[2013] UKUT 0336 (TCC)
Case No: FTC/78/2010

TYPE OF TAX – Corporation tax - deductibility of expenditure - sponsorship payments intended to improve fortunes of sports club- expectation of trade benefits principally as a result of recognition by others involved with the club of taxpayer's benefaction - dual purpose of benefiting sports club and taxpayer's trade - payments not deductible - Income and Corporation Taxes Act 1988, s 74 – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
ON APPEAL FROM THE FIRST TIER TRIBUNAL (TAX CHAMBER)
SITTING IN LONDON

Before:

MR JUSTICE BIRSS

- -

Between:

INTERFISH LIMITED **Appellant**
- and -
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

Jonathan Peacock QC (instructed by **Deloitte LLP**) for the **Appellant**
Patrick Way QC (instructed by **HMRC**) for the **Respondents**

Sitting in public in London: 20th May 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE BIRSS

Mr Justice Birss:

1. This is an appeal from two inter-related decisions of Mr Nicholas Paines QC sitting as the First-tier Tribunal (FTT) by which the Appellant, Interfish, appealed against assessments to corporation tax insofar as they related to payments made by Interfish to Plymouth Albion Rugby Football Club (Plymouth Albion). The appeal is concerned with the deductibility of such payments in the computation of Interfish's profits for the purposes of corporation tax for its accounting periods ended 31 January 2003, 2005 and 2006. The payments come to about £1.2 Million and the extra tax due if the payments are not deductible is about £300,000. Before the FTT, Interfish contended that the payments are deductible but the FTT held that they were not. Interfish appeals and contends that in reaching the conclusion it did, the FTT made an error of law. Before me Interfish is represented by Mr Jonathan Peacock QC instructed by Deloitte LLP. The respondents on the appeal, the HMRC, contend that there has been no error of law. They support the reasoning of Mr Paines QC. The HMRC are represented by Mr Patrick Way QC instructed by the HMRC.

Background

2. Mr Colam is a director of Interfish. The judge set out Mr Colam's involvement with the rugby club in considerable detail in paragraphs 6 - 30 of the first decision given on 13 May 2010. There is no point in trying to summarise the whole of the history of the dealings between Mr Colam and the rugby club which span a period of approximately ten years. Highlights include the following.

3. Interfish is a fishing, fish processing, fish wholesaling (in the U.K. and internationally) and fish retailing business based in Plymouth. Interfish is both a major employer in Plymouth and a significant business in the south west of England. Its retail business (within the stores of one of the major supermarkets retailers) trades as "South West Seafoods". Interfish is wholly owned by Jan Colam and a family trust, and is controlled by Mr Colam. It was common ground before the judge below and before me that Mr Colam's state of mind amounted to the state of mind of the company.

4. Plymouth Albion is a rugby club based in Plymouth. It is a member of the Rugby Football Union. In the relevant years the club was one of the largest clubs in the south west. It played in the RFU's National Division 1 and was eligible for, and played in, the RFU's national cup competition drawing considerable crowds to home matches. In the relevant years Interfish made payments to Plymouth Albion which it treated as deductible amounts in its accounts under the heading Advertising and Marketing. The sums paid represent about 1%-3% of Interfish's turnover.

5. Mr Colam became heavily involved in the club in about 1999. At that stage the club was in severe financial difficulties. The management hoped that Mr Colam might help out. The club was going to incorporate and he was invited to join the board. £10,000 to £12,000 was needed urgently and only £6,000 to £8,000 had been raised though subscriptions for £10 shares in the newly formed company. Mr Colam was asked to buy 300 shares and did so in order to help the chairman out and keep the club

going. He also became a director of the new company. From a statement that Mr Colam made to the board in December 2003 it appears that in 1998/1999 the club had debts in the region of £200,000. At that stage other sponsors would not increase their contributions over what one of the witnesses, Mr Harris, a partner of a local firm of chartered accountants described as "a magic threshold". Interfish was prepared to be more generous. Mr Colam wanted to be established in the business community in Plymouth and to have the value of the business connections that the club afforded. There seems to be no dispute that Mr Colam did obtain significant influence in the community through being the club's major sponsor in a way which could not be achieved by simply participating as a director.

6. The debts which the club owed included a substantial overdraft which was an embarrassment to the local Regional Corporate Director of the NatWest Bank, Mr Spencer, who was also closely involved in the running of Plymouth Albion. Mr Colam said in evidence that he wanted to show the bankers who were involved with the club that he could make the club run sensibly.

7. In 2003 Mr Colam acquired more shares and he told the FTT that he did this because he did not want to see his ideas for the club outvoted; he wanted the club to go in the direction in which he thought it ought to go in the interests of Interfish. After the relevant sponsorship payments with which this case is concerned were made, Interfish has made some further payments to Plymouth Albion but by about 2006 Mr Colam had achieved what he wanted to for Interfish and had told the club that he was reducing his sponsorship payments.

8. In the relevant period Interfish had advertised its South West Seafoods brand on a perimeter hoarding and on players' shirts as did other local companies. It is in addition an agreed fact that Interfish's South West Seafoods logo has been on each page of the club's website. Interfish also used the club for business hospitality. It may, although the evidence was not clear on the point, have paid fees for some of the above. What the judge thought was most significant was that Interfish has both lent money to the club and made substantial payments to cover what would otherwise be a deficit in the club's player budget. One of the club's needs was to improve its squad of players. Interfish's first sponsorship payment was to enable the club to recruit the Plymouth born Graham Dawe, a former Bath, England and British and Irish Lions player as its director of Rugby. Mr Colam attended committee meetings with a view to giving Mr Dawe support in getting finance for a group of players that would make the club more attractive to spectators. For example, on 22 April 2004, a budget for the year 2004/2005 was presented including a player budget of £658,000 and Interfish sponsorship of £250,000. Mr Dawe was asked if he could survive and obtain promotion with this budget and he said it was risky but possible. The budget was approved.

9. A particular benefit to Interfish which Mr Colam perceived as a result of making the payments, apart from visible promotion of South West Foods, was that it made it easier to obtain bank funding for Interfish's expansion. The FTT accepted that the role that Mr Colam had taken on at the club in 1999, his promise of financial support and the loan that Interfish was making to the club at least by December 2001 was perceived by Mr Colam as likely to earn Interfish the goodwill of Mr Spencer of the NatWest Bank. Mr Colam's view of his position as director and benefactor of the rugby club was that it opened doors within NatWest and the Plymouth business

community. The judge accepted that this role eased Mr Colam's dealings with Mr Spencer and to some extent with his successors. I should say Mr Spencer left NatWest in 2003.

10. Another example given in evidence of the advantages Mr Colam's position at the club brought to Interfish was an occasion in which it was necessary for Interfish to bring a large vessel into Plymouth unexpectedly at short notice. On that occasion arrangements were made quickly for Interfish to have the temporary use of a ferry berth. The judge indicated that he could well understand that business people who frequented the club and in particular those in involved in its affairs were disposed to assist Interfish and this is an example of that.

11. Mr Colam's position at the club also enabled him to have club players, who understandably enjoyed a degree of star status locally, visit the counters of Interfish's South West Foods wet fish counters which are within the major supermarkets in the area. The players visited the counters dressed in playing kit and this was a very effective way of promoting the counters.

12. Mr Colam used the club for business entertaining. For example there was a visiting team from Japan. Japan is a very important export market for Interfish and this earned considerable goodwill for Interfish in Japan.

13. The judge summarised the position as follows in paragraph 29:

> "*[…]* In summary, his position as the benefactor of the city's Rugby Club will have given Mr Colam a particular status among those in the local community who were aware of it - and those people will have included business and professional people who frequented the Club – of a sort that will have favourably disposed them towards Mr Colam and his business. I consider that Mr Colam was generally aware of those possibilities when he embarked on the series of sponsorship payments; in my judgment he would not have made the payments if he had not anticipated benefits of that sort for Interfish. I do not consider that he was using Interfish's funds to finance the Club simply in order to give himself the satisfaction of being the benefactor of the Club or of enjoying the status which that position carried with it. I consider that he did derive satisfaction out of what he and Interfish were doing for the Club and his status within it; he would not be human if he did not derive pleasure when, for example, a team strengthened through Interfish's financial contributions played successfully or when the team captain came over to speak to guests Mr Colam was entertaining at the best table in the hospitality suite. But I do not find that his motive in making the payments was to gratify himself in those sorts of ways."

14. The judge accepted that the loans from the NatWest Bank of some £45m were crucial to Interfish's expansion and that the sponsorship payments may have assisted, particularly at the time of Mr Spencer, but the judge did not accept that they were determinative of the NatWest's decision to make them. The judge also found that the

influence and connections that Mr Colam established can only have been beneficial to Interfish, again to an extent that cannot be qualified financially.

Tax law

15. Interfish, as a UK resident company, is liable to corporation tax on the profits of its trade (sections 6, 8, 9, 18 Income and Corporation Taxes Act 1988 ("ICTA 1988"). Its taxable trading profits are calculated by taking its accounting profits as determined under generally accepted accounting practice and making such adjustments as are required by, inter alia, the tax statutes (in this case s42 of the Finance Act 1998). One such adjustment, required by s74(1)(a) of ICTA 1988 is to exclude , in computing the amount of profits to be charged under Case I or Case II of Schedule D, amounts of expenditure which are not "wholly and exclusively laid out or expended for the purposes of the trade". The relevant principles to be applied when considering the language of s74 (1)(a) have been identified in a number of authorities. They were common ground.

16. The relevant provision seeks to identify whether the expenditure is both "wholly" and "exclusively" incurred for business purposes. "Wholly" refers to the quantum of payment. No issue about that arises on this appeal. The case concerns the requirement that the expenditure must be exclusively for business purposes. Essentially the point is that the business purpose must be the sole purpose of the expenditure. Expenditure for a dual purpose, one of which is a business purpose but the other is not, falls outside the provision and is not deductible. The issue arose in ***Vodafone v Shaw*** (1997) 69 TC 376. There Vodafone had made a substantial payment to rid the group of which Vodafone was the parent of a trading liability. The payment was also a benefit to two subsidiary companies since it meant that it would be unnecessary to put in hand whatever arrangements there might be within the group to enable the liability to be financed. The Special Commissioners held that the payment was made for the benefit of the taxpayer company and the two subsidiaries and so was not made exclusively for the purposes of the trade carried out by the taxpayer company. The High Court upheld the decision of the Special Commissioners but the Court of Appeal allowed the appeal and found for the taxpayer company. The Court of Appeal held that the liability in question was a liability of the taxpayer alone and so the directors' intention in making the payment, whether articulated or not, was exclusively to serve the purposes of the taxpayer's trade. The fact that the payment might benefit the subsidiary companies was merely a consequential and incidental effect of the elimination of the liability; it was not its purpose. At p437 Millett LJ (as he then was) summarised the effect of the authorities and said as follows:

> "The leading modern cases on the application of the "exclusively" test are *Mallalieu v Drummond* [1983] AC 861 and *Mackinlay v Arthur Young McClelland Moores & Co. [1990] 2 AC 239* . From these cases the following propositions may be derived:
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> 1 The words "for the purposes of the trade" mean "to serve the purposes of the trade". They do not mean "for the purposes of the taxpayer" but for "the purposes of the trade", which is a different concept. *A fortiori* they do not mean "for the benefit of the taxpayer."

2. To ascertain whether the payment was made for the purposes of the taxpayer's trade it is necessary to discover his object in making the payment. Save in obvious cases which speak for themselves, this involves an inquiry into the taxpayer's subjective intentions at the time of the payment.

3. The object of the taxpayer in making the payment must be distinguished from the effect of the payment. A payment may be made exclusively for the purposes of the trade even though it also secures a private benefit. This will be the case if the securing of the private benefit was not the object of the payment but merely a consequential and incidental effect of the payment.

4. Although the taxpayer's subjective intentions are determinative, these are not limited to the conscious motives which were in his mind at the time of the payment. Some consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made.

To these propositions I would add one more. The question does not involve an inquiry of the taxpayer whether he consciously intended to obtain a trade or personal advantage by the payment. The primary inquiry is to ascertain what was the particular object of the taxpayer in making the payment. Once that is ascertained, its characterisation as a trade or private purpose is in my opinion a matter for the [Tax Tribunal], not for the taxpayer. Thus in *Mallalieu v Drummond* the primary question was not whether Miss Mallalieu intended her expenditure on clothes to serve exclusively a professional purpose or partly a professional and partly a private purpose; but whether it was intended not only to enable her to comply with the requirements of the Bar Council when appearing as a barrister in Court but also to preserve warmth and decency.

Similarly, in my opinion, the present case does not involve an inquiry whether the directors who resolved to enter into the fee cancellation agreement consciously intended to obtain a benefit thereby for one company rather than another. The primary inquiry is to ascertain the particular object which the directors sought to achieve by it. Once that is ascertained the characterisation of that object as serving the purposes of the trade of one particular company or another is not a finding of primary fact, but a conclusion based upon the primary facts."

17. Both sides before me agreed that Millett LJ's summary was correct but Mr Peacock reminded me that, as with all summaries, it is sometimes worth returning to the source materials. In this case the earlier authority on which Mr Peacock placed reliance was the judgment in ***Bentleys Stokes & Lowless v Beeson*** (1952) 33 TC 491. The case concerned the expenses associated with a firm of solicitors having lunch with clients. The Commissioners had found that there was in part a social element to the lunches given by the partners to their clients and so the expenses were not incurred wholly and exclusively for the purposes of the firm's profession. Giving the judgment of the Court of Appeal Romer LJ said (at 503 to 504)

> "The relevant words of para. 3 (a) of the Rules applicable to Cases I and II - "wholly and exclusively laid out or expended for the purposes of the profession" - appear straightforward enough. It is conceded that the first adverb - "wholly"- is in reference to the *quantum* of the money expended and has no relevance to the present case. The sole question is whether the expenditure in question was "exclusively" laid out for business purposes, that is: what was the motive or object in the mind of the two individuals responsible for the activities in question? It is well established that the question is one of fact: and again therefore the problem seems simple enough. The difficulty however arises as we think from the nature of the activity in question. Entertaining involves inevitably the characteristic of hospitality. Giving to charity or subscribing to a staff pension fund involves inevitably the object of benefaction. An undertaking to guarantee to a limited amount a national exhibition involved inevitably supporting that exhibition and the purposes for which it has been organised. But the question in such cases is: was the entertaining, the charitable subscription, the guarantee, undertaken solely for the purposes of the business that is solely the objective of promoting the business or its profit earning capacity?
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> It is, as we have said, a question of fact. It is quiet clear that the purpose must be the sole purpose. The paragraph also says so in clear terms. If the activity being undertaken with the object both of promoting business and also of some other purpose, for example, with the objective of indulging the independent wish of entertaining a friend or stranger or of supporting a charitable or benevolent object, then the paragraph is not satisfied though in the mind of the actor the business motive may predominate. For the statute so prescribes. *Per contra*, if in truth the sole object is business promotion, the expenditure is not disqualified because the nature of the activity necessarily involves some other result, or the attainment or furtherance of some other objective, since the latter result or objective is necessarily inherent in the Act."

18. After this passage Romer LJ refers to two examples in which on both occasions a solicitor has lunch with a client and discusses business. In the first example the solicitor's motive is to see his friend, a client, knowing that he may wish to talk business. In the second the client wishes to see the solicitor urgently on a matter of business but is only available at lunchtime. The first example is not deductible even though the parties discuss business over lunch because the solicitor's motive was not solely to do so whereas in the second case is allowable even though there is present inevitably the motive or purpose of hospitality, since that motive is unavoidably involved in the activity itself.

19. ***Bentleys*** illustrates the difficulties which can arise in practice with a test referring to a sole purpose in circumstances in which there are two possible motives or purposes in

play. If someone has lunch with a business contact then self evidently one of their motives is and is always to gain sustenance by eating some food. And yet in some circumstances the law permits the expense to be deductible whereas in others it does not. The task is to distinguish between a case in which the business purpose is the tax payer's sole purpose and the other purpose is merely necessarily inherent (allowable); and a case in which the business purpose may be predominant but the other purpose is present as well (not allowable). The way in which the law distinguishes between these two cases is by focussing on the taxpayer's subjective intentions. They are determinative (***Vodafone***). A judgment must be made about the matter, which is a matter of fact. That judgment will be heavily influenced by the taxpayer's conscious motives but it is not bound by them.

20. Mr Peacock cited ***Usher's Wiltshire Brewery v Bruce*** (1914) 6 TC 399 per Lord Sumner at 437 to illustrate the point that the fact that there is a benefit to a third party does not, of itself, mean that a payment is non-deductible and he also cited ***Atherton v British Insulated Cables*** (1925) 10 TC 155 per Viscount Cave L.C. to show that the business purpose to satisfy the wholly and exclusively test can be to indirectly facilitate the business in question. I accept those points.

21. Mr Peacock also cited ***Icebreaker 1 v HMRC*** [2010] UKUT 477 (TCC) and drew attention to paragraph 38 of the judgment of Vos J in which he pointed out that the purpose of s74 of ICTA 1988 was to allow a deduction from taxable profits for revenue expenses incurred by the taxpayer for the purposes of trade and that the focus is all on the taxpayer's own business, not the use made of the money by the recipient. I accept Mr Peacock's submission. The issue is always to focus on what the taxpayer's purpose was, not the purpose of the recipient.

22. I should mention two decisions of the Special Commissioners since although they are not binding on me they are referred to in the decision. They are ***Executive Network (Consultants) v O'Connor*** [1995] Sp C 56 and ***McQueen v HMRC*** [2007] Sp C 601. In ***Executive Network*** the taxpayer company sponsored the equestrian activities of members of the family of one of the shareholders with a view to promoting the company through their participation in and equestrian events. The expenditure was held not to be deductible. Whereas in ***McQueen*** it was held that expenditure incurred by Mr McQueen himself (a sole trader) in competing in motor rallies in a rally car decorated in the livery of the taxpayer's motor coach business was deductible.

Principles applicable on appeal

23. The right of appeal to this tribunal from the FTT is "on any point of law" s11(1) of the Tribunals, Courts and Enforcement Act 2007). One of the leading cases on the principles applicable on appeal in Gax cases is ***Edwards v Bairstow*** [1956] AC 14. The parties were agreed that the relevant principles were correctly summarised by Arnold J in paragraphs 24 to 28 in ***Okolo v HMRC*** [2012] UKUT 416 (TCC). I will not set them out here.

24. If I find that an error of law has occurred then I may (but need not) set aside the decision and I may remit the case to be reconsidered by the FTT or re-make the decision (s12 of the 2007 Act). The appellant's position before me was that if I allowed the appeal I should remake the decision and not remit the matter.

25. In argument both sides referred me to observations made by Lord Carnwath in a recent judgment of the Supreme Court (***Jones v FTT*** [2013] UKSC 19). These observations can be said to widen the scope of appeals from the FTT to the Upper Tribunal. Mr Way sought to distinguish the judgment of Lord Carnwath and submitted that the observations did not apply in tax cases like this. Mr Peacock did not agree with Mr Way's submission but in any case Mr Peacock argued that since his appeal was on a point of law, the possible significance of Lord Carnwath's judgment did not arise. I agree with Mr Peacock and therefore I do not need to consider ***Jones***.

The decision

26. In the FTT Mr Paines QC heard evidence from Mr Colam. He said at paragraph 4 of the first decision:

> "Mr Colam impressed me as an intelligent and enterprising businessman. I found his evidence, though occasionally inaccurate in detail, to be given honestly; if the resolution of these appeals depended on whether I believed that his motive in causing Interfish to make the payments to which the appeal relates was purely to benefit Interfish's business, I would not be able to reject his evidence to that effect".

27. The judge analysed the evidence he had heard in detail in paragraphs 6 to 30. Neither side criticised that section of the decision. The judge recorded the parties' submissions at paragraph 31 to 37 and no error was said to have occurred there. In paragraphs 38 to 46 the judge dealt with the applicable law. He set out and considered the passage from Millet LJ's judgment in ***Vodafone***, a passage from Lord Brightman's speech in ***Mallalieu***, a passage from the judgment of Pennycuick J in ***Bowden v Russell & Russell*** [1965] 1WLR 711 which includes the passage from Romer LJ in ***Bentleys*** which I have set out above, and also the two judgments of the Special Commissioners: ***Executive Network*** and ***McQueen***. Neither side criticised the judge's summary of the law in these sections.

28. The key to the decisions under appeal is in paragraphs 47 to 52 of the first decision. Paragraph 47 is as follows:

> "47. In the present case, Interfish's purpose in making the payments can best be stated as being to improve the financial position of the Club, in particular by enabling it to enhance its squad of players without incurring a deficit, in order that those involved with the Club would thereby be induced to look favourably on Interfish in ways that would assist Interfish's trade. I find that improving the financial position of the Club in this way was a conscious purpose in the mind of Mr Colam (and therefore the company); the amounts contributed were tailored to the Club's reasonable requirements for players and contributing them formed part of Mr Colam's plans for the Club which he did not want to see outvoted. The improvement of the Club's financial position was also an inevitable consequence of the payments. On the basis of the evidence of Mr Colam and Mr Harris I find also that in Mr Colam's mind

> was a reasonably held expectation that those involved with the Club would in return look favourably upon Interfish in ways that would assist Interfish's trade, and that it was also his purpose was to achieve that."

29. Thus the judge has here held that improving the financial position of the Club was a conscious purpose in the mind of Mr Colam and therefore Interfish. He went on to consider the relationship between that purpose and the benefit to Interfish of making these payments in paragraphs 48 and 49 as follows:

> "48. It is true that the pursuit of one purpose (obtaining the benefits for Interfish) depended on pursuing the other: the purpose of the payments was to improve the Club's position so that Interfish's commercial interests would in consequence be furthered. Lord Millett's third proposition indicates that something which is 'merely a consequential and incidental effect' of making a payment is not to be regarded as part of the object of the taxpayer, but I do not see how in this case the furtherance of the Club's trade can be dismissed as merely a consequential or incidental effect of the payments. As I accepted in debate with Mr Thornhill, the acquisition of goods or services for the purposes of a trade will inevitably involve contributing to the turnover, and usually the profits, of the supplier. But in most cases the taxpayer does not set out to promote the business of the supplier; he pays him in order to obtain in a lawful manner the goods or services necessary for his own trade. Promotion of the business of the supplier is an unintended consequence of the purchase – 'merely a consequential and incidental effect'. Here, by contrast, promotion of the business of the Club was not an unintended consequence of Interfish's payments; it was a consciously intended consequence and, indeed, necessary if Interfish were to derive benefit. The business interests of Interfish would not be furthered, or at least not as effectively, if Interfish were not seen to be the benefactor of the Rugby Club. As Mr Colam put it (and I do not see how he could have put it otherwise), Interfish would 'help them [the Club people] out so they could help Interfish out'.
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> 49. It can be said that the helping out was a means to an end, the end being furtherance of Interfish's trade through what Mr Thornhill described in opening as 'reciprocal support'. But that does not in my judgment make it 'consequential and incidental' in the sense in which the words were used by Lord Millett, as meaning not a purpose being pursued. Mr Thornhill submitted, in effect, that if I found that supporting the Club was not in Mr Colam's mind an end in itself, the consequence would be that the expenditure was deductible. That seems to me to be contrary to Lord Millett's final proposition based on *Mallalieu v Drummond*: it did not matter in *Mallalieu* whether Ms

> Mallalieu's conscious intention when maintaining her professional wardrobe was exclusively to comply with the dress requirements rather than to clothe herself. In simple language, this indicates to me that, where a payment has more than one purpose, the issue of deductibility is not determined by the taxpayer saying 'the purpose I had in mind was securing the trade advantage'. The outcome would be different only if there were a rule that a purpose that is pursued with a view to an ulterior purpose somehow drops out of the picture, but such an approach would be inconsistent with the nature of the exercise prescribed by the authorities, namely that of identifying the purpose or purposes being pursued."

30. Next, in paragraphs 50 and 51 the judge considered the extent to which the case was analogous to the two decisions of the Special Commissioners (***Executive Network*** and ***McQueen***). He said:

> "50. I do not consider that this case is analogous to *McQueen*, where rally driving in the business livery was an effective way of advertising the business, for that purpose somebody had to drive the rally car and the only economically viable course was for Mr McQueen, who enjoyed rally driving, to do so himself. His enjoyment of doing so was not the purpose but merely an incidental effect, just as the remunerating of another driver, if one had been employed, would not have been the purpose but an incidental effect. This case is, if anything, more like *Executive Network*, where the payments were tailored to the requirements of Mrs Toms's business. A point of distinction is that Mrs Toms was the wife of one of the shareholders, who would be likely to want to see her business prosper for her own sake, whereas Mr Colam wished to benefit the Club so that Interfish might benefit in consequence; but that is not a point of distinction if (as I consider) a purpose that is pursued with a view to another purpose does not thereby cease to be a purpose.
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> 51. I am fortified in my conclusion by the fact that it is consistent with the approach taken to sponsorship payments by the Special Commissioners in the passage I have cited from *Executive Network*, with which, though it is not binding on me, I respectfully agree. My conclusion also seems to me to be consistent with the legislative purpose underlying section 74. The requirement of 'wholly and exclusively ... for the purposes of the trade' is a restrictive one, and it would be surprising if the provision allowed the deduction of sums (and in this case substantial sums) laid out for the immediate purpose of promoting the trade of someone other than the taxpayer, in circumstances where the 'knock-on' benefits to the taxpayer's trade, whilst real, were intangible and hard to quantify."

31. Finally the judge concluded:

> "52. It follows that in my judgment the sums paid by Interfish for purposes such as increasing the Club's player budget are not deductible. Within the sums at issue in the appeals there may be sums which fall on the right side of the line drawn by the Special Commissioners in *Executive Network* or are deductible for some other reason. If Interfish and HMRC are unable to agree on the treatment of the deductions claimed by Interfish in the tax years in question in the light of this Decision, I shall hear further argument."

32. Following the first decision a further hearing took place and a second decision was made on 4th April 2012. For that decision Interfish sought to apportion the sums paid against different purposes. The apportionment was:

(i) Hoardings at the ground £25,000
(ii) Logos on players' shirts £25,000-£50,000
(iii) Promotion of Interfish on Club's tickets, programmes, marketing materials and website £10,000
(iv) Access to the Club's best hospitality facilities £10,000
(v) Availability of players to promote Interfish's Retail fish counters £125,000-£250,000
(vi) Being known locally as a significant supporter of the Club £25,000
(vii) Being known locally for strong local community involvement £100,000
(viii) Being able to promote itself nationally and internationally as having strong local social responsibility £50,000
(ix) Access to key local and regional business figures Intangible

33. In the second decision (paragraph 6) the judge noted that in fact promotion on hoardings had been separately paid for and the expenditure allowed by HMRC as deductible.

34. The conclusion of the second decision was that if the first decision was correct then none of the sums paid were deductible; whereas if the decision was wrong, all of them would be. Before me Mr Peacock did not challenge the second decision. The apportionment which was advanced by Interfish above is irrelevant and this appeal is an all or nothing affair. If the appeal is allowed, the whole sum will be deductible whereas if the appeal fails, none of it will be.

The arguments

35. Mr Peacock submits that the first decision was that the payments were made for the benefit of Plymouth Albion in order to benefit Interfish. The issue, he submitted, was about a payment made by one trader (A) to another trader (B) which is for an immediate purpose of benefiting trader B but in order to achieve an ultimate objective of benefiting trader A. He contended that in this situation, the fact that the benefit to trader B is necessarily inherent in the object of furthering the trade of trader A does not mean that the payment is excluded. In this case the ultimate purpose of the payment was and was always to benefit Interfish. The benefit to Plymouth Albion should been seen as merely a consequential and incidental effect. On that basis the payment is deductible as a matter of law and the decision is wrong. Mr Peacock invites me to correct the error of law, deciding the issue on appeal in the Appellant's favour.

36. Although it was not limited to them, Mr Peacock's argument focussed on two sentences in the first decision, the first sentence of paragraph 47 and the first in paragraph 48 (see both above). These showed, he argued, that the finding was that the payments were made for the immediate benefit of Plymouth Albion in order ultimately to benefit Interfish and that therefore the payment was deductible in law. Mr Peacock also referred to the passage at the end of paragraph 49 of the first decision. He contended that the judge was right that the outcome would be in Interfish's favour if there were a rule that a purpose that is pursued with a view to an ulterior purpose drops out of the picture and argued that there was indeed such a rule, referring in particular to the passage from the judgment of Romer LJ in ***Bentleys*** and the reference to an object which was necessarily inherent in another purpose.

37. Mr Peacock told me that this was an important case and was being watched by those concerned with corporate sponsorship. He submitted that the decision had important implications in that sphere.

38. Mr Peacock also drew my attention to a parallel case concerning sponsorship money paid by South West Communications Group Plc to Plymouth Albion's local rivals, the rugby team, Exeter Chiefs. Apparently in that case the HMRC refused to accept certain sponsorship payments on the same basis as in this case but before the matter was heard by the FTT, it was compromised. There is a judgment of the FTT which shows that the dispute existed (***Southwest Communications Group v The Commissioners*** [2012] UKFTT 701 (TC)) but it is not concerned with the merits at all, only with costs. I can well understand why Mr Colam might think in these circumstances that his company has not been treated in the same way as South West Communications but without information about the details of the dispute it is impossible to say more. I cannot draw a conclusion on this appeal from the existence of that dispute.

39. Mr Way supported the judge. He said that this was a simple case and was not important in the manner contended for by Mr Peacock. Mr Way submitted that the judge had found as a fact that Mr Colam and therefore Interfish had two purposes in making the payments, to benefit Plymouth Albion and to benefit Interfish. In particular Mr Way referred to the second sentence in paragraph 47 in which the judge stated that he found that improving the financial position of the Club was a conscious purpose in the mind of Mr Colam. Mr Way argued that on that finding the outcome was inevitable. Mr Way took me through the decision to show that there was ample evidence on which the judge could draw such a conclusion. That was a helpful exercise but I note that Mr Peacock at least ostensibly does not seek to challenge any of the judge's findings of fact. He argues that the findings do not give rise as a matter of law to the conclusion reached.

Assessment

40. I reject the submission inherent in Mr Peacock's argument that it is useful to consider this case as one in which the attainment of an *immediate* objective is undertaken in order to attain an *ultimate* objective. This distinction does not arise from the statute nor is it one made in the cases. The question is not whether different purposes can be characterised as immediate or ultimate, the question is only: what were the actual objectives of the taxpayer? A taxpayer may have had only the so called ultimate purpose in mind in which case the payment is deductible regardless of that fact that one can analyse the case and see that another purpose could have been in mind too. Equally a taxpayer may have both the ultimate and the immediate purposes in mind, in which case the payment is not deductible regardless of the fact that one may be said to predominate over the other.

41. Mr Peacock drew attention to the fact that in many cases the "other" purpose apart from the purpose of furthering the taxpayer's trade was a private purpose (see e.g. ***Executive Network*** and ***McQueen***) and that in this case the judge had expressly held that Mr Colam did not arrange the payments from Interfish to Plymouth Albion for his own private gratification (paragraph 29, quoted above). Mr Peacock is right but the point does not assist Interfish. The "wholly and exclusively" test does not set up two categories of purpose – private and business – and provide that everything must be allocated to one or other category. The question is only whether the taxpayer's actual purpose was exclusively (i.e. solely) a business purpose. If not then the test is not satisfied.

42. It was open to the judge to hold that Mr Colam's object was solely to benefit Interfish. The judge could have done so regardless of the fact that this object necessarily inherently had a further objective or result to benefit Plymouth Albion. If that is what the FTT had determined then the decision that the expenditure was not deductible would plainly be wrong. ***Bentleys*** shows that the existence of a necessarily inherent objective or result of some activity carried on for another reason does not mean that the activity automatically has two purposes in the relevant sense which would prevent the expenditure from being deductible. It seems to me that the real question in this case is whether that is what the FTT held in the facts in this case.

43. The judge clearly had in mind the question of whether the fact that it could be said that helping Plymouth Albion was a means to an end (the end being benefiting

Interfish) made helping Plymouth Albion consequential and incidental in the sense those words were used by Millett LJ. He did not accept that they were.

44. I prefer Mr Way's submissions in this case. It seems to me that the second sentence of paragraph 47 is a clear finding that Mr Colam's and therefore Interfish's subjective intentions included improving the position of Plymouth Albion. The judge was finding, as a fact, that one of the taxpayer's purposes in making the payment was to benefit Plymouth Albion. It is a finding which was plainly open to the FTT to make on the evidence in the case.

45. I reject Mr Peacock's argument about the last sentence of paragraph 49. In my judgment neither ***Bentleys*** nor any of the other cases cited is authority for the proposition that there is a rule that a purpose that is pursued with a view to an ulterior purpose drops out of the picture or is irrelevant. The judge expressed himself with precision. If a purpose is pursued *with a view to* another purpose then both purposes are in view. If one of them is not a relevant purpose within the statute then the payment is not deductible. A different case entirely would be a case in which the taxpayer only has one purpose in view. Then the existence of another necessarily inherent object does not prevent deduction.

46. As I mentioned above, Mr Peacock placed reliance on the first sentence of paragraph 47 and the first sentence of paragraph 48. In these passages the judge is saying that the pursuit of one purpose depended on the pursuit of the other. I asked Mr Way about the first sentence of paragraph 48 and he suggested that the sentence was perhaps ill phrased and could be rewritten. I disagree. In these sentences, the judge recognised and expressed the true relationship he had found between the two reasons Mr Colam had for making the payments. Mr Colam's conscious purpose of improving Plymouth Albion's financial position was so that Interfish's commercial interests would be furthered in consequence. That is plainly true on the judge's findings but it does not mean that the improvement of Plymouth Albion's finances can be relegated to something consequential and incidental. As the judge held, improving Plymouth Albion's finances was not an unintended consequence of Interfish's payments, it was an intended consequence. Both purposes were in view and therefore the payments were not wholly and exclusively for the purposes of the taxpayer's trade. The decision of the FTT was correct.

Conclusion

47. I will dismiss this appeal.

Mr Justice Birss

Release Date: 16 July 2013