[2019] UKFTT 227 (TC)

TC07074

Appeal number:TC/2015/02945

INCOME TAX – earnings – Income Tax (Employment and Pensions) Act 2003 – premier league footballer – image rights agreement – whether payments viewed realistically were earnings – appeal dismissed

HULL CITY AFC (TIGERS) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 29-31 October 2018

Mr Keith Gordon of counsel instructed by Jacksons Chartered Accountants for the Appellant

Mr Akash Nawbatt QC and Mr Sebastian Purnell of counsel instructed by HM Revenue & Customs Solicitor's Office and Legal Services for the Respondents

DECISION

Background

1. This appeal concerns payments made by the appellant to an offshore company pursuant to an image rights agreement between the appellant and a professional footballer. The footballer in question is Mr Geovanni Gomez, known as Geovanni. Essentially, the issue is whether those payments were earnings for the purposes of PAYE and national insurance respectively.

2. The appellant runs a football club which was promoted to the Premier League for the 2008-09 season. This was the first time in the club's history that it would play in the top flight of English football. On 7 July 2008 before the season started the appellant signed Geovanni on a 2-year contract ("the Playing Contract") following his release by Manchester City. Once the season had commenced, on 7 November 2008 a contract was signed in respect of Geovanni's overseas image rights ("the Image Rights Agreement") between the appellant and Joniere Limited ("Joniere"), a company registered in the British Virgin Islands.

3. In September 2009 the Playing Contract was extended by one year, and potentially a further year. There is some evidence that in or about March 2010 the appellant and Joniere entered into a variation of the Image Rights Agreement extending the term of that agreement. Geovanni left the appellant in the summer of 2010 following relegation from the Premier League. At the same time the Playing Contract and the Image Rights Agreement were terminated. In the period December 2008 to July 2010 the appellant paid Joniere a total of £440,800, said to be referable to the Image Rights Agreement. HMRC claim that this sum was earnings of Geovanni for the purposes of PAYE and national insurance and that the appellant is liable to account for tax and national insurance on that sum. As a result, HMRC issued Directions under Regulation 80 Income Tax (Pay as You Earn) Regulations 2003 and Decisions under Section 8 Social Security Contributions (Transfer of Functions) Act 1999 for tax years 2008-09, 2009-10 and 2010-11.

4. The issue before me is whether the sums paid by the appellant to Joinere were in respect of Geovanni's image rights or whether they are properly characterised as earnings. The burden is on the appellant to establish that the sums paid did not constitute earnings. The respondents do not allege that the Image Rights Agreement was a sham, but they do say that viewed realistically the sums paid were earnings and were not paid in respect of Geovanni's image rights. I shall describe the respondent's case more fully below.

5. On behalf of the appellant I heard evidence from Mr Paul Duffen, who was the executive chairman of the appellant between June 2007 and October 2009. I also heard expert evidence from Mr Daniel Chapman, a solicitor with Leathes Prior who has acted for a number of football clubs, players and agents, including in relation to employment contracts and image rights agreements. Mr Chapman is currently vice-chair of the Society of Football Intermediaries and Agents.

6. On behalf of the respondents I heard evidence from Mr Mark Hadley, an officer of HMRC who was the project lead for enquiries into football clubs and image rights and who had some involvement in the enquiry into the appellant's image rights agreements. I also heard expert evidence from Mr Peter Hackleton of Saffrey Champness. Mr Hackleton is a chartered accountant, a member of the Chartered Institute of Taxation and has wide experience of dealing with tax issues in sport generally and image rights in particular.

7. All witnesses produced witness statements, gave oral evidence and were cross examined on their evidence. I set out below my findings of fact based on the evidence before me. First, I set out my conclusions on various legal submissions made by the parties

Legal Framework

8. The key issue in this appeal is whether payments made by the appellant to Joniere Ltd are earnings of Geovanni. There is no real distinction between earnings for income tax and national insurance for present purposes and I shall not distinguish between the two in this decision.

9. Part 2 Income Tax (Employment and Pensions) Act 2003 provides for a charge to income tax on employment income. The charge includes a charge to tax on general earnings. In this context earnings is defined by section 62 as follows:

> "62(2) … 'earnings', in relation to an employment, means –
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> (a) any salary, wages or fee,
>
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
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> (c) anything else that constitutes an emolument of the employment."

10. The appellant's case is relatively straightforward. Mr Gordon who appeared for the appellant relies on the existence of the Image Rights Agreement which required payments to be made to Joniere in respect of Geovanni's image rights. Mr Gordon also points to the absence of any argument by the respondents that the Image Rights Agreement was a sham. In those circumstances he says that there is no basis on which to characterise the payments as earnings.

11. The respondents' case is that the existence of the Image Rights Agreement does not necessarily mean that payments said to be made pursuant to that agreement may not in reality be earnings. Mr Nawbatt QC who appeared for the respondents together with Mr Purnell re-stated at the conclusion of the evidence that the respondents were not making any allegation of sham or dishonesty on the part of the appellant. He submitted as follows:

> (1) The appellant's evidence failed to discharge the burden on it to establish that the Determinations and Decisions were wrong or excessive.

(2) Taking all the circumstances into account and viewed realistically the payments in this case were earnings rather than payments for Geovanni's image rights. This submission relied on the application to the facts of principles set out by the Supreme Court in *UBS and Deutsche Bank v HM Revenue & Customs [2016] UKSC 13* and *RFC 2012 Plc (in liquidation) (formerly Rangers Football Club Plc) v Advocate General for Scotland [2017] UKSC 45*.

(3) In the alternative, the evidence supported a conclusion that the payments were mislabelled as being for Geovanni's image rights. In reality, they were earnings. This submission relied on principles set out by the Supreme Court in *Autoclenz v Belcher [2011] UKSC 41* and by the Court of Appeal in *PA Holdings v HM Revenue & Customs [2011] EWCA Civ 1414*.

12. A number of the issues arising out of these submissions were canvassed at a case management hearing in the present appeal before Tribunal Judge Gammie QC. That hearing was concerned primarily with the burden of proof on the appeal, and the order in which the parties were required to serve their evidence. Judge Gammie considered the nature of the respondents' case, and in particular whether it relied on an allegation of sham. If the respondents were alleging sham they would have had the burden of establishing that the Image Rights Agreement was a sham. Judge Gammie accepted that the respondents were not making any allegation of sham and found that the legal burden lay on the appellant. In the course of a comprehensive analysis, Judge Gammie considered and made observations on a number of the authorities to which I have been referred. Neither party suggested that I was in any way bound by Judge Gammie's observations. The arguments before me were made in the context of the evidence as a whole, and Judge Gammie did not have the benefit of hearing the arguments in the light of that evidence. In the circumstances I have approached the arguments afresh.

13. I shall consider the legal issues in this appeal by reference to the three alternative submissions made by Mr Nawbatt on behalf of the respondents. Before doing so I should refer to a Special Commissioners' decision in *Sports Club Plc v HM Inspector of Taxes [2000] STC (SCD) 443* which was relied on by both parties. Mr Gordon on behalf of the appellant submitted that Sports Club Plc illustrated that football clubs could enter into separate agreements for image rights with separate companies holding those rights and that payments pursuant to such agreements were not earnings for income tax purposes. The respondents submitted that there was a stark contrast between Sports Club Plc and the present appeal. Mr Nawbatt contrasted the circumstances in Sports Club Plc with the present case. In particular, unlike the present case Sports Club Plc involved two truly world class players of international standing. There was comprehensive evidence from the people involved in negotiating the image rights agreements together with contemporary evidence as to the value of the image rights and ways in which the club could exploit those image rights. There was also evidence as to how the club in fact exploited the image rights and in the case of one of the players why the rights were not fully exploited.

14. In Sports Club Plc there was a submission by the Inland Revenue that the "promotional agreements" as they were called were in reality rewards for the players becoming employees. The issue identified by the Special Commissioners in relation to

this submission was whether the promotional agreements "were a 'smokescreen' for additional remuneration". This appears to have been an argument that the promotional agreements were shams, although it was accepted by the Inland Revenue that they were real in the sense that real activities were to take place under the agreements and real sums of money were to pass under the agreements (see [87]). The Special Commissioners noted that no authority was cited to support the view that those realities could be ignored. The Special Commissioners found that the promotional agreements were genuine commercial agreements which the parties could seek to enforce and that the image rights had an independent value. They found that the agreements were not a "smokescreen" for the payment of additional remuneration.

15. I do not consider that Sports Club Plc greatly assists in relation to the present appeal. It does not deal with the authorities referred to in this appeal or the way in which the issues have been raised in this appeal. Both parties to the present appeal accept that in appropriate circumstances payments made by a football club to a third party pursuant to an image rights agreement will be taxed as such and not as earnings. The respondents did not suggest that the Special Commissioners' decision on the facts of Sports Club Plc was wrong.

16. I now turn to the three issues identified by the respondents.

(1) Burden of Proof

17. It was common ground between the parties that the legal burden in this appeal is on the appellant to show that the payments made to Joniere were not earnings of Geovanni. I shall consider whether they have satisfied that burden in my reasons below. The facts which the appellant must establish to satisfy the burden of proof will depend to some extent on how I resolve various questions of law in relation to issues (2) and (3).

(2) Realistic View of the Payments

18. The respondents submitted that I should view the payments made to Joniere realistically. Taking into account all the circumstances, they were earnings rather than payments for image rights. They relied upon the approach to statutory construction of taxing statutes set out by the Supreme Court in *UBS AG & Deutsche Bank Services (UK) Ltd v HM Revenue & Customs [2016] UKSC 13*. Those cases involved avoidance schemes in relation to bankers' bonuses. The bonuses were used to pay for redeemable shares in offshore companies set up for the purpose of the schemes. The shares were then awarded to employees with the intention that they would obtain the benefit of exemptions for employment related securities which were restricted securities but would cease to be restricted securities within 5 years. Lord Reed gave the only judgment and described the purposive approach to construction of tax statutes in the context of tax avoidance schemes, quoting the following passage from *Barclays Mercantile Business Finance Ltd v Mawson [2005] STC 1*:

> " The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve

considering the overall effect of a number of elements intended to operate together) answered to the statutory description. ... As Lord Nicholls of Birkenhead said in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311, 320, para 8: 'The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.'"

19. Lord Reed went on to identify two important factors in that approach:

"64. This approach has proved to be particularly important in relation to tax avoidance schemes as a result of two factors identified in *Barclays Mercantile* at para 34. First, "tax is generally imposed by reference to economic activities or transactions which exist, as Lord Wilberforce said, 'in the real world'". Secondly, tax avoidance schemes commonly include "elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge". In other words, as Carnwath LJ said in the Court of Appeal in *Barclays Mercantile,* [2002] EWCA Civ 1853; [2003] STC 66, para 66, taxing statutes generally "draw their life-blood from real world transactions with real world economic effects". Where an enactment is of that character, and a transaction, or an element of a composite transaction, has no purpose other than tax avoidance, it can usually be said, as Carnwath LJ stated, that "to allow tax treatment to be governed by transactions which have no real world purpose of any kind is inconsistent with that fundamental characteristic." Accordingly, as Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 52; (2003) 6 ITLR 454, para 35, where schemes involve intermediate transactions inserted for the sole purpose of tax avoidance, it is quite likely that a purposive interpretation will result in such steps being disregarded for fiscal purposes. But not always."

20. Lord Reed then referred to cases involving composite transactions where elements are inserted without any business or commercial purpose with the intention that the composite transaction should not be taxable. He stated:

"65. … In each case the court considered the overall effect of the composite transaction, and concluded that, on the true construction of the relevant statute, the elements which had been inserted without any purpose other than tax avoidance were of no significance. But it all depends on the construction of the provision in question. Some enactments, properly construed, confer relief from taxation even where the transaction in question forms part of a wider arrangement undertaken solely for the purpose of obtaining the relief. The point is illustrated by the decisions in *MacNiven v Westmoreland Investments Ltd* [2001] UKHL 6; [2003] 1 AC 311 and *Barclays Mercantile* itself.

66. The position was summarised by Ribeiro PJ in *Arrowtown Assets*, para 35, in a passage cited in *Barclays Mercantile*:

> 'The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.'"

21. Lord Reed explained the reference to a transaction being viewed realistically as follows:

"67. References to "reality" should not, however, be misunderstood. In the first place, the approach described in *Barclays Mercantile* and the earlier cases in this line of

> authority has nothing to do with the concept of a sham, as explained in *Snook*. On the contrary, as Lord Steyn observed in *McGuckian* at p 1001, tax avoidance is the spur to executing genuine documents and entering into genuine arrangements.
>
> 68. Secondly, it might be said that transactions must always be viewed realistically, if the alternative is to view them unrealistically. The point is that the facts must be analysed in the light of the statutory provision being applied. If a fact is of no relevance to the application of the statute, then it can be disregarded for that purpose. If, as in *Ramsay*, the relevant fact is the overall economic outcome of a series of commercially linked transactions, then that is the fact upon which it is necessary to focus. If, on the other hand, the legislation requires the court to focus on a specific transaction, as in *MacNiven* and *Barclays Mercantile,* then other transactions, although related, are unlikely to have any bearing on its application."

22. Mr Nawbatt submitted that the points referred to at [67] and [68] establish that it is not necessary to rely on sham and the respondents can still rely on a realistic view of the facts. In support of that submission he relied upon the decision of the Supreme Court in RFC 2012 and the decision of the Court of Appeal in PA Holdings.

23. The issue in RFC 2012 was whether an employee's remuneration was taxable as earnings when it was paid to a third party, in that case a trust, in circumstances where the employee had no prior entitlement to receive it himself. The FTT had found that the arrangements were not shams and that what the employees received were loans from the trusts. The argument of HMRC before the Supreme Court was that payment of sums to the trust involved a redirection of the employee's earnings which remained taxable as such.

24. Lord Hodge gave the judgment and at [35] he stated that income tax on earnings is, principally but not exclusively, a tax on the payment of money by an employer to an employee as a reward for his or her work as an employee. At [39] he addressed the purpose of the legislation:

> "39. I see nothing in the wider purpose of the legislation, which taxes remuneration from employment, which excludes from the tax charge or the PAYE regime remuneration which the employee is entitled to have paid to a third party. Thus, if an employee enters into a contract or contracts with an employer which provide that he will receive a salary of £X and that as part of his remuneration the employer will also pay £Y to the employee's spouse or aunt Agatha, I can ascertain no statutory purpose for taxing the former but not the latter. The breadth of the wording of the tax charge and the absence of any restrictive wording in the primary legislation, do not give any support for inferring an intention to exclude from the tax charge such a payment to a third party which the employer and employee have agreed as part of the employee's entitlement. Both sums involve the payment of remuneration for the employee's work as an employee."

25. At [64] Lord Hodge stated the following conclusion applying a purposive construction of the legislation to the scheme set up by RFC 2012:

> " 64. The relevant provisions for the taxation of emoluments or earnings were and are drafted in deliberately wide terms to bring within the tax charge money paid as a reward for an employee's work. The scheme was designed to give each footballer

> access without delay to the money paid into the Principal Trust, if he so wished, and to provide that the money, if then extant, would ultimately pass to the member or members of his family whom he nominated. Having regard to the purpose of the relevant provisions, I consider the sums paid to the trustee of the Principal Trust for a footballer constituted the footballer's emoluments or earnings."

26. PA Holdings was an employee-owned service company which allocated a significant proportion of its profits into employee trusts from which awards were made to employees under discretionary bonus schemes. The company agreed to a complex arrangement whereby the bonuses awarded were re-routed to employees so that they were paid as dividends of a separate UK registered company intended to be taxable as distributions.

27. The FTT had found that the payments were profits arising from employment, but that they were also dividends or distributions. Both the FTT and the Upper Tribunal applied *section 20(2) Income and Corporation Taxes Act 1988* which required the cash received to be taxed as dividends and not under any other provision of the Income Tax Acts. Moses LJ giving judgment of the Court of Appeal endorsed the FTT's finding that the payments were earnings as follows:

> "38. … The court should not be seduced by the form in which the payments (that is as dividends declared in respect of the shares in Ellastone) reached the employees. It should focus on the character of the receipt in the hands of the recipients.
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> 39. This was the approach of the First Tier Tribunal in the instant case. The First Tier Tribunal asked whether the payments were in reference to the services rendered by the employees, as rewards for services past, present or future (Upjohn J's test in *Hochstrasser v Mayes* [1959] Ch 22 at 33) and concluded the payments were emoluments or earnings falling within the definition in section 19 ICTA [73]. It relied on a number of features which demonstrated the character of the receipts:-
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> > i) The purchase of the shares in Ellastone was funded in full by PA, the employer, the dividends and full value of the shares were transferred at no cost to the employees; [68]
> > ii) The intention was to motivate and encourage the employees, and payment was represented to them as payment of the bonus for that year; [69] and [70]
> > iii) Those who left, even after PA had funded funds to Mourant were not eligible; [70]
> > iv) That the employees had no right to the payments was irrelevant. [72]
>
> 41. It does not seem to me possible either to impugn the approach of the First Tier Tribunal in law, still less to challenge those findings of fact. That approach owes nothing and need owe nothing to "the law's development, during the past thirty years, in its attitude to artificial tax avoidance" (*Tower MCashback v HMRC* [2011] 2 WLR 1131 at 1148, [2011] UKSC 19). For at least sixty years courts have identified the character of a receipt in the hands of the recipient by looking at its substance and not its form."

28. HMRC sought to invoke "the Ramsay principle" in PA Holdings in construing section 20(2) ICTA 1988. However, the Court of Appeal held that it was not necessary to do so. Section 20(2) was not engaged because having found that the payments were earnings they could not also be dividends. The basic principle was that

income taxable under one schedule could not also be taxed under another schedule. Notwithstanding that finding, which was sufficient to uphold HMRC's appeal, the Court of Appeal went on to consider Barclays Mercantile. At [68] Moses LJ stated:

> "68. The insertion of the steps which created the form of dividends or distributions did not deprive the payments of their character as emoluments. The insertion had no fiscal effect because Section 20, construed in its statutory context, does not charge emoluments under Schedule F…. The award of the shares and the declaration of the dividend were, in reality not separate steps but the process for delivery of the bonuses."

29. It seems to me that PA Holdings is a similar case to RFC 2012. The employer agreed to pay remuneration and then structured it in a way intended to give it the appearance of another form of income or payment. In the case of RFC 2012 a loan from a trust and in the case of PA Holdings a dividend from a company. The ultimate issue in each case was resolved by reference to the underlying nature of the payment, which was earnings. Mr Nawbatt submitted that in PA Holdings whilst the transaction documents legally created dividends, that did not deprive the payments of their character of earnings. He submitted that in the present appeal, viewed realistically, the Club was paying earnings to Geovanni.

30. Mr Gordon submitted that PA Holdings involved previously agreed bonuses which were converted artificially into shares in a company which paid commensurate dividends. Similarly, RFC 2012 involved agreed salary which was diverted to a third party trust. What was important was that in each case there was a sum agreed as salary part of which was purported to be paid otherwise than as salary, whereas here the sum agreed as salary was paid as such. A separately agreed sum was paid as image rights and not for playing football. Mr Gordon argued that the reality of the situation was a payment by way of image rights. The respondents' submissions, he said ignored that reality.

31. Mr Gordon submitted that there was nothing in the present case which would attract the Ramsay approach, and no reason to ignore the Image Rights Agreements on the strength of what the respondents say is a realistic view of the facts. There is nothing uncommercial or artificial about a footballer having a separate image rights agreement.

32. I do not consider that Mr Gordon's submission is inconsistent with taking a realistic view of the facts. The fact that an Image Rights Agreement was negotiated and entered into will be part of the factual matrix. It is prima facie evidence that what was paid to Joniere was consideration for the licensing of image rights and not by way of reward for Geovanni's footballing services.

33. Mr Gordon submitted that PA Holdings and RFC 2012 were a long way from the present facts. Both cases were decided in the context of employment relationships. The present appeal was not simply an employment relationship. It was also concerned with the negotiation and assignment of image rights

34. I agree there is nothing unrealistic about a Premier League football club entering into an image rights agreement with a player at or about the same time that

the player signs for the Club or extends his contract with the Club. However, the analysis requires the arrangements to be viewed in their full context.

35. I do not consider that a finding the payments made to Joniere were in reality the emoluments of Geovanni requires a finding of sham. There was no allegation by HMRC of sham in PA Holdings. The real issue is whether the payments made were emoluments as a reward for Geovanni's past, present or future services as a football player or whether they were consideration for the licensing of Geovanni's image rights. I must therefore look to see whether the payment to Joniere was as a reward for Geovanni's services as a footballer. In doing so I must look at the substance of the sums paid, and not their form. I did not understand Mr Gordon to be saying that if in reality the payments to Joniere were a reward for Geovanni's services as a footballer then they should not be treated as such. His case was that realistically viewed the payments were made in respect of Geovanni's overseas image rights.

36. In the circumstances it does not seem to me that Mr Nawbatt's third issue arises. I am not bound by the labelling of the sums due as being in respect of image rights pursuant to an image rights agreement. I shall however record the parties' arguments on the third issue.

(3) Mislabelling

37. The respondents submitted that where there is a dispute as to the nature or content of the parties' agreement, the relevant question is "what was the true agreement between the parties". In answering that question the Tribunal is not limited to the words and descriptions contained in the agreement. In support of this submission the respondents relied on *Autoclenz Ltd v Belcher [2011] UKSC 41* at [23] and [29]. Mr Nawbatt described this as a separate line of authority which enables a court to look at substance over form.

38. Mr Gordon submitted that the respondents could not rely on a principle of mislabelling without alleging sham, and in the absence of a sham the position was as stated by Lightman J in *Spectros International Plc (in liquidation) v Madden (Inspector of Taxes) [1997] STC 114* at 136c:

> "…The law respects the freedom of the parties to a transaction to frame and formulate their agreement as they wish and to suit their own legitimate interests (taxation and otherwise) and, so long as the form adopted is genuine, and not a sham, honest, and not a fraud on someone else, and does not contravene some established principle of public policy, the court will give effect to the method adopted. But as a corollary to this freedom, where the parties have chosen one method, it is not open to them to invite the court to treat as adopted some other method because it is more advantageous to them, because it leads to the same practical and economic result and because it is the more obvious and sensible method to have adopted."

39. Lord Clarke gave the judgment of the Supreme Court in Autoclenz. He noted that in the context of employment contracts, where one party alleges that the written

contract does not accurately reflect the true agreement of the parties, the employment tribunal adopts a test which focusses on the reality of the situation. He referred to the concept of sham, where both parties to an agreement have a common intention that acts or documents are not to create the legal rights and obligations which they give the appearance of creating (*Snook v London and West Riding Investments Ltd [1967] 2 QB 786*. He then said this:

> "23. … I would accept the submission made on behalf of the claimants that, although the case [Snook] is authority for the proposition that if two parties conspire to misrepresent their true contract to a third party, the court is free to disregard the false arrangement, it is not authority for the proposition that this form of misrepresentation is the only circumstance in which the court may disregard a written term which is not part of the true agreement. That can be seen in the context of landlord and tenant from *Street v Mountford* [1985] AC 809 and *Antoniades v Villiers* [1990] 1 AC 417, especially per Lord Bridge at p 454, Lord Ackner at p 466, Lord Oliver at p 467 and Lord Jauncey at p 477. See also in the housing context *Bankway Properties Ltd v Pensfold-Dunsford* [2001] 1 WLR 1369 per Arden LJ at paras 42 to 44."

40. The respondents relied on Lord Clarke's endorsement of the following statement by Elias J in *Consistent Group Ltd v Kalwak [2008] EWCA Civ 430* in the context of employment contracts containing substitution clauses:

> "58. In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.
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> 59. … Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance…"

41. It is clear from Lord Clarke's judgment that such an approach is not limited to arguments of sham. In preferring the approach of Elias J to that of the Court of Appeal in Kalwak, Lord Clarke said this:

> "28. … Rimer LJ said at para 28 in *Kalwak* that a finding that the contract was in part a sham required a finding that both parties intended it to paint a false picture as to the true nature of their respective obligations. He was there applying the approach of Diplock LJ in *Snook* to this situation. In my opinion that is too narrow an approach to an employment relationship of this kind. In this regard I agree with the views expressed by ACL Davies in an illuminating article entitled *Sensible Thinking About Sham Transactions* in (2009) 38 ILJ 318, which was a note on *Szilagyi* published before the decision of the Court of Appeal in the instant case.
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> 29. However, the question for this court is not whether the two approaches are consistent but what is the correct principle. I unhesitatingly prefer the approach of Elias J in *Kalwak* and of the Court of Appeal in *Szilagyi* and in this case to that of the Court of Appeal in *Kalwak*. The question in every case is, as Aikens LJ put it at para 88 quoted above, what was the true agreement between the parties. I do not perceive any

distinction between his approach and the approaches of Elias J in *Kalwak*, of Smith LJ and Sedley LJ in *Szilagyi* and this case and of Aikens LJ in this case."

42. Mr Gordon submitted that Autoclenz is an example of a sham and in that sense a continuation of Snook. He submitted that the cases referred to such as Antoniades v Villiers and Kalwak were cases where there was inequality of bargaining position. In the former, between landlord and tenant, in the latter between employer and employee. In those cases, the pretence was created in favour of the party with the stronger bargaining position. That was the only distinction between those cases and so-called "Snook Sham". All the cases involved dishonesty such that even if there was mislabelling the burden of proof was on the party alleging sham, but in the present case the respondents disavowed any reliance on sham and could not therefore rely on mislabelling.

43. I do not accept that submission. Even without a finding of sham a tribunal is entitled to view terms in agreements for what they are rather than what they purport to be. In particular, a party may allege that a statement in a contract that £x is paid in consideration of Y is not definitive and is not reflective of what the consideration was truly paid for – see *Acornwood LLP v HM Revenue & Customs [2016] UKUT 361*. In Acornwood, the question was whether certain expenditure was wholly and exclusively expended for the purposes of a trade. In relation to the distinction between sham and mislabelling, Nugee J said as follows at [59]:

> "59. …Mr Davey accepted, as HMRC had accepted below, that the transactions were not a sham in the classic sense explained by Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786. Mr Davey however said that the fact that HMRC accepted that the documents were not shams did not mean that the legal rights and obligations arising from the documents were the same as the actual rights and obligations that the parties expressed them to create. He drew a distinction between the doctrine of sham and the doctrine of mislabelling. Thus for example a document which purports to grant a licence to a person to occupy land may be a sham if the parties intended the document to be a pretence, concealing the true transaction between the parties. However even if a document is not a sham in that sense, it is commonplace that the labels which the parties use in their contract are not determinative of the true legal effect of what they have done: see the well-known example given by Lord Templeman in *Street v Mountford* [1985] AC 809 of the five pronged implement for digging, which is a fork even if the manufacturer insists that he intended to make and has made a spade; or the less well known but equally vivid example given by Bingham LJ in *Antoniades v Villiers* [1990] 1 AC 417 at 444B: "a cat does not become a dog because the parties have agreed to call it a dog." I accept that the two doctrines, of sham and mislabelling, are different doctrines; and I also accept that in this case HMRC's acceptance that the contractual documents entered into by the parties were not shams or pretences does not preclude them from contending that a statement in a contract that £x is paid in consideration of Y is not reflective of what the consideration truly was for which £x was paid."

44. It is also clear from Acornwood that where the parties to a transaction have allocated the consideration in a certain way, HMRC is not bound by that allocation. At [62] Nugee J said:

> " HMRC's submission was that … while the parties to a transaction might, indeed normally would, be bound by what they had agreed, and could not seek to re-characterise it for fiscal advantage, the Crown was not so bound and could treat the arrangement for what it was, and not for what it appeared to be. That submission, as appears from the passage which I have cited from [265] of their decision, was one which they accepted. In my judgment they were right to do so."

45. Mr Gordon sought to distinguish Acornwood on the basis that it was concerned with the breakdown of sums payable under a contract, where the breakdown did not correlate with reality. He submitted that it is not authority for the proposition that one can ignore the contract altogether. Here there is a contract which transferred image rights from Joniere to the appellant in consideration for a sum of money. The present case does not involve the allocation of consideration between different supplies. The respondents case was that despite a clear agreement to assign image rights to the appellant in consideration for certain payments, in fact those payments were being made for something completely different. The only way the respondents could possibly do that would be if the Image Rights Agreement were a sham, which they have not alleged.

46. Mr Gordon further submitted that the present appeal was not simply concerned with the label given to the Image Rights Agreement. He submitted that this was a separate agreement with operative provisions which licenced Geovanni's image rights to the appellant. The respondents' case went well beyond mislabelling and into the arena of sham, which the respondents were not alleging.

47. In my view it is clear that at least in an employment context a court may disregard a term in a written contract which does not genuinely reflect what might realistically be expected to occur. The court may do so without finding that the term was a sham in the Snook sense.

48. I can see force in Mr Gordon's submission one cannot use the concept of mislabelling to completely re-write the whole basis of an agreement honestly entered into by the parties. However, in light of my finding on the second issue I must take a realistic view of the facts and it is not necessary for me to make a finding in relation to the third issue. As Moses LJ stated in PA Holdings, the character of a receipt in the hands of the recipient is identified by looking at its substance and not its form. The same applies where, as in RFC 2012, the recipient is a third party. In the circumstances of this case the respondents' arguments in relation to the third issue add nothing to their arguments in relation to the second issue.

Evidence and Findings of Fact

49. As stated above, there is a burden on the appellant to establish that payments made by the appellant to Joniere were made in respect of image rights and not earnings as a reward for Geovanni's services. In doing so the appellant can rely on the existence of the Image Rights Agreement and all the surrounding circumstances.

However, I am concerned with the substance of the payments and not just their form. In this section I set out my findings of fact.

50. There was evidence before me as to the use of image rights agreements generally within football clubs from 2007 up to the present day. The evidence came principally from the two expert witnesses and from Mr Hadley. I can deal with my findings of fact on this aspect quite briefly.

51. HMRC had been enquiring into the use of image rights agreements for some years prior to 2007. In 2000 the Special Commissioners in Sports Club Plc had found that payments to two high profile Premier League players by way of image rights were not emoluments from employment or benefits in kind. However, HMRC continued to have concerns in relation to a number of issues connected with image rights payments made by Premier League football clubs, including what they considered to be uncommercial and excessive payments to offshore companies in respect of non-domiciled players.

52. By 2007, the use of image rights agreements by Premier League clubs was commonplace. Much of the use of image rights agreements was driven by agents of overseas players. Some of the larger clubs had image rights agreements with as many as 20 players. HMRC's view was that with the exception of the "top clubs", there was often little evidence of commercial justification for entering into such agreements and no plans in place to exploit the rights being acquired. The top clubs at that time for these purposes were Manchester United, Chelsea, Arsenal, Liverpool, Everton and Aston Villa. In 2010 HMRC met with the Premier League and a without prejudice agreement was reached on a way to settle liabilities arising from prior years. At the same time articles appeared in the professional press concerning the treatment of payments for image rights. HMRC acknowledge that since 2010 image rights payments have continued to be made by clubs but generally in circumstances where there is evidence that they are "commercially justifiable".

53. I am satisfied from the expert evidence that in 2008:

(1) Premier League clubs outside the top 6 did not generally have the skills to maximise commercial opportunities involving the exploitation of image rights.

(2) There was a general understanding amongst Premier League clubs that provided a player was an elite and recognisable sportsperson it was acceptable to pay up to 20% of employment earnings as an annual fee to purchase UK and overseas image rights. HMRC however had never agreed such an approach.

(3) It is not just players who are in the elite group of recognisable sportspeople who have image rights with a commercial value overseas. A player from a part of the world not otherwise represented in the Premier League but which provided significant commercial opportunities might have valuable overseas image rights. For example, in 2004 Manchester United signed a young Chinese player called Dong Fangzhou. He played for the first team only once in four years but helped Manchester United open up commercial opportunities in Asia. Geovanni did not fall into that category of player because there were

approximately 20 other Brazilian players in the Premier League at that time, most of whom were international players at top 6 clubs.

(4) The opportunity for Premier League clubs to exploit image rights commercially arose principally from the demands of the clubs' commercial partners to use players' images in support of advertising and marketing campaigns.

(5) If a club intended to acquire the image rights of a player they would have been well advised to keep the negotiation of that agreement separate to the salary negotiation. The club would also have been well advised to ensure that the valuation of image rights was documented by reference to a business case for the acquisition, with monitoring over the life of the image rights agreement.

(6) A club such as Hull City would not be expected to have the experience, resources or ability to exploit the commercial opportunities associated with players' image rights.

(7) Historically, image rights agreements had been used by some Premier League clubs and players as a means of disguising employment income to gain tax advantages.

54. There are advantages to a club and a player if sums are paid pursuant to an image rights agreement rather than as salary, in addition to the tax advantage that PAYE and national insurance is not payable. Clubs have the opportunity to maximise commercial revenues, and to prevent players from endorsing brands which rival their own partners and sponsors. Payments to an overseas company can act as a form of pension scheme for the player. There are also potential disadvantages to a player. Payments due under an image rights agreement are not treated as "football debts" in the event the club were to enter an insolvency procedure and so would not get the preference which arises in practical terms for players' unpaid earnings.

55. I turn now to the specific position of the appellant. The evidence in relation to the Club's use of image rights agreements and of Geovanni's Image Rights Agreement in particular came mainly from Mr Duffen. In assessing the evidence I take into account the importance of documentary evidence (see *Kimathi v Foreign & Commonwealth Office [2018] EWHC 2066 (QB) at [95] to [97]*) and the distinct lack of supporting documentary evidence in this case.

56. Mr Duffen had been chief executive officer of Catalyst Media Group Plc which was a business using internet technology to exploit rights for television, sport and video content. He had no previous connection with the business of football prior to 2007. In 2007 Mr Duffen was the public face of a consortium which acquired Hull City Football Club ("the Club"). The principal member of the consortium was Mr Russell Bartlett. On 4 June 2007 Mr Duffen was appointed executive chairman of the Club. At that time the Club was playing in the Championship, the second tier of English football.

57. I am satisfied that Mr Duffen was doing his best to give reliable evidence to the Tribunal. However, he was being asked to recall events and details going back 10

years which occurred at a very hectic time for everyone involved at the Club and in relation to which there is very little documentary evidence.

58. The Club was successful in the 2007-08 season, which was Mr Duffen's first year as executive chairman. On 24 May 2008 the Club won the Championship Playoff Final and was promoted to the Premier League. In Mr Duffen's words the Club was "woefully under-resourced in every aspect". It was short on human resources and experience and it "needed to sign an entire new team to ensure we had the best chance of staying in the Premier League". For this purpose the Club obtained a £20m loan facility from its bankers. The Club signed new players including former Dutch international George Boateng and former Greek international Stelios Giannakopolous.

59. One of the new players the Club decided to sign was Geovanni, indeed the Club was thinking of signing Geovanni as early as 1 June 2008 just a few days after the Playoff Final. I was provided with considerable evidence as to Geovanni's playing career and also a good deal of speculation as to why his playing career had until then not developed as might have been expected. It is not appropriate for me to engage in such speculation and I shall focus on the facts. Much of the evidence was directed towards Geovanni's talents as a football player and why he did not win more international caps for Brazil. Football fans across the world debate the relative merits of players, and interesting though such a debate may be it does not really help in this appeal. I can however summarise Geovanni's playing career up to 2008 when he signed for the Club.

60. Geovanni was born in Brazil in January 1980. He started his professional football career at the age of 17 playing for Cruzeiro, one of the most famous clubs in Brazil. He played 50 times for Cruzeiro between the ages of 17 and 21. On 12 July 2001 he made his one international appearance for Brazil in the Copa America tournament against Mexico. In the summer of 2001 Geovanni signed for Barcelona for a transfer fee reported to be $18 million.

61. Geovanni was known as a "Number 10" meaning that he played as an attacking midfielder, a playmaker creating and scoring goals. Many of the most famous Brazilian players of all time have played in that role, including Pele. Geovanni made 26 appearances in two seasons at Barcelona, scoring 2 goals. In 2003 he signed on loan for Benfica, in the Portuguese league. The move was later made permanent on a free transfer. Between 2003 and 2006 Geovanni played 91 times for Benfica and scored 16 goals.

62. In 2006 Geovanni cancelled his contract with Benfica and moved back to Brazil to join Cruzeiro on a 3 year contract. Both parties in this appeal accept that the move to Benfica and subsequently back to Cruzeiro were backward steps in his career, although there was disagreement as to how much of a backward step the move to Benfica was. Geovanni played for Cruzeiro 14 times and scored 2 goals in 2006-07.

63. On 17 July 2007 Geovanni signed for Manchester City in the Premier League on a one year deal. At this time Manchester City were a mid-table team that had a new ambitious owner who had just appointed former England manager Sven-Goran

Eriksson as club manager. Geovanni scored on his debut and the following week scored the only goal of a match in which Manchester City beat Manchester United. Geovanni went on to make 23 appearances for Manchester City that season, mainly as a substitute and scored 3 goals. However, at the end of the season he was released. The evidence of Mr Hadley which I accept is that Geovanni did not have an image rights agreement when he was at Manchester City.

64. Mr Duffen believed that the possibility of signing Geovanni came through the Club's assistant manager, Brian Horton who had previously managed Manchester City. Phil Brown who was the Club's manager would have negotiated the salary and Mr Duffen would have simply been asked to approve it, which he did. The salary was presented to him as a "fait accompli". Mr Duffen thought that there was probably also an agent acting for the Club. When he was shown an agreement dated 1 June 2008 appointing Mr Manasseh of Stellar Group Ltd as the Club's agent to secure the signature of Geovanni he acknowledged that the Club must have had an agent acting. The Club agreed to pay the agent £450,000 to secure the signature of Geovanni.

65. Mr Duffen acknowledged that Mr Manasseh might have been able to give relevant evidence to the tribunal given his involvement in the transfer.

66. There was very little documentation evidencing negotiations in relation to the Playing Contract or the Image Rights Agreement. There was an email dated 26 June 2008 from Mr Hough who was the Club Secretary to Mr Manasseh in which he attached the Club's "proposed offer" to Geovanni subject to Geovanni agreeing terms. The email appears to have had attached to it Schedule 2 to the intended playing contract and what was described as a "blank image rights agreement". Neither of the attachments were in evidence.

67. Geovanni signed the Playing Contract on 7 July 2008. It was a standard form Premier League contract ending on 30 June 2010. Mr Hough signed on behalf of the Club and his signature was witnessed by Mr Duffen. Geovanni himself signed the Playing Contract. Mr Manasseh was noted as acting as the Club's agent and signed the Playing Contract in that capacity.

68. Clause 4 of the Playing Contract is headed "*Community public relations and marketing*". I was referred to the following provisions:

> "4.1 For the purposes of the promotional community and public relations activities of the Club and/or (at the request of the Club) of any sponsors or commercial partners of the Club and/or of the League and/or of any main sponsors of the League the Player shall attend and participate in such events as may reasonably be required by the Club including but not limited to appearances and the granting of interviews and photographic opportunities as authorised by the Club. The Club shall give reasonable notice to the Player of the Club's requirements and the Player shall make himself available for up to six hours per week of which approximately half shall be devoted to the community and public relations activities of the Club. No photograph of the Player taken pursuant to the provisions of this clause 4.1 shall be used by the Club or any other person to imply any brand or product endorsement by the Player.

…

4.6 The Player hereby grants to the Club the right to photograph the Player both individually and as a member of a squad and to use such photographs and the Player's Image in a Club Context in connection with the promotion of the Club and its playing activities and the promotion of the League and the manufacture sale distribution licensing advertising marketing and promotion of the Clubs club branded and football related products …

…

4.11 Nothing in this clause 4 shall prevent the Club from entering into other arrangements additional or supplemental hereto or in variance hereof in relation to advertising marketing and/or promotional services with the Player or with or for all or some of the Club's players (including the player) from time to time. Any other such arrangements which have been agreed as at the date of the signing of this contract and any image contract or similar contract required to be set out in this contract by the League Rules are set out in Schedule 2 paragraph 13."

69. Schedule 2 of the Playing Contract set out Geovanni's remuneration including his basic wage, bonuses and other payments. His basic wage was £14,400 per week and there was also a team incentive schedule. Other payments included £500 per game, an accommodation expense of £4,000 per month and a £100,000 bonus if the Club retained its Premier League status each season.

70. An additional schedule to the Playing Contract referred to image rights as required by clause 4.11:

"Pursuant to an Agreement dated 7th July 2008 and made between the Club and the Image Rights Company the Club shall pay to the Image Rights Company the sum of £187,200 per annum from the 7th July 2008 to the 30th June 2010. In consideration of these payments, the Club and player acknowledge that the Image Rights Company has granted to the Club rights and entitlements equivalent to those set out in Clause 4 of this contract."

71. The additional schedule was signed by Geovanni and Mr Hough, and both signatures were witnessed by Mr Duffen.

72. In fact, the Image Rights Agreement was not signed until 3 November 2008. Mr Duffen was unable to say why that was the case but he suggested that it was down to "slack admin" which I accept. It is not clear who signed the Image Rights Agreement on behalf of the Club or on behalf of Joniere, but both signatures were witnessed. Mr Duffen had no contact with Joniere Ltd in relation to the Image Rights Agreement and did not know who represented Joniere Ltd. No due diligence was carried out in relation to Joniere and Mr Duffen could not recall whether the Club obtained evidence that Joniere Ltd actually owned Geovanni's image rights. There was little evidence before me about Joniere Ltd.

73. The Image Rights Agreement recited that Joniere was authorised and licensed to grant licences relating to Geovanni's name, image, signature and other characteristics

and personal appearances throughout the Territory, which was defined as the World excluding the UK. Joniere also gave a warranty of authority.

74. The licence granted by the Image Rights Agreement was set out in clause 2 and extended to the Territory. The rights granted were expressed to be in addition to the rights in Geovanni's Playing Contract. I was referred specifically to Clause 2.1.1 and 2.1.3 which provided the rights:

> "to use and exploit the Player's image exclusively in a Club Context in an individual capacity and/or as a member of a group for the Club's promotional and public relations purposes and for inclusion and content in and for all Club media activities and publication, in all cases relating to brands relating solely to the Club, whether undertaken or produced by the Club or on their behalf by a Club Partner."
>
> and
>
> "to use and exploit the Player's image exclusively in a Club Context in an individual capacity and/or as a member of a group for promotional purposes by third parties and/or Club Partners for the promotion of such third parties and/or Club Partners' products and services."

75. Club Partners were the Club's "top-tier" sponsors of which there could be no more than two at any one time. Mr Duffen said and I find that in the relevant period for this appeal the top-tier sponsors were Kingston Communications and Bonus Electrical who were both based in Hull. It was not suggested that either business might have any commercial interest in Geovanni's overseas image rights.

76. In addition, the Club was granted rights subject to certain restrictions to require Geovanni to make personal appearances.

77. Mr Duffen understood that the Image Rights Agreement gave the Club the exclusive right to "use" Geovanni for promotional purposes of the Club, its partners and third parties globally. That appears to be right, save that the Image Rights Agreement did not licence UK rights and the rights granted by the Player's Contract were very limited. Mr Duffen could not recall why UK rights were excluded. He thought that such rights might have been covered by the Playing Contract but that is not the case.

78. Mr Duffen could not say what if any research was done as to how the Club might exploit Geovanni's image rights. He was asked what commercial opportunities he considered could be exploited using the Image Rights Agreement. Initially his answer was very vague, and he spoke of overseas marketing initiatives when the Club was on foreign tours. He maintained that the Club's marketing department considered that it was a "great idea" to have the image rights. As someone involved in the media business he found the opportunity to do something with Geovanni's image rights "irresistible". Later in his evidence he suggested that he considered the best opportunity to exploit Geovanni's image was in Latin America and the Far East, for example alongside the "Tiger" image of the Club. He suggested the possibility of joining with an overseas partner such as Tiger beer and using Geovanni's image to

encourage football tourism, in the sense of overseas tourists coming to the UK to watch Premier League football. He pointed to the fact that in 2009 half the Premier League income from TV deals came from international TV rights. In 2008 Mr Duffen said that following promotion to the Premier League he and the Club felt that it could "walk on water".

79. The Club itself had previously entered into an image rights agreement with an overseas company in respect of the image rights of Jay Jay Okocha. The Club signed Okocha in August 2007 from Bolton Wanderers, at that time an established Premier League club. Okocha was a high profile player at the end of his career who had previously been African Footballer of the Year. Mr Duffen had only been at the Club a matter of weeks when this agreement was signed on 31 August 2007. He could not recall whether he was aware of the agreement at the time, who had negotiated it or whether Okocha's image rights were exploited by the Club. In 2008, when Geovanni signed for the Club, Mr Duffen could not recall whether he was aware how Okocha's agreement had operated in practice. It seems that no payments were made by the Club pursuant to Jay Jay Okocha's image rights agreement but Mr Duffen was unable to confirm that fact.

80. It is not surprising that Mr Duffen was unable to recall detail in relation to the negotiations with Geovanni and Joniere in 2008. His recollection of the image rights agreement entered into by the Club with Jay Jay Okocha was poor. He clearly had in mind that image rights agreement in February 2013 because he drew it to the attention of the appellant in an email. However, at the time of his witness statement dated 25 October 2017 he stated that when the Club signed Geovanni neither the Club nor he had any prior experience of image rights agreements. Similarly, Mr Duffen had no recollection that the Club had used Mr Manasseh as an agent to secure the services of Geovanni until he was pointed to a written agency agreement. A written document was required to prompt Mr Duffen's memory, which again is not surprising given the passage of time. I do not know how Mr Duffen's evidence might have been affected if there had been documentation available to evidence the negotiations. I am satisfied that Mr Duffen was doing his best to recall his dealings in relation to Geovanni and there was no suggestion that he was deliberately giving partial evidence. However, I am satisfied that Mr Duffen's memory of relevant matters is not very reliable. I do not wholly discount Mr Duffen's evidence but I do take this into account when assessing the evidence as a whole and making my findings of fact.

81. The term of the Image Rights Agreement was expressed to be from 7 July 2008 to 30 June 2010 which was the term of Geovanni's Playing Contract. The consideration payable by the Club to Joniere Ltd was set out in Clause 6.1. The sum of £187,200 was payable annually in arrears in four equal instalments commencing 1 October 2008. It is not clear why, but the first payment was not made until 13 November 2008. Clause 6.1 of the Image Rights Agreement stated:

> "If the Player's Playing Contract is extended for a further year from 1 July 2010 to 30 June 2011 [the Club] agree to pay a further sum of £187,200 per annum, payable on the same quarterly dates as above"

82. The effect of this clause was that the parties were bound to extend the Image Rights Agreement on its existing terms if the Playing Contract was extended for a year.

83. Geovanni's agent in the negotiations was a Brazilian associate who also acted as his translator. Mr Duffen had no more than two meetings with Geovanni, prior to his signing on 7 July 2008. Mr Duffen had some recollection of his first meeting with Geovanni and his agent. He did not specifically recall but thought that the manager Phil Brown was likely to have been present. His recollection was that Geovanni's agent raised the possibility of an image rights agreement as something that the Club might be able to take advantage of. Mr Duffen said that he also viewed it as protecting the Club's interest in Geovanni's image rights. It was not clear exactly what Mr Duffen meant by this, although as appears from the expert evidence there can be advantages to a club obtaining a player's image rights apart from the opportunity to exploit those rights commercially.

84. In the light of Mr Duffen's evidence as a whole I consider that what I was told about the prospect of exploiting Geovanni's image overseas is based on hindsight as to how the image might have been exploited, rather than recollection of any clearly defined intention or plan in 2008 to exploit the image in the way he described. If there had been a clearly defined intention or plan to exploit Geovanni's image in 2008 then I am satisfied that Mr Duffen would have been a party to internal discussions and he or others who could have been called as witnesses would have recalled those discussions.

85. Returning to the Club's position in the summer of 2008, Mr Duffen regarded Geovanni as a "marquee signing" for the Club, that is a signing who would excite the fans and who the manager might be expected to build a team around. Mr Duffen told me that from his previous experience in sport and media he considered that the opportunity to secure Geovanni's overseas image rights was an exciting opportunity. However, he had no experience in relation to image rights agreements and I was told that the Club took advice with regard to the structure and quantum of the Image Rights Agreement from IPS Law, a specialist law firm. In particular, Mr Duffen said that he wanted advice about the value of the image rights and whether it was a sound commercial proposition. He said that the advice would have been received in writing but it would have been dealt with between the Club Secretary and IPS Law. Mr Duffen also thought that IPS Law had drafted the Image Rights Agreement. Mr Duffen said that the Club Secretary would have briefed IPS Law and dealt with all legal matters and documentation. Mr Duffen would then have been provided with the advice of IPS Law which he would have looked at and then said "yes" or "no".

86. I note that Geovanni's basic wage at the Club under the Playing Contract was £748,800 and that the annual image rights payment of £187,200 is exactly 25% of that sum. There is no evidence that the sum due under the Image Rights Agreement was intended to be 25% of the basic wage. Indeed, there is no reliable evidence at all as to how the parties arrived at the annual image rights payment and no evidence other than the recollection of Mr Duffen as to any involvement of IPS Law in relation to the Image Rights Agreement.

87. I am satisfied that Mr Duffen's involvement with the signing of Geovanni and the contractual negotiations which led to the Playing Contract and the Image Rights Agreement was minimal. He had very little knowledge or recollection of the dealings between the Club, Geovanni and his agent. I am satisfied that the Club Secretary or the Finance Director would have been involved in the negotiations and that Mr Duffen simply "signed off" on the deal, including the Image Rights Agreement.

88. Mr Nawbatt invited me to draw an adverse inference from the appellant's failure to adduce evidence from IPS Law (see *NRC Holdings Ltd v Danilitskiy [2017] EWHC 1431*). I was invited to infer that there was no valuation and/or that any evidence IPS Law might have given as to their involvement in the Image Rights Agreement and its variation would not support the appellant's case. There are also other relevant witnesses who were not called without explanation, for example Mr Hough and Mr Manasseh. The absence of evidence from IPS Law and others in circumstances where I would expect to see such evidence and no reason has been given for the absence of such evidence does tend to suggest that whatever evidence they might have given either through witnesses or through documents would not support the appellant's case.

89. On balance I find that IPS Law did not provide any valuation or expression of opinion on the value of Geovanni's image rights. No supporting documentation has been produced and there is no evidence from anyone at IPS Law or from the Club who was privy to the negotiations. I would have expected to see evidence from IPS Law as to their involvement in valuing the image rights if they had done so, and there has been no explanation from the appellant as to why such evidence has not been adduced. IPS Law drafted an appellant's Statement of Case in the present appeal dated 1 April 2016. It refers to an "independent valuation" being obtained valuing the rights at £200,000-300,000. That is a reference to an informal valuation produced by the appellant's expert witness Mr Chapman in 2012 for the purpose of HMRC's enquiry which I describe later. If IPS Law had expressed any contemporaneous opinion on the value of Geovanni's image rights in 2008 then I am satisfied they would have referred to that valuation in the Statement of Case.

90. The Club's first season in the Premier League started exceptionally well. Having been favourites for relegation at the start of the season, they won 6 of their first 9 games and Geovanni scored 3 decisive goals. Towards the end of October 2008 they were at the top of the league equal on points with Chelsea and Liverpool which qualified the Club for a competition in the Far East the following summer. Mr Duffen told me that as a result of this success the Club was completely overwhelmed by the attention they were receiving and had no resources available to exploit Geovanni's image rights. I do not accept Mr Duffen's evidence as to why no steps were taken to exploit Geovanni's overseas image rights. There was never any clear intention or plan to exploit those rights and so it is not a surprise that the rights were not exploited.

91. The Club finished 17th in the Premier League table and retained its status for the 2009-10 season. In the spring and summer of 2009 there had been a financial cloud hanging over the Club. The principal backer had financial problems and it was becoming clear that the bank would be reducing the Club's loan facility. In August

2009 the Club sold one of its best players, Michael Turner, to pay the wages. There were discussions about selling the Club and Mr Duffen was trying to keep the Club in the best possible situation for a sale. Geovanni was a key player and the Club wished to extend his contract. In September 2009 there were discussions about extending the Playing Contract and the Image Rights Agreement. Mr Duffen was directly involved in re-negotiating an extension of the Playing Contract. He was not involved in discussions about extending the Image Rights Agreement.

92. A new Playing Contract was entered into on 23 September 2009 which extended the existing contract by a year to 30 June 2011. Geovanni's basic wage was increased substantially to £25,575 per week. In certain circumstances the contract would be extended for a further year at the rate of £30,575 per week.

93. An Additional Schedule to the new Playing Contract provided as follows:

> "Pursuant to an Agreement dated 23 September 2009 and made between the Club and the Image Rights Company the Club shall pay to the Image Rights Company the sum of £230,116 per annum from the 23rd September 2009 to the 30th June 2011. Should the player's contract be extended by a further year in accordance with Clause 8(f) the Image Rights Agreement will expire on 30 June 2012"

94. Mr Duffen said that the Image Rights Agreement was dealt with by IPS Law and that the value of the rights was also referred to IPS Law. He thought that IPS Law would have told the Club Secretary the value of the rights and this would have been communicated by the Club Secretary to Geovanni and his agent. Mr Duffen was not "hands on" in the negotiations which were conducted by the Finance Director and the Club Secretary. They consulted with IPS Law and Mr Duffen said that he would have been told that they had got advice from IPS Law.

95. I am satisfied that the evidence of Mr Duffen is to a large extent his reconstruction of how he thinks matters might have proceeded rather than how they did proceed. Again, I find that the Club did not obtain a valuation of Geovanni's image rights or any opinion as to the value of his image rights at this time.

96. It was pointed out to Mr Duffen that the original Image Rights Agreement made provision for payment to continue at the rate of £187,200 in the event that the Playing Contract was extended. He was asked to explain why the Club would decide to increase the payment to £230,116 per annum. Mr Duffen said that this was because there was a re-negotiation of Geovanni's Playing Contract "*and everything extant comes into the negotiation … It was part of the overall negotiations with the player. The agent would raise the value of the image rights based on the player's performance the previous season. When you are negotiating with a key employee to try and retain him, especially a footballer, then all aspects were open for negotiation*".

97. Despite that evidence, Mr Duffen maintained that Geovanni's salary and his image rights were separate issues, although they were negotiated at the same time. When asked whether it was worthwhile to increase the image rights payment he said that keeping Geovanni at the Club and the opportunity to exploit his image rights was

the Club's "central strategy". I accept that keeping Geovanni at the Club was a central strategy because he was a key player. I do not accept that the exploitation of Geovanni's image rights was a central strategy, or indeed that there was ever any strategy to exploit those rights.

98. There is a document entitled "Variation of Image Rights Agreement" which I am satisfied was drafted by IPS Law. It is undated and appears to be signed only on behalf of Joniere Ltd on 24 March 2010. By then Mr Duffen had left the Club and there was no witness or documentary evidence to explain the circumstances in which it came to be signed. HMRC produced a meeting note from a meeting on 15 and 16 June 2010 at which the Club's financial controller told HMRC officers that a variation of the Image Rights Agreement was "still currently under negotiation". I am not satisfied that there was ever a finalised agreement executed by the parties to vary the Image Rights Agreement.

99. A recital to the variation agreement stated that the parties believed that the quality and marketability of Geovanni's image had increased both with respect to his status and the Club's retained status in the Premier League. It also stated that the parties believed that the value of Geovanni's image would continue to increase.

100. Mr Duffen told me that the Club was confident that the value of Geovanni's image rights had increased significantly following his successful 2008-09 season. The Club was confident that it would have the opportunity to exploit the image rights as it had originally intended. However, Mr Bartlett's property investment business was facing severe cashflow problems and the Club's bankers reduced its loan facility from £20m to £15m. The result in Mr Duffen's words was to "distract all attention from the positive commercial opportunities as well as the [Club's] ability to exploit them". This included Geovanni's image rights. For reasons previously given I do not accept that there had been any clear intention or plan to exploit the image rights. I am satisfied that the extension of the Playing Contract and the variation of the Image Rights Agreement formed part of one set of negotiations. The increase in the payment for overseas image rights was offered in order to encourage Geovanni to sign and extended Playing Contract.

101. Mr Duffen told me and I accept that the Clubs' various financial issues resulted in him resigning as executive chairman on 26 October 2009. In the event Club was relegated from the Premier League at the end of the 2009-10 season. Geovanni left the Club that summer and moved to San Jose Earthquakes in the United States. The Playing Contract and the Image Rights Agreement were terminated at the same time.

102. There was evidence before me as to a legal dispute between Mr Duffen and the Club following his departure. There was also evidence as to a tax avoidance scheme entered into by Mr Duffen whilst he was at the Club which is the subject of a separate appeal to this tribunal, and of an enquiry into Mr Duffen's tax affairs. These matters appear to be relied upon by HMRC as going to the credibility of Mr Duffen and to demonstrate his willingness to enter into tax avoidance schemes. I do not consider that I am in a position to make findings of fact in relation to these matters and shall not do

so. Any relevance such matters might have to the issues on this appeal appears to be marginal at best.

103. The Club is now under new ownership. It was suggested that the previous owners had been responsible for the lack of documentary evidence in relation to the Club's dealings with Geovanni and Joniere. Even if that is right, and I make no finding to that effect, it does not explain the absence of evidence from IPS Law or others in relation to relevant matters.

104. The expert evidence before me considered the utility of image rights agreements generally in 2008 and 2009 and the valuation of Geovanni's image rights in those years. There was also evidence as to how Premier League clubs and HMRC have approached image rights since 2009, but that evidence does not really assist as to the position in 2008 and 2009.

105. In 2012 Mr Chapman was asked by the appellant's representative to provide an informal valuation of Geovanni's image rights for the purpose of HMRC's enquiries into payments made by the Club to Joniere. Mr Chapman expressed his opinion in a letter dated 6 August 2012. He said that in November 2008 Geovanni's overseas image rights were worth between £200,000 and £300,000. Mr Chapman accepted that he did not arrive at this valuation following any detailed or comprehensive analysis. The valuation included a figure of £100,000 ascribed to the value of a boot deal. A boot deal is where a manufacturer of football boots pays a professional footballer to wear their brand of boots in return for brand exposure and associated commercial activities.

106. There was no agreement between the parties or any direction of the Tribunal as to what precise issues the expert evidence should address. It is fair to say that this has led the evidence of both experts to lack focus. It is also unsatisfactory that Mr Chapman was asked to provide his evidence for this appeal without any access to the underlying evidence. This was apparently a mis-guided attempt to enhance his independence.

107. Mr Chapman was asked to provide his views on Geovanni as a player and whether he was in the "elite group of players" deserving of an image rights contact. He was also asked to comment on the basis and justification of his 2012 valuation. The unsatisfactory way in which Mr Chapman was instructed, by which I mean no criticism of Mr Chapman, is exemplified by what Mr Chapman said in a witness statement provided in response to Mr Hackleton's report. He stated:

> "I have been asked by solicitors for the Appellant whether I wish to make any responses or replies to what I have read in [Mr Hackleton's] Report, although given no indication as to what matters (if any) it might find useful for the Court (sic) to have my additional testimony …"

108. Both experts considered the justification for image rights contracts in general. They were agreed that elite players have marketable image rights which go beyond the rights granted to clubs by the Premier League standard playing contract. They also

agreed that it is not just elite players who might have marketable image rights. One of the examples given was Dong Fangzhou at Manchester United, mentioned earlier.

109. The value of a player's image rights comes from club sponsors and other businesses who might want that player to be associated with their brand. There are different tiers of such businesses. In the first tier are what may be regarded as global brands, such as car manufacturers who want to be associated with global superstars. There is no suggestion Geovanni fell into that category. There are other businesses who might want to be associated with players who would not be described as global superstars, but who nevertheless have an image with which the business wants to associate.

110. Mr Chapman took the view that clubs might also want to own a player's image rights to prevent others such as third party ownership companies from commercially exploiting those rights. Mr Hackleton accepted that clubs might want to own image rights to prevent others from using them, but in the context of brands which rivalled the clubs own sponsors. In this context there was a reference at [69] of Sports Club Plc to the "negative value" of being able to control the activities of players. Mr Duffen referred in his evidence to protecting the Club's interest in Geovanni's image rights and this may have been what he meant. However, I do not consider that any such factors were a consideration for the Club in acquiring Geovanni's overseas image rights.

111. Mr Chapman's evidence in summary based on his general knowledge of football and public knowledge as to Geovanni's career was that by the summer of 2006 Geovanni was "one of the world's elite players". He regarded Geovanni as the 4th or 5th best Number 10 of Brazilian origin which made him an elite and recognisable sportsperson and an attractive commercial proposition. Whilst Geovanni's career took a backward step in 2006-07 when he moved back to Brazil, in 2008 he was the Club's marquee signing and at that stage he remained in the "elite group of recognisable sports people". By November 2008, having started the 2008-09 season so well, Mr Chapman considered that the case for describing Geovanni as such was stronger.

112. Mr Chapman had only limited access to the documents and he assumed or was told that Geovanni's basic wage was in excess of £25,000 per week. I do not understand why Mr Chapman would have been given that figure when in 2008 Geovanni's basic wage was approximately £15,000 per week. In any event, applying the 20% rule to a wage of £25,000 – 30,000 per week indicated to Mr Chapman a maximum valuation of £260,000 to £312,000. However, he saw this as a crude valuation tool. He took into account his knowledge of comparable image rights agreements at that time. He concluded that £100,000 should be achievable for a boot deal and other commercial opportunities would be valued at £100,000 – 200,000.

113. In his letter dated 6 August 2012 Mr Chapman described the commercial opportunities as referable to "shirts and merchandise sales, boot deals, books/calendars and personal appearances". However, as Mr Hackleton pointed out

and as I accept, shirt sales and use of photographs in a Club Context were both covered by clause 4.6 of the Playing Contract.

114. Mr Chapman stood by the informal valuation he had given in 2012 of £200,000 – 300,000. In justifying that value, Mr Chapman said that the Club should have been able to exploit commercial opportunities using Geovanni's image rights in Brazil, Portugal and the UK. In his oral evidence he also said that "the Asian market was also of interest for Brazilian players". He emphasised the value of "a Brazilian No 10". I am satisfied from Mr Hackleton's evidence that for a club such as Hull City in 2008, the most important market to exploit Geovanni's image rights would be the UK, which was not covered by the Image Rights Agreement. Hence any value attributable to the UK rights ought to have been excluded from the valuation.

115. Mr Hackleton found it "utterly bizarre" that the Club only contracted to acquire Geovanni's overseas image rights. In his experience this was unique. I accept that evidence. The most obvious market to exploit Geovanni's image was the UK and the Playing Contract only gave very limited rights to do so. This may reflect the Club's inexperience in dealing with image rights and the situation the Club found itself in during the 2008 and 2009. Alternatively, it may suggest a lack of any real interest in exploiting the image rights and more interest in obtaining Geovanni's services as a player. Looking at the evidence as a whole I find it more likely that the Club did not have any real interest in commercially exploiting Geovanni's overseas image rights.

116. Mr Chapman made reference in his evidence to comparable deals. There was no evidence before me as to any comparable deals. I accept this might be for reasons of confidentiality, but the result is that I do not have the opportunity to test Mr Chapman's opinion in so far as it is based on comparables.

117. Mr Hackleton disagreed with Mr Chapman's evidence that in 2008 Geovanni was in the elite group of recognisable sportspeople. In support of this conclusion he relied not just on his general knowledge of football but also his professional involvement with the Premier League. He also relied on the fact that Geovanni did not have an image rights agreement with Manchester City. He said that if Geovanni had been part of that elite group the likelihood is that Manchester City would have entered into an agreement in relation to his image rights. Given that Manchester City were not at that time one of the top Premier League clubs I do not accept that is necessarily the case.

118. Whether a player is in the elite group of recognisable sportspeople is a value judgment. Clearly a player must be recognisable if his image rights are to have a value. It seems to me that what makes a player recognisable will include that player's footballing talent, the league in which he plays, the team for which he plays and possibly other personal attributes. The question which the parties invite me to answer in this appeal is whether or not Geovanni's overseas image rights had any commercial value.

119. Mr Chapman has given his valuation of Geovanni's image rights. Mr Hackleton does not expressly say that Geovanni's image rights had no value in 2008. He does not put a figure on what value they might have had. His conclusion was as follows:

> "My personal view is that Geovanni's commercial value outside of the UK at this time would not have been significant; I do not believe that [the Club] would have been approached with commercial partnerships, nor would they generate significant overseas merchandise sales based on Geovanni."

120. Surprisingly, this aspect of Mr Hackleton's evidence was not specifically explored. However, it seems to me that the tenor of Mr Hackleton's evidence as a whole was that there was little if any prospect of the Club entering into commercial agreements to exploit Geovanni's overseas image rights. I accept Mr Hackleton's evidence to this effect.

121. Mr Hackleton viewed the value of a boot deal as being irrelevant to the value placed on the Image Rights Agreement. He did not consider that the Club would have been entitled to any share of the revenue from a boot deal. Having said that, he considered that it would be Geovanni, if he was the owner of his UK image rights and/or Joniere as the owner of the overseas rights who would be entitled to negotiate a boot deal. It is not clear to me why if Joniere had some entitlement to revenue from any boot deal that that would not be covered by the Image Rights Agreement. I can see however that any boot deal would have to be negotiated by both Geovanni and Joniere, assuming that Geovanni had retained his UK image rights over and above those granted by the Playing Contract. This is essentially a matter of legal analysis and the difficulty appears to arise because there was no carve out in the Image Rights Agreement of rights in respect of a boot deal. Mr Hackleton described this as "the number one standard carve out in these types of negotiations". Based on the evidence I am not satisfied that any sum ought to be attributable to the value of Geovanni's overseas image rights in respect of a boot deal. I prefer Mr Hackleton's evidence in this regard.

122. I infer that Geovanni's image was exploited in the UK in a club context pursuant to the Playing Contract, for example in shirt sales or use in matchday programmes. However, it is striking that there is no evidence before me of Geovanni's image ever being exploited commercially in the UK outside of a club context or, more importantly, overseas. There was no evidence that Geovanni's image was ever exploited commercially prior to his joining the Club in July 2008 or after he left the Club in June 2010. Nor was there any evidence that the appellant considered at the time of entering into the Image Rights Agreement whether and if so how Geovanni had previously exploited the value of his overseas image rights.

123. It may have been possible for the Club to have commercially exploited Geovanni's image rights to some extent. On balance however, the appellant has not satisfied me that Geovanni's overseas image rights had any commercial value in 2008, or later in 2009-10 when consideration was being given to extending the Image Rights Agreement. It still remains possible that the Club believed that the overseas image rights did have a significant commercial value to justify the sums payable

under the Image Rights Agreement. However, no-one at the Club could reasonably have believed that Geovanni's overseas image rights had any commercial value. Mr Duffen acknowledged in his evidence that the Club felt that it could "walk on water". The Club may have had high hopes for the future in 2008 but I am not satisfied that Mr Duffen or anyone else at the Club ever addressed their minds to whether it was realistic to think that the Club could commercially exploit Geovanni's overseas image rights. If they had done, evidence would have been available to that effect.

Discussion

124. Mr Gordon submitted that the Playing Contract and the Image Rights Agreement speak for themselves. Further, they are supported by the evidence of Mr Duffen as to the circumstances in which the Club satisfied itself that Geovanni's overseas image rights had a commercial value and that the Club intended to exploit those image rights. He submitted that was enough to satisfy the burden of proof on the appellant to show that the determinations and decisions were wrong. The Image Rights Agreement was as much a reality as the Playing Contract. Mr Gordon submitted that the high point of the respondents' case was the absence of documentary evidence of the negotiations and the admitted fact that the image rights were not exploited.

125. Mr Nawbatt's primary case is that viewed realistically the payments made by the appellant to Joniere were earnings of Geovanni. He submitted that the appellant had failed to adduce sufficient evidence to satisfy the burden of establishing that the payments made to Joniere were not earnings. In particular Mr Nawbatt pointed to:

(1) The lack of any documentation corroborating the negotiations which led to the Playing Contract and the Image Rights Agreement

(2) The appellant's failure to adduce evidence from individuals involved in those negotiations.

(3) The appellant's failure to adduce any evidence in relation to the involvement of IPS Law, in particular any advice given at the time in relation to the Image Rights Agreement and the valuation of Geovanni's image rights.

126. I consider that as a matter of law I must take a realistic view of the payments made, by reference to their substance and not their form. The existence of the Image Rights Agreement is not conclusive evidence that payments said to be made pursuant to that agreement are consideration for the acquisition of Geovanni's overseas image rights. The burden is on the appellant to show that viewed realistically, in substance the payments were made to acquire Geovanni's image rights and not earnings of Geovanni.

127. The only evidence relied on by the appellant is essentially the existence of the two agreements and Mr Duffen's evidence as to what happened. Mr Duffen was not directly involved in negotiations for Geovanni's Playing Contract or for the Image Rights Agreement. His evidence was that he "signed them off". Further, for reasons previously given I do not consider that Mr Duffen's evidence in relation to the negotiations was reliable.

128. In taking a realistic view of the payments and considering their substance and not just their form I have had regard to the evidence as a whole. I consider the following findings and inferences to be particularly relevant:

(1) The Club did not have any clearly defined intention or plan to commercially exploit Geovanni's overseas image rights.

(2) There is no reliable evidence as to how the Club arrived at the annual image rights payment of £187,200 in 2008 and £230,116 in 2009.

(3) The Club did not obtain any valuation or opinion as to the value of Geovanni's overseas image rights in 2008 or 2009.

(4) The Club offered to increase the sum payable for Geovanni's overseas image rights without any contractual obligation to do so and as part of negotiations in 2009 intended to secure Geovanni's services as a footballer for a further year.

(5) The Club did not have the resources to exploit Geovanni's overseas image rights even if there was a market to do so.

(6) The Club did not have any real interest in commercially exploiting Geovanni's overseas image rights.

(7) There was little if any prospect of the Club exploiting those rights.

(8) Geovanni's overseas image rights were never commercially exploited, before, during or after his period at the Club.

(9) The appellant has not satisfied me that Geovanni's overseas image rights had any commercial value.

(10) No-one at the Club could reasonably have believed that the rights had any commercial value to the Club.

(11) No-one at the Club, including Mr Duffen ever addressed their minds to whether it was realistic to consider that the Club could commercially exploit Geovanni's overseas image rights.

129. These are all facts which, viewed realistically, tend to suggest that the sums payable by the Club to Joniere were actually paid to secure Geovanni's services as a footballer and not to obtain the right to commercially exploit his overseas image.

130. Mr Nawbatt also relied on the fact that the employment contract included reference in its schedule to the Image Rights Agreement. I do not accept that is a relevant factor. Premier League rules and the Playing Contract required the terms of an image rights agreement to be described in a schedule to the Playing Contract.

131. I note that neither party adduced evidence as to the ultimate ownership and control of Joniere. However, I infer from the circumstances in which Joniere was introduced to the Club by Geovanni's agent that Geovanni had at least some interest in payments being made to Joniere.

132. I am not making a finding that the Image Rights Agreement was a sham. The Image Rights Agreement did as a matter of contract grant rights to the Club to exploit Geovanni's overseas image rights. I do not accept that those rights had any commercial value. I am satisfied that the Club viewed the sums payable under the Playing Contract and the Image Rights Agreement as an overall package which Geovanni required and the Club was willing to pay for him to sign for the Club. In reality payments to Joniere were a reward for Geovanni's services as a footballer and formed part of his earnings.

Conclusion

133. For the reasons given above I dismiss the appeal.

134. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 22 MARCH 2019