

Newcastle United Plc. v. HMRC

[2007] EWHC 612 (Ch)

By Paul Harris

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On 23rd February 2007 Mann, J. allowed an appeal by Newcastle United Plc, the owners of Newcastle United Football Club ("Newcastle United"). He remitted the case for a retrial in the Tribunal.

The case concerned the deduction of input VAT on the fees paid by Newcastle United to football Players' Agents when carrying on transactions relating to Players' contracts, for example, in transfers or contract renegotiations.

The Tribunal found not only that there was an obligation of exclusivity owed by a Player to an Agent only to have one Agent acting for him in a transaction, but that there was also an obligation on the part of the Agent to act exclusively for the Player in relation to that transaction. It had then considered that, in light of various written materials, including Agency Representation agreements between Players and various Agents, the Agents who Newcastle United claimed had been providing services to it could not in fact have been providing those services. To do so would have been in breach of the obligations of exclusivity and have given rise to conflicts of interest. Therefore, it was decided, there was no supply to Newcastle United, and no entitlement to deduct.

The Tribunal so found, notwithstanding that Newcastle United claimed, and submitted evidence to the effect, that it was "industry practice" for an Agent to a particular Player often to act for Clubs (including Newcastle United) in a given transaction concerning that Player. When acting for Newcastle United the Player's Agent would provide services to Newcastle United and be

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paid directly by the Club in return for those services. Having paid the Agent for his services and having been charged output tax by the Agent on those services, Newcastle United wished to deduct that tax as its input tax.

HMRC had denied the deduction, taking the view that Newcastle United had not proved that the various Agents had actually provided services to the Club, when they were signed up to act for the Player. HMRC was concerned with the lack of documentary evidence concerning the alleged "industry practice", with how the claim appeared to be contradicted by much of the documentation that did exist, with the conflicts of interest that arose, and with the breaches of football regulatory provisions to which such an "industry practice" would give rise.

There was a further dispute between the parties as to whether, even if the written, contractual relationship in the transaction was between the Player and the Agent, nevertheless this was a 'third party consideration' case (along the lines of *Redrow* [1999] STC 161 and *WHA* [2004] STC 1081) in which the third party payer (Newcastle United) received a benefit (as well as the Player) and could, therefore, recover the input tax.

The High Court was deeply critical of the Tribunal's Decision. It held that the Tribunal had erred in concluding that there was an obligation of exclusivity owed by the Agent to the Player and by overlooking the fact that, even if there was such an obligation of exclusivity, it still did not mean that the Agent had not provided services to Newcastle United, for the simple reason that the Agent could be acting in breach of that obligation.

Effectively, the High Court upheld the submission that the Tribunal had fallen into the "classic error" of basing its VAT analysis exclusively on what written contracts say rather than on what was actually done in practice.

This error permeated the entire analysis undertaken by the Tribunal, because it began its assessment of the each of the transactions against this flawed background. The correct question would have been to assess each transaction in turn, on its merits, taking account of all the evidence relating to that transaction. In that regard, it may well have been relevant to note inconsistencies and contradictions in documentation as evidential matters going to the likelihood of there being no supply of services by the Agent to Newcastle United, but for VAT purposes those matters were only evidential. In other words, the story did not end with conflicts of interest, breaches of exclusivity provisions, or breaches of football regulatory codes.

As to the *Redrow* issue, the High Court was in no position to decide. It held that, absent a proper analysis on the facts of the true nature of the relationship of the parties in each of the transactions, it could not decide which party or parties had truly received benefits. That was a matter central to the *Redrow* analysis. Accordingly there would have to be a retrial.

As the High Court put it, the key question on the facts was:

"...did [the Agent] *really* provide services to the Club...?" (emphasis added)

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