commentary of *Vogel* and *Baker* as reflecting the orthodox OECD understanding of Article 6. In *Klaus Vogel on Double Taxation Conventions* (5th ed.), Vogel draws a clear distinction between "use" and "alienation", stating that:

> "No use within the meaning of Article 6(3) OECD and UN MC but rather an alienation ... takes place if the taxpayer fully or partly transfers his interest in the immovable property..."

> and that:
>
> "This distinction follows from the treaty itself; a recourse to domestic law is not necessary."

100. A similar view is expressed by *Baker*, who states that:

> "the focus is therefore on income from exploiting land or from permitting the occupation of land, and not from the sale of the land or any interest in it."

101. We accept that these passages provide direct support for the Appellant's interpretation and demonstrate that respected commentators have understood Article 6 as drawing a distinction between income derived from the use of land and income arising on its alienation. However, academic commentary derives its persuasive force from the cogency of its reasoning rather than its status. Neither *Vogel* nor *Baker* addresses in any detail the specific question which arises in this appeal, namely whether profits realised by a property developer from the acquisition, development and sale of land fall within Article 6. Ultimately, the issue turns on the language adopted by the contracting parties. For the reasons already given, we do not consider that the text and structure of Article 6 support the limitation advocated by those commentaries. Whilst they provide support for the Appellant's case, they do not persuade us to depart from the conclusion reached from the treaty itself.

Structure of the treaty and Article 13, and *Royal Bank of Canada*

102. The Appellant placed significant reliance on the structure of the arrangements and, in particular, the relationship between Articles 6 and 13. It submitted that the arrangements draw a fundamental distinction between income arising from the use or exploitation of property, dealt with by Article 6, and gains arising from its alienation, dealt with by Article 13. Central to that submission was the decision in *Royal Bank of Canada v HMRC* and the OECD materials considered in that case. Since *Royal Bank of Canada* was relied upon both in relation to Article 6 and Article 13, it is convenient to deal with it at this stage.

103. *Royal Bank of Canada ("RBC")* concerned payments received by the taxpayer under rights acquired following the insolvency of a company involved in the exploitation of the Buchan oil field in the North Sea. Although the receipts were accepted to constitute income, RBC itself held no proprietary or concessionary interest in the oil field. Its entitlement arose solely under assigned contractual rights. The issue was whether those receipts fell within Article 6 of the UK-Canada Convention and, in particular, within the limb of Article 6(2) extending to:

> "rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits".

104. The Court of Appeal held that Article 6(2) was:

> "confined to rights to payments held by a person who has some form of continuing interest in the land" ([92]).

105. The Court emphasised that:

> "RBC does not hold, and indeed has never held, an interest in the Buchan field" ([97]).

106. The Supreme Court affirmed that analysis, holding that the inquiry required examination of the true nature of the rights generating the income and that rights detached from any proprietary interest in land did not fall within Article 6 ([101]-[106]).

107. The Appellant relied particularly on the Court of Appeal's discussion of the OECD Commentary to Article 12 at [63]-[67]. Article 12 concerns payments received "for the use of, or the right to use" intellectual property. Paragraph 8.2 of the Commentary explains:

> "Where a payment is in consideration for the transfer of the full ownership of an element of property referred to in the definition, the payment is not in consideration "for the use of, or the right to use" that property and cannot therefore represent a royalty. As noted in paragraphs 15 and 16 below as regards software, difficulties can arise in the case of a transfer of rights that could be considered to form part of an element of property referred to in the definition where these rights are transferred in a way that is presented as an alienation. For example, this could involve the exclusive granting of all rights to an intellectual property for a limited period or all rights to the property in a limited geographical area in a transaction structured as a sale. Each case will depend on its particular facts and will need to be examined in the light of the national intellectual property law applicable to the relevant type of property and the national law rules as regards what constitutes an alienation but in general, if the payment is in consideration for the alienation of rights that constitute distinct and specific property (which is more likely in the case of geographically-limited than time limited rights), such payments are likely to be business profits within Article 7 or a capital gain within Article 13 rather than royalties within Article 12. That follows from the fact that where the ownership of rights has been alienated, the consideration cannot be for the use of the rights. The essential character of the transaction as an alienation cannot be altered by the form of the consideration, the payment of the consideration in instalments or, in the view of most countries, by the fact that the payments are related to a contingency."

108. The Appellant submitted that the Commentary reflects a broader OECD distinction between use and alienation. Article 12 applies where ownership is retained and rights are exploited by another. By contrast, where ownership has been transferred, the payment is consideration for alienation rather than use. The Appellant argued that the same distinction underlies Article 6(3), whose references to direct use, letting and use in any other form all proceed on the basis that ownership is retained rather than extinguished through sale.

109. The Appellant submitted that *RBC* confirms that understanding. It relied in particular upon the Court of Appeal's references to a "continuing interest" in land and argued that, if Article 6 extended to all income sufficiently connected with immovable property, much of the analysis in RBC concerning proprietary interests and the Article 12 Commentary would have been unnecessary.

110. HMRC rejected that analysis. It submitted that the Article 12 Commentary reflects the language of a provision concerned with payments "for the use of" intellectual property and cannot simply be transposed into Article 6. Further, *RBC* was concerned with a different question. The issue there was whether assigned contractual rights possessed a sufficient proprietary nexus with immovable property to engage Article 6 at all. It was not concerned with income realised by an owner on the disposal of its own property.

111. We prefer HMRC's submissions. *RBC* must be understood in the context of the issue before the courts. The case concerned income received under contractual rights held by a taxpayer with no proprietary interest in the underlying property. The courts therefore had to determine whether the connection between the receipts and the property was sufficiently direct and proprietary to engage Article 6. It was in that context that they emphasised the need for a continuing interest in the land and rejected an approach based upon mere economic or causal connection.

112. The Appellant's submissions conflate two distinct questions. The first, which arose in *RBC*, is whether the receipts possess a sufficient proprietary connection with immovable property to fall within Article 6 at all. The second, which arises in the present appeal, is whether income which plainly possesses that connection is confined to income generated during continuing ownership. *RBC* addresses the first question, not the second. The requirement for a continuing interest excludes receipts derived from rights lacking a sufficient proprietary nexus with the property. In other words, the requirement for a continuing interest was used to distinguish income derived from rights sufficiently connected with immovable property from income derived under contractual rights lacking that connection. The court was not considering whether an owner who unquestionably possessed the requisite proprietary connection ceased to fall within Article 6 merely because the profits were realised on disposal.

113. Accordingly, neither the Article 12 Commentary nor the reasoning in *RBC* establishes the general proposition for which the Appellant contends, namely that Article 6 is confined to income arising from ongoing use or exploitation and excludes income realised on disposal. Those materials explain the nature of the connection required between the income and the property. They do not justify importing into Article 6 a limitation not found in its language or structure.

114. We also note HMRC's submission that caution is required before drawing conclusions from *RBC* because it concerned a differently worded treaty which, following Canada's reservation to the OECD Model, expressly extended Article 6(3) to "profits from the alienation" of immovable property. We accept that observations made in that case must be read in their particular treaty context. However, the Appellant's reliance upon *RBC* was not confined to the effect of that wording, but extended more broadly to the court's discussion of OECD concepts, including the distinction between use and alienation and the significance of a continuing interest in the underlying property. The fact that the Canadian treaty contained different wording does not, by itself, answer those arguments. They fail instead for the reasons already given, namely that *RBC* was concerned with the existence of a sufficient proprietary nexus to engage Article 6 at all and does not establish the limitation upon the scope of Article 6 for which the Appellant contends.

115. The Appellant also relied upon references in the OECD Commentary describing Article 6 as applying to "income from immovable property" or to "property producing income". Whilst that language reflects the paradigm case of Article 6 income, namely income generated through the exploitation of property whilst it is held, the Commentary does not purport to define exhaustively every form of income capable of being derived from immovable property. We therefore do not regard those references as materially advancing the interpretative issue before us.

Contextual Materials Relating to the 2016 Protocol and 2018 DTA

116. HMRC relied upon a number of materials surrounding the introduction of the 2016 Protocol and the subsequent 2018 DTA. These included United Kingdom technical and explanatory materials accompanying the introduction of the offshore property developer regime, the Explanatory Memorandum to the relevant Order in Council, statements made during parliamentary debates and other contemporaneous explanatory documents. HMRC submitted that these materials demonstrate a clear objective that profits derived by non-resident developers from United Kingdom land should be capable of being taxed by the United Kingdom notwithstanding the absence of a permanent establishment. The Appellant accepted that these materials form part of the historical background but disputed the weight to be attached to them and denied that they could alter the proper interpretation of the treaty wording.

117. The Appellant's position was that the search is for an objectively ascertainable common intention and not the unilateral intention of either contracting party. Ms McCarthy therefore placed particular emphasis on the materials emanating from the Isle of Man, including the Tynwald debates and associated explanatory materials. She did not suggest that the UK materials were inadmissible or irrelevant. Rather, she submitted that their significance must be assessed against what the Isle of Man can objectively be taken to have understood itself to be agreeing to. Those materials consistently described the amendments as adopting OECD-model provisions and bringing the arrangements into line with OECD standards, rather than creating a bespoke allocation of taxing rights materially different from that contemplated by the OECD model.

118. The Statement of the Isle of Man Treasury Minister explained:

> "Because of its age, the UK DTA, unlike more modern agreements, is not based on the current OECD model DTA wording. Earlier this year, this led to the UK expressing concern that some of the old clauses in the agreement provided potential loopholes that maybe enabled some developers of UK property to avoid UK tax [sic]. As a result, a protocol was agreed with all the Crown Dependencies which will close the loophole by introducing OECD model language into the DTAs. This wording would normally be included in any new standard DTA as a matter of course. The protocols have effect from the same date for each of the Crown Dependencies. The UK is also amending its own domestic law to prevent avoidance in this area…."

119. We accept that the Isle of Man materials form an important part of the relevant context. They consistently describe the amendments as adopting OECD-model provisions and bringing the arrangements into line with OECD standards. However, OECD conformity was not pursued as an end in itself. The materials indicate that the OECD-based provisions were adopted in order to alter the operation of the arrangements in relation to profits derived from United Kingdom land and, to that extent, support HMRC's submission that the parties contemplated a broader allocation of United Kingdom taxing rights than existed previously. The difficulty, however, is that those materials do not resolve the present dispute. They support an inference as to the objective of the amendments, but not the separate question whether the language ultimately adopted achieves that objective. That remains a question of treaty interpretation. We therefore regard the materials as relevant context, but as neither determinative of nor particularly helpful in discerning the meaning of Article 6.

Cannot use domestic legislation to interpret treaty?

120. That conclusion leads naturally to a further argument advanced by the Appellant that, even if the contextual materials demonstrate that the parties wished to expand the circumstances in which the United Kingdom could tax profits derived from United Kingdom land, it is impermissible to use the domestic legislation introduced in 2016 as an interpretative aid in determining whether the treaty language in fact achieves that result. Relying on *Royal Bank of Canada* and *Fowler*, it argued that one cannot begin with a domestic tax charge and then construe the treaty so as to preserve it. We accept that submission to the extent that the existence of a domestic charge cannot determine the meaning of Article 6 and, if the treaty allocates taxing rights differently, the treaty must prevail. However, that is not the use HMRC makes of the legislation. HMRC relies on it as part of the legal and factual background against which the 2016 Protocol and 2018 DTA were negotiated. Consistently with *Anson* at [58], the existing legal position forms part of the relevant context. The legislation therefore assists in understanding the problem to which the parties believed they were responding and the allocation of taxing rights which they expected the revised arrangements to achieve, even

though it cannot itself determine the meaning of the treaty provisions adopted to achieve that objective.

UK-Canada wording point

121. The Appellant also relied upon the fact that the United Kingdom had previously used express alienation language in other treaties, most notably the Canada Convention. It submitted that the absence of comparable wording from the present arrangements must therefore have been deliberate and should be taken as indicating that income arising on alienation was intended to fall outside Article 6.

122. We do not accept that submission. The fact that different wording was available and had been used elsewhere does not of itself determine the meaning of the language adopted here. The inference sought by the Appellant assumes that the parties understood the omission of Canadian-style wording to carry the significance now attributed to it. However, that assumption is difficult to reconcile with the Appellant's own emphasis on common intention. The relevant question is not what the United Kingdom may have known from its experience of other treaties, but what meaning is to be ascribed to the language which these parties adopted in the circumstances in which they adopted it.

The Lacuna Argument

123. HMRC submitted that the Appellant's interpretation would create a significant gap in the allocation of taxing rights. On that interpretation, profits derived from the development and sale of United Kingdom land by an Isle of Man resident without a permanent establishment would fall outside United Kingdom taxing jurisdiction altogether. Rental income and certain gains connected with the same land could be taxed in the United Kingdom, whereas trading profits realised from its development and sale could not.

124. There is some force in that submission. The result would be a striking distinction between different categories of income derived from the same immovable property. However, we do not place substantial weight upon that consideration. As we have already explained, neither the existence of a domestic tax charge nor the objective which the parties sought to achieve can determine the meaning of the treaty language. It remains possible, as a matter of principle, that the parties intended a broader allocation of United Kingdom taxing rights than was ultimately achieved by the words they adopted.

125. We therefore do not treat the avoidance of such a lacuna as an independent reason for our conclusion. Rather, it provides some confirmation that the interpretation reached from the text, structure and context of Article 6 produces a coherent allocation of taxing rights. Had the language of Article 6 pointed clearly in the opposite direction, we would have been bound to follow that language notwithstanding the resulting anomaly.

Property has a special status?

126. We also derive limited assistance from HMRC's broader submission that immovable property occupies a special position in treaty practice. Whilst Articles 6 and 13 commonly allocate taxing rights by reference to the situs of the land, that observation is too general to determine the present issue. Moreover, immovable property was not historically treated as a distinct category under the United Kingdom-Isle of Man arrangements prior to the adoption of OECD-style provisions in 2016. We therefore accept this as part of the background but do not attach significant weight to it. Ultimately, the question is one of construing the language adopted by the parties, not applying any presumption that income connected with land should be taxable where the land is situated.

Foreign authorities

127. We were also referred to decisions of the German Federal Fiscal Court and the Dutch Supreme Court. HMRC relied upon those authorities as demonstrating that courts interpreting OECD-derived provisions concerning immovable property have not invariably treated Article 6 as confined to rental income or other forms of passive enjoyment of land. The Appellant submitted that both decisions arose in materially different treaty and domestic-law contexts and provided little assistance on the issue before this Tribunal.

128. We accept that foreign decisions may assist where they concern provisions derived from the OECD Model. However, their persuasive force depends upon the cogency of their reasoning and the similarity of the issue under consideration. Neither authority concerns the development and sale of land by its owner under treaty provisions materially identical to those in issue here, and neither can determine the outcome of the present appeal.

129. The German authority relied upon by HMRC was the decision of the Bundesfinanzhof of 23 March 1972 (I R 128/70). The case concerned land acquired in Italy for development and sale. The court rejected an argument that the resulting profits and losses fell outside the treaty provision allocating taxing rights over immovable property and held that gains and losses associated with the property, including those connected with its anticipated disposal, fell within that provision.

130. HMRC relied upon the decision as demonstrating that a court interpreting a treaty provision concerning immovable property did not regard development activity and intended disposal as necessarily taking the resulting profits or losses outside the property article. The Appellant submitted that little weight should be attached to the decision because it concerned a pre-OECD treaty and neither considered the OECD materials nor addressed the "use vs. alienation" arguments advanced before this Tribunal.

131. We derive little assistance from the German decision. It arises in a materially different treaty context, concerned a treaty which predated the OECD Model Convention and does not engage with the interpretative materials upon which the parties have placed particular reliance. Whilst the outcome reached by the court is not inconsistent with HMRC's position, we do not regard the decision as providing meaningful guidance on the interpretation of the arrangements currently before the Tribunal and place no material weight upon it.

132. HMRC placed greater reliance upon a decision of the Dutch Supreme Court dated 27 May 2022 (21/03579). The case concerned an apartment owned by a Mexican resident and retained for personal use. Under Dutch law a notional return was attributed to the property and taxed as investment income. The issue was whether that deemed income fell within Article 6 of the Netherlands-Mexico Convention, which applied to income derived from the "exploitatie" (exploitation), letting or any other form of exploitation of immovable property.

133. The taxpayer argued that personal occupation did not constitute "exploitatie" of the property. The court rejected that argument, holding that the concept of exploitation was a broad one and that income derived from the use of immovable property was capable of encompassing any form of use of the property, including personal occupation.

134. HMRC relied upon that reasoning as demonstrating that use or exploitation within Article 6 should not be confined to active income-producing activities such as letting. The Appellant submitted that the decision concerned deemed income from personal occupation rather than profits from development and sale and did not address the distinction between use and alienation upon which it relies.

135. We accept that the Dutch decision arose in a materially different factual context and did not concern property development profits. Nor did it address the question whether income

arising upon alienation falls within Article 6. Nevertheless, the court directly considered the meaning of use or exploitation within an OECD-derived property article and rejected a narrow reading of those concepts. Its reasoning is therefore difficult to reconcile with the proposition that Article 6(3) is confined to a narrow class of revenue-producing activities. Whilst far from determinative, the decision provides some support for HMRC's submission that Article 6(3) should not be construed narrowly.

136. Accordingly, neither authority materially influences our conclusion on the meaning of Article 6. We derive little assistance from the German decision and place no material weight upon it. The Dutch decision is of greater relevance because it directly addresses the meaning of use or exploitation within an OECD-derived property article, although it does not address the specific issue before us. At most, it provides some support for HMRC's submission that concepts such as use and exploitation in Article 6 should not be construed narrowly. Neither authority is determinative of the present appeal.

Conclusion on Article 6 issue

137. We conclude, for the reasons set out above, that the income in issue falls within Article 6(1). That conclusion is sufficient to dispose of the appeal before us in relation to the relevant closure notices. It follows that the profits were taxable in the United Kingdom pursuant to Article 6 and it is unnecessary to determine any separate issue concerning the scope of Article 6(3).

138. Our conclusion follows principally from the language and structure of Article 6 itself. The natural meaning of "income derived from immovable property" is sufficiently broad to encompass income which arises directly from the ownership, development and sale of the immovable property in question, and nothing in Article 6(3) requires Article 6(1) to be confined to income generated during a period of continuing ownership. We do not agree that the OECD Commentary, the reservation practice, or the reasoning in *RBC* establishes the narrower "use versus alienation" distinction for which the Appellant contends. Whilst those materials do not provide a direct answer to the present question, they are not inconsistent with the interpretation we have reached. That interpretation is also consistent with the broader context and purpose of the arrangements and avoids what would otherwise be a striking exclusion from source-state taxation of a particular category of income derived from United Kingdom immovable property. Our conclusion does not depend upon any one of those contextual considerations. Rather, they provide confirmation that the meaning derived from the text and structure of Article 6 produces a coherent and commercially realistic allocation of taxing rights.

139. Accordingly, we accept HMRC's primary submission that the profits realised by KDL constituted income derived from immovable property within the meaning of Article 6(1).

Obiter observations on Article 6(3)

140. In light of that conclusion, it is unnecessary to reach a separate conclusion on Article 6(3). However, because the point was fully argued and formed an important part of the Appellant's case on Article 6(1), we indicate briefly the conclusion that would have been reached had Article 6(3) fallen to be considered as imposing an independent limitation upon Article 6(1). The observations which follow are therefore obiter and do not form part of the basis upon which the appeal is decided.

141. The parties disagreed fundamentally as to the meaning of the phrase "use in any other form". The Appellant submitted that Article 6(3) identifies an exhaustive category of activities falling within Article 6 and that the common feature uniting those activities is the retention and exploitation of property whilst ownership continues. It relied upon the Article 12 Commentary, the reservation practice discussed above, the commentary of *Vogel* and *Baker*, and the

observations in *RBC* concerning a continuing interest in the underlying property. On that analysis, Article 6(3) extends beyond direct occupation and letting but remains confined to use-based activities. The profits in issue were said to derive from the sale itself. Whilst KDL undoubtedly carried out development activities before disposal, those activities generated value which was realised only upon sale. The income was therefore said to arise from alienation rather than use.

142. HMRC's primary position was that Article 6(3) is not exhaustive. Alternatively, it submitted that the Appellant's construction was unduly narrow. Mr Fell argued that the phrase "use in any other form" is deliberately broad language directed to the different ways in which immovable property may be commercially utilised. KDL did not merely acquire and sell land. It carried on an integrated property development business involving the acquisition of sites, the obtaining of planning permissions, the funding and construction of residential developments and the sale of completed units. HMRC submitted that the land was actively employed throughout that process as an integral part of the development trade and that such activities constituted a use of the property within Article 6(3).

143. If, contrary to the conclusions reached above, Article 6(1) does not itself extend to the profits in issue and Article 6(3) therefore assumes determinative importance, we would nevertheless conclude that KDL's activities fell within Article 6. That conclusion proceeds on the assumption, contrary to our primary conclusion, that Article 6(3) imposes a substantive limitation upon Article 6(1). Even on that assumption, KDL's activities constituted a use of immovable property and the resulting income was income derived from that use.

144. The Appellant's analysis places undue emphasis upon the final act of sale. Whilst the profits were realised upon disposal, the source of those profits lay in the activities undertaken on and through the land over an extended period. KDL did not passively hold land which subsequently appreciated in value. It acquired sites as trading stock, obtained planning permission, funded and carried out development works, constructed residential units and marketed those units for sale. Those activities were not merely preparatory to the profit-making transaction. They were the means by which the profits were generated. The sale represented the culmination of that process rather than the sole source of the income.

145. That conclusion follows principally from the language of Article 6(3) itself and the nature of KDL's activities. Even on the Appellant's construction, Article 6(3) extends beyond direct occupation and the receipt of rent. The phrase "use in any other form" is deliberately expansive. A property development trade involves substantially more than the passive holding of land pending disposal. The land is employed, altered, improved and commercially deployed in order to generate profit. In ordinary language, that constitutes a form of use.

146. We would not place significant weight on HMRC's reliance upon the French text of Article 6 or the references in OECD materials to "exploitation". The parties ultimately accepted that little turns upon any linguistic distinction between "use" and "exploitation". Nor would we place material reliance upon the decision of the German Federal Fiscal Court (referred to above), which arose in a materially different treaty context and provides little assistance on the issue before us.

147. Somewhat greater assistance is provided by the 2022 decision of the Dutch Supreme Court (referred to above). That case did not concern property development profits and does not determine the present issue. However, its reasoning proceeded on the basis that the concept of *exploitatie* should be understood broadly and not confined to a narrow category of passive or revenue-producing activities. To that limited extent, it provides some support for HMRC's submission that the phrase "use in any other form" should not be construed narrowly.

148. Accordingly, if it had been necessary to determine the issue on the footing that Article 6(3) imposed the relevant limitation, we would have concluded that KDL's development activities involved the use of immovable property within Article 6(3) and that the resulting profits therefore fell within Article 6.

ARTICLE 13 ISSUE

The issue

149. Our conclusion that the profits in issue fall within Article 6(1) makes it unnecessary to determine the scope of Article 13 in order to dispose of the appeal. However, given the extent of the parties' submissions, and because the issue is liable to arise in the related appeals, it is appropriate to express a concluded view, albeit on an obiter basis.

150. The question is whether the profits realised by KDL from its trade of acquiring, developing and selling United Kingdom land fall within Article 13 as:

> "Gains derived by a resident of a Territory from the alienation of immovable property".

Domestic law and Article 3(2)

151. HMRC's alternative Article 13 argument relied in part upon Article 3(2), which directs that undefined treaty terms take their meaning from domestic tax law unless the context otherwise requires. Since Article 13 uses the term "gains" without defining it, HMRC submitted that its domestic law usage was relevant.

152. HMRC's submission was that, in United Kingdom tax legislation, the word "gains" is not inherently confined to gains of a capital nature. Particular reliance was placed upon section 15(2) of the Taxation of Chargeable Gains Act 1992, which provides that all gains are chargeable gains unless excluded by the Act. HMRC also relied upon section 37(1), which excludes from the consideration for a disposal taken into account in the computation of the gain amounts charged to income tax as income of, or taken into account as a receipt in computing the income or profits of, the person making the disposal, and upon provisions within Part 8ZB of CTA 2010 treating profits or gains arising from disposals of UK land (including gains of a capital nature) as profits of a trade.

153. HMRC submitted that these provisions demonstrate that, as a matter of domestic tax usage, the term "gains" is capable of referring both to gains of a capital nature and to gains which are taxed as income. It therefore argued that, pursuant to Article 3(2), the word "gains" in Article 13 should be given that broader domestic law meaning.

154. The Appellant submitted that these provisions establish no single domestic law meaning of the term "gains". More fundamentally, they are charging and coordination provisions concerned with the operation of domestic tax legislation and do not answer the distinct question of treaty allocation.

The structure of the arrangements

155. It is common ground that the profits in issue are trading profits and are income in nature under domestic law. The dispute concerns whether Article 13 is confined to gains of a capital nature or whether, as HMRC contends, it extends to any gain realised on disposal, including trading profits.

156. HMRC submitted that Article 13 is concerned with gains arising on alienation and that the provision contains no express restriction to capital gains. Mr Winter, who made HMRC’s submissions on this part of the case, emphasised that Article 13 refers simply to "gains" and not "capital gains". Had the contracting parties intended such a restriction, they could readily have included it. HMRC submitted that treaty interpretation is autonomous and that domestic

classifications of receipts as income or capital are not determinative. On that basis, profits realised on the disposal of land constitute gains from alienation irrespective of their domestic tax characterisation.

157. The Appellant submitted that Article 13 forms part of a broader treaty structure which distinguishes between income and capital gains. Article 6 deals with income from immovable property, Article 7 with business profits and Article 13 with gains. The Appellant argued that Article 13 occupies the position conventionally occupied by the capital gains article in OECD-model conventions and that the word "gains" must be interpreted in that context. Once it is accepted that the receipts in issue are trading profits and therefore income in nature, Article 13 is not engaged.

Discussion

158. We begin with the text. HMRC's submission has force if Article 13 is viewed in isolation. The Article refers to "gains" rather than "capital gains". Had the contracting parties intended a narrower formulation, more explicit language could readily have been adopted. The word "gains" is capable, as a matter of ordinary language, of extending beyond gains of a capital nature. The question, however, is not what the word can mean in isolation but what it means in the context of these arrangements. In our judgment, the strongest indications are provided by the structure of the arrangements as a whole.

159. Particular significance attaches to Article 7(4), which provides:

> "Where profits include items of income or capital gains which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article."

160. That provision proceeds upon a distinction between "income" and "capital gains". It does not refer to income and gains generally. Nor does it suggest that all gains realised on disposal fall within Article 13 irrespective of their character. Rather, it reflects a treaty structure in which certain Articles deal with income and others with capital gains.

161. The same distinction appears elsewhere in the arrangements. The title and overall scheme of the arrangements distinguish taxes on income from taxes on capital gains. Read in that context, Article 13 is naturally understood as addressing the latter category.

162. We do not accept that overlap between treaty provisions is necessarily impossible or impermissible. However, HMRC's construction materially weakens the distinction between income articles and gains articles which the arrangements otherwise appear consistently to maintain. If Article 13 extends to trading profits merely because they arise on disposal, it becomes difficult to identify the function served by the repeated distinction between income and capital gains elsewhere in the arrangements.

163. We therefore accept the Appellant's submission that Article 13 must be interpreted on its own terms and within its own treaty context. It is not permissible to expand the meaning of the word "gains" in Article 13 by reference to conclusions reached about the scope of Article 6. Article 6 is concerned specifically with immovable property. As Ms McCarthy pointed out in her reply, Article 13 extends more broadly to gains realised from different classes of property and transactions. The meaning of Article 13 cannot sensibly fluctuate according to the interpretation adopted of a separate provision dealing only with immovable property.

Royal Bank of Canada

164. The parties placed considerable reliance upon *RBC*. We accept that neither the Court of Appeal nor the Supreme Court was required to determine the precise issue which arises in the present appeal. Nonetheless, the reasoning provides assistance in understanding the relationship between Articles 6 and 13 within a convention based on the OECD model.

165. The Appellant relied in particular upon a number of passages in the judgments which proceed upon a distinction between income and capital gains. In the Court of Appeal, Falk LJ, in the context of her discussion of Canada's reservation, noted (at [51]) that

> "…the inclusion of a reference to profits from alienation makes it clear that profits from the disposal of immovable property that are in the nature of income profits rather than capital gains – most obviously trading profits – can be taxed in the State in which the property is situated. In contrast, capital gains made on the disposal of immovable property would fall within art 13(1)…"

166. The Supreme Court in *RBC* similarly described Article 13 (at [50]) as dealing with capital gains. Moreover, when rejecting HMRC's argument in its Respondent's Notice Falk LJ considered (at [100]-[101]) HMRC's submission that the payments received by RBC were taxable under Article 13 as gains derived from the alienation of United Kingdom oil-related interests. She rejected that argument in clear terms:

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

167. The Appellant, noting the Supreme Court's endorsement of Falk LJ's analysis, submitted that this reasoning is difficult to reconcile with the proposition that Article 13 extends generally to income profits realised upon disposal.

168. At [101], Lady Rose stated that it was sufficient to construe Articles 6, 13 and 27A in a manner which ensured that they operated within what Falk LJ had described as: "a coherent, and explicit, structure for the allocation of taxing rights in relation to natural resources". At [102], Lady Rose observed that "Article 13 deals with capital gains" and went on to summarise Falk LJ's reasoning that Articles 13(4) and (5) had been specifically added by the United Kingdom and Canada in order to ensure source-state taxation of certain hydrocarbon-related gains. At [103] she noted Falk LJ's concern that HMRC's construction of Article 6 would make it difficult to understand the function performed by those specific provisions if the concept of immovable property in Article 13(1) were already as extensive as HMRC contended. Finally, at [104], Lady Rose expressly agreed with Falk LJ's conclusion that: "articles 13 and 27A, and in particular article 13(4), support a narrower construction" and that they formed: "a specially agreed, and coherent, set of provisions allocating taxing rights" which should not be expanded beyond their intended scope.

169. The Appellant submitted that both Falk LJ and Lady Rose proceeded throughout on the basis that Article 13 occupies the role conventionally performed by the capital gains article in conventions based on the OECD model.

170. It is true, as HMRC submitted, that those observations cannot determine the present issue because neither the Court of Appeal nor the Supreme Court was required to decide whether Article 13 extends beyond gains of a capital nature. Nevertheless, the observations are not without significance. Both courts repeatedly treated Article 13 as the provision concerned with capital gains and drew a distinction between income receipts and gains falling within Article 13. Neither court suggested that income receipts could nevertheless fall within Article 13 merely because they arose on a disposal.

171. The significance also lies in the emphasis of those decisions on treaty structure. The Supreme Court approached Article 13 as a distinct provision serving a particular function within a coherent allocation of taxing rights. That approach supports the Appellant's submission that Article 13 must be interpreted on its own terms and not by deriving its scope

from conclusions reached about Article 6. It also supports the broader proposition that specific gains provisions should not readily be given a meaning which renders the structure of the treaty difficult to explain. Whilst not determinative of the present issue, the reasoning is therefore consistent with the view that Article 13 occupies the role conventionally performed by the capital gains article in an OECD-model convention.

Other cases

172. The parties also referred to *Fowler*. The case concerned the classification, for treaty purposes, of income received by a diver working in the United Kingdom sector of the continental shelf and the interaction between that classification exercise and a domestic statutory deeming provision. The Supreme Court emphasised the need first to identify the true nature of the income in question before determining the treaty article under which it fell and held that, in the circumstances of that case, the receipts were to be treated as employment income rather than business profits. The Appellant relied on the case as illustrating the importance of identifying the true nature of the receipts before determining the treaty provision under which they fall. In the present appeal, however, there is no dispute as to the character of the receipts. The parties agree that they are trading profits and therefore income in nature. The issue is whether profits of that agreed character nevertheless fall within Article 13. We do not, accordingly. consider this case helps on the interpretation issue facing us.

173. HMRC also relied upon a decision of the Dutch Supreme Court of 12 July 2013 (12/04039). The taxpayer, a resident of Canada, purchased a plot of land in the Netherlands after planning permission had been obtained and sold it a short time later at a substantial profit. The profit was taxed in the Netherlands as income from other activities rather than as a capital gain. It was common ground before the Dutch court that Article 13(1) of the Netherlands-Canada treaty applied to the disposal.

174. HMRC relied upon the decision because the receipt in question was treated domestically as income and yet was nevertheless accepted as falling within the treaty provision corresponding to Article 13. HMRC submitted that this illustrates the autonomy of treaty classification and demonstrates that an income gain can fall within a treaty gains article.

175. The Appellant submitted that the significance of the authority is limited because the applicability of Article 13 was not in dispute. The issue before the Dutch court concerned the source and allocation of the income under Dutch domestic legislation, not the scope of Article 13 itself. The court was therefore not asked to decide, and did not decide, whether a gains article extends to trading profits merely because they arise on disposal.

176. We see force in that point. The crucial question before this Tribunal was not before the Dutch court at all. The applicability of the equivalent of Article 13 was common ground and the court did not analyse whether there is a distinction between income articles and gains articles of the kind debated in the present appeal. Accordingly, whilst the decision provides some support for HMRC's submission that treaty classification is autonomous, it offers limited assistance on the specific interpretative issue which this Tribunal must decide.

Conclusion on Article 13 issue

177. HMRC's textual argument is therefore not without force. If Article 3(2) operated without qualification, the domestic legislative usage of the word "gains" could support HMRC's contention that Article 13 is not confined to gains of a capital nature. The critical question, however, is whether the context otherwise requires a different meaning. In our judgment it does. Article 7(4), the structure of the arrangements as a whole, the repeated distinction between income and capital gains and the reasoning in *RBC* all point in the same direction. In our view, had it been necessary to decide this issue we would have concluded that Article 13 is concerned with gains falling within the treaty category conventionally described as capital

gains. It does not extend to trading profits merely because those profits arise on the disposal of property.

OVERALL CONCLUSION

178. For the reasons set out above, we conclude that the profits realised by KDL fall within Article 6 of the arrangements between the United Kingdom and the Isle of Man. It follows that the United Kingdom is entitled to tax those profits. The closure notices for the relevant years were therefore correct and are upheld.

179. KDL's appeal is therefore dismissed.

MR JUSTICE NICHOLAS THOMPSELL
JUDGE SWAMI RAGHAVAN

Release date 25 August 2026

Annex: OECD Commentary on Article 6

COMMENTARY ON ARTICLE 6
CONCERNING THE TAXATION OF INCOME FROM IMMOVABLE PROPERTY

1. 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. Although income from agriculture or forestry is included in Article 6, Contracting States are free to agree in their bilateral conventions to treat such income under Article 7. Article 6 deals only with income which a resident of a Contracting State derives from immovable property situated in the other Contracting State. It does not, therefore, apply to income from immovable property situated in the Contracting State of which the recipient is a resident within the meaning of Article 4 or situated in a third State; the provisions of paragraph 1 of Article 21 shall apply to such income.
(Amended on 11 April 1977; see HISTORY)

2. Defining the concept of immovable property by reference to the law of the State in which the property is situated, as is provided in paragraph 2, will help to avoid difficulties of interpretation over the question whether an asset or a right is to be regarded as immovable property or not. The paragraph, however, specifically mentions the assets and rights which must always be regarded as immovable property. In fact such assets and rights are already treated as immovable property according to the laws or the taxation rules of most OECD member countries. Conversely, the paragraph stipulates that ships and aircraft shall never be considered as immovable property. No special provision has been included as regards income from indebtedness secured by immovable property, as this question is settled by Article 11.
(Amended on 21 November 2017; see HISTORY)

2.1 The phrase "including income from agriculture or forestry" in paragraph 1 extends the scope of Article 6 to include not only income derived from immovable property as defined in paragraph 2 but also income from activities that constitute agriculture or forestry. Income from agriculture and forestry includes not only the income that an enterprise engaged in agriculture or forestry derives from selling its agricultural and forestry production but also income that is an integral part of the carrying on of agriculture or forestry activities — for instance, income derived from the acquisition or trading of emissions permits (the nature of these permits is explained in paragraph 75.1 of the Commentary on Article 7) where such acquisition or trading is an integral part of the carrying on of agriculture or forestry activities, e.g. where the permits are acquired for the purpose of carrying on these activities or where permits acquired for that purpose are subsequently traded when it is realised that they will not be needed.
(Added on 15 July 2014; see HISTORY)

3. Paragraph 3 indicates that the general rule applies irrespective of the form of exploitation of the immovable property. Paragraph 4 makes it clear that the provisions of paragraphs 1 and 3 apply also to income from immovable property of industrial, commercial and other enterprises. Income in the form of distributions from Real Estate Investment Trusts (REITs),

however, raises particular issues which are discussed in paragraphs 67.1 to 67.7 of the Commentary on Article 10.
(Amended on 17 July 2008; see HISTORY)
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.

Reservations on the Article

…
8. Canada and Latvia reserve the right to include in paragraph 3 a reference to income from the alienation of immovable property.
(Amended on 21 November 2017; see HISTORY)

HISTORY in relation to that reservation reads:
Paragraph 8: Amended on 21 November 2017, by adding Latvia as a country making the reservation, by the report entitled "The 2017 Update to the Model Tax Convention", adopted by the OECD Council on 21 November 2017. After 29 April 2000 and until 21 November 2017, paragraph 8 read as follows:
"8. Canada reserves the right to include in paragraph 3 a reference to income from the alienation of immovable property."
Paragraph 8 was added on 29 April 2000 by the report entitled "The 2000 Update to the Model Tax Convention", adopted by the OECD Committee on Fiscal Affairs on 29 April 2000.