

Image Rights Companies in Football - Where are we now?

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Pete Hackleton

Tax Partner, Sports & Entertainment Group, Saffery Champness

The FA Premier League was formed in 1992, in part to capitalise on the perceived commercial value of English football both domestically and through global television markets.

Over the next few years a number of the top footballers from around the world moved to England to play in the Premier League. As these players started to move to the UK, the standard of football increased, as did the global appeal of the English game. Broadcasting rights both in the UK and across the world increased exponentially. This virtuous circle meant more money for the member clubs, with the increase in their share of central broadcasting revenues, and more money to spend on players. This further increased the quality of the product for broadcasters and fans to enjoy, and consequently the broadcast rights became even more valuable.

As the new millennium came and went it became clear that the value of high-profile talent employed by the clubs went far beyond the registration rights that attach to their on-field ability. In almost all cases, players were still acquired for their on-field ability, but the commercial value of a player was not to be underestimated. Real Madrid estimated that David Beckham's total contract value over his four year deal was recouped in the first six months he spent in Madrid on shirt sales alone. During his four years in Madrid, merchandising profits increased by a staggering 137%.

Delivering on commercial agreements is a key factor for Premier League clubs to be able to deliver to their commercial partners and increase revenues. Now we are in an era of Financial Fair Play (FFP) the ability to grow commercial revenues will be vital in order to increase funds available to spend on the playing squad to satisfy the 'break even requirement'. In order to do this, it is absolutely vital to secure commitment from key talent (both players and managers) to contribute regularly to the clubs commercial programmes.

THE START OF IMAGE RIGHTS STRUCTURES IN THE UK

As top international players started to move to the Premier League in the 1990's, the use of image-rights contracts became increasingly popular. High profile players moving to England from a top European club might have an image rights structure in place already. Others didn't, but wanted one to put them on an equal footing with their overseas colleagues, and English players and agents also started to recognise the importance and value of the structures.

In the summer of 1995, Arsenal Football Club bought the Dutch International Denis Bergkamp and then England captain David Platt from Inter Milan and Sampdoria respectively. Both players had existing image rights companies and contracts. Arsenal entered into playing contracts with both players and image-rights contracts with the two players' image rights companies in order to secure the players' commitment to the clubs commercial projects.

The UK tax authorities (first HMIT and then HMRC) later enquired into the image rights arrangements, and ultimately took the case to a Tribunal hearing. At the hearing in the case of 'Sports Club vs HMIT', heard in 2000, it was ultimately held that:

'On the facts, the promotional and consultancy agreements had an independent value. The players had had similar agreements with other clubs and it was clear that organisations were willing to pay for the right to use the players' images in association with their products, as provided for under the agreements. Other players of a similar calibre also had such arrangements. Moreover, it was not right to describe the payments as a 'smokescreen' for additional remuneration...payments were to be made under them [the image rights contracts] and they could have been sued upon them'

It is clear therefore that in this case (to date still the only case taken by HMRC in relation to image rights structures) the courts found in favour of the taxpayers, Platt and Bergkamp.

Subsequently HMRC argued, through correspondence, with various football clubs and image rights companies that the Premier League playing contract (clause 4) covers the services provided by players – that clubs already hold the right to utilise a players' image under this clause. This is clearly not the case, as clause 4.11 states:

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.

Therefore, where a players image rights have separately been transferred into a company, the services provided to clubs under an image rights contract would typically go way beyond what is expected of a player under the standard Premier League contract. Clause 4.11 gives the club and the player the right to enter into a separate deal in relation to the use of the player's image outside the standard playing contract, a right that is clearly a valuable one for club to contract with.

Image rights contracts have been and continue to give clubs the vital ability to require a player or manager to carry out activities over and above their contractual obligations. This in turn drives the continued success, increased brand identification and crucially, the increased revenues of both the football clubs.

KEY CONSIDERATIONS IN ESTABLISHING THE IMAGE RIGHTS STRUCTURE

In order to set up an image rights company it must be clear that the individual has an image that has an independent value to sponsors. If the image has a value, and the player or manager wants to hold this in a separate entity in order to protect and separately manage those rights, the image should be valued and the rights transferred to a company. Capital gains tax (CGT) will typically be due on the transfer of rights based on the market value of those rights (as it is unlikely that reliefs such as incorporation relief, which might allow any gain to be deferred, will be available). A tax charge will arise as the individual will dispose of the image rights held by them personally, so that it becomes an asset of a new company set up for that purpose.

Once the company is established and the rights transferred, then on any future transfer a club will need to negotiate a deal between the player or manager for their performance duties. In addition, if they want access to the individual's image for commercial activities, the club will separately need to negotiate a deal with the image rights company.

It is now commonplace for players and managers to have existing image rights companies in place when they move to a new club. The initial valuation work is therefore unnecessary, and it is simply a matter of commercial negotiation between the club and the image rights company to agree a fair market rate for the image rights contract. This is often agreed at the same time as the individual's employment contract, which is why HMRC often seek to challenge such agreements as effectively '*disguised remuneration*'. Consequently, ensuring that separate discussions take place and are clearly documented between a) a players advisors and the club in relation to an individual's employment contract, and b) between the image rights company and the club in relation to the image rights contract is crucial.

Often, the individual will not be UK domiciled for tax purposes and will have worked in a number of other countries before coming to the UK. Consequently, the individual's image rights may be more popular outside the UK than in the UK. In that scenario, the individual might establish two image rights

companies; a UK resident company to manage UK rights, and a non-UK resident company to manage non-UK rights. There is often clearly a tax benefit for doing so, as it ensures that non-UK source income from personal commercial deals are not brought into the UK tax net for non-domiciled individuals. However there are often also significant commercial benefits; the non-UK resident company often has access to or knowledge of non-UK markets and can therefore maximise the value of such rights. There is no reason why non-UK rights of a player or manager currently working in the UK would need to be managed in the UK.

Clubs which acquire the rights should monitor the benefit they receive from the image rights arrangements as they would any other commercial contract they enter into. Assessing the benefit of a player or manager on the clubs commercial activities can be difficult, but clubs should record the number of appearances the individuals make under the various commercial partnerships that the club has entered into. Prior to the renewal of such an agreement, a review of activities carried out and perceived commercial worth to the club should be undertaken to ensure that any new contracts reflect the benefit the club has obtained during the initial deal.

OUT OF CONTROL?

Over the ten years from the first image-rights arrangements, a significant number of image-rights contracts were entered into, and HMRC commenced numerous enquiries into the contracts entered into by many clubs. In some cases, such enquiries were justified as the amounts paid to image rights companies were excessive in the context of the players overall package and to the value to the clubs' commercial partners. Equally however, in many cases careful consideration had been given to such arrangements, and a prudent view had been taken of the value of the individual's image.

As set out above, there are clearly a number of factors to consider in entering into image rights agreements. From an individual perspective, the rights must be identified, valued (split between UK and non-UK if necessary) and transferred into an image rights company (or companies). From the clubs perspective, the benefit of using the players' image should continually be assessed and evaluated.

HMRC ON THE ATTACK

As the use of image-rights structures became more widespread following the Sports Club case, it became clear that best practice was not being followed in many cases with image rights contracts being used as a tax efficient method of delivering part of an overall 'package' to players.

HMRC therefore changed their angle of enquiry in this area and began opening enquiries into the overall tax affairs of many FA Premier League and Championship clubs, focusing primarily on the use of image rights contracts. During these enquiries HMRC demanded a huge amount of documentation and further information relating to the image rights arrangements that clubs had entered into. The enquiries required extensive time on behalf of both HMRC and the clubs in order to collate and process the information requested.

Ultimately, after a considerable amount of time, effort and commitment on both sides, HMRC offered the clubs a deal to settle historic image rights enquiries up to 31 December 2010. The deal was based on the clubs turnover, and required a partial settlement of income tax and National Insurance Contributions (NICs) which would have fallen due had the payments to image rights companies been treated as salary payments.

It is understood that almost all Premier League clubs settled with HMRC on this basis, while a number of Championship clubs reached similar agreements.

Settlement offers from HMRC accepted that a proportion of the payments to image-rights companies were bona fide payments to companies for the use of the image, but that a smaller proportion should be treated as salary, with outstanding Pay As You Earn (PAYE) and NICs paid to HMRC. In many cases, players had long since left the clubs, and the clubs were held liable for making good the shortfall to HMRC. In the majority of cases penalties were not charged.

WHERE ARE WE NOW

HMRC's settlement offer was not binding on any club or future deal. From 1 January 2011 therefore any new contracts negotiated could still be subject to enquiry. However that on the basis of:

1. the Sports Club case;
2. HMRC agreeing the tax position of a number of players with image rights companies with no adjustment to the players tax returns;
3. the settlement agreement entered into between HMRC and clubs; and,
4. HMRC's negotiations with Premier Rugby to agree acceptable parameters for image rights payments for professional rugby union players as a proportion of an overall remuneration package;

HMRC recognise that, where structured properly, an image rights structure is an effective mechanism for a club to contract with a company to access an individual's image rights. If HMRC were certain that in general the agreements had no underlying commercial value, they would not have agreed to a settlement with the clubs.

If HMRC were able to successfully challenge an image-rights arrangement, they would seek to treat payments to the image rights company as salary payments. PAYE and NICs (employers and employees) would fall due as well as interest and penalties.

CONCLUSION

Where structured properly, with clear guidance followed by the player on setting up the structure, and the clubs on contracting with the image rights companies, that image-rights companies are an effective way of holding and monetising such rights. The verdict in the Sports Club case itself made clear that *'Moreover, it was not right to describe the payments as a 'smokescreen' for additional remuneration...payments were to be made under them [the image rights contracts] and they [the image rights companies] could have been sued upon them'*.

Therefore despite HMRC's clear dissatisfaction with the abuse of such structures in the past, where it is appropriate to implement such an arrangement for a high-profile player going forward, such structures are still effective. However it is clear that they remain open to close scrutiny from HMRC, and therefore care should be taken to implement them correctly.

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