Neutral Citation Number: [2021] EWCA Civ 792

Case No: A4/2020/1466

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)
HHJ Pearce
[2020] EWHC 1385 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/05/2021
and 11/06/2021

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE MALES
and
LADY JUSTICE SIMLER

- -

Between:

GREGOR FISKEN LIMITED	**Respondent /Claimant**
- and -	
BERNARD CARL	**Appellant/ Defendant**

- -
- -

Philip Shepherd QC (instructed by **Charles Russell Speechlys LLP**) for the **Appellant**
William Hooper (instructed by **Rosenblatt Limited**) for the **Respondent**

Hearing date: 18th May 2021

- -

Approved Judgment

PLUS ADDENDUM & SCHEDULE

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 11th June 2021

Lord Justice Males:

1. The Ferrari 250 GTO with which this appeal is concerned is one of only 36 such cars manufactured by Ferrari between 1962 and 1964. When first built, they cost US $18,000, with each owner having to be personally approved by Enzo Ferrari, but now they change hands for tens of millions of dollars, breaking records for the world's most expensive car. In this case the sale price agreed was US $44 million, but the car in question had become separated from its original gearbox and the price reflected this. The parties included terms in their contract recognising that the Appellant Seller was unable to deliver the gearbox, providing that he would use his best efforts to recover and deliver it to the Buyer, and agreeing that, in certain circumstances, if he succeeded in doing so he would be entitled to a further payment of US $500,000.

2. The sale of the car itself, without its original gearbox, was successfully completed and not long afterwards the gearbox was recovered. It was in the possession of a company in California owned by Mr Bruce Canepa, a classic car specialist ("Canepa": it is unnecessary for the purpose of this judgment to distinguish between Mr Canepa and his company), who agreed to hold it to the order of the Appellant. However, although both parties professed to want to reunite the gearbox with the car, and agreed that the Appellant had earned the additional US $500,000, they fell out over how this was to be achieved. Eventually the Appellant maintained that the Respondent had repudiated the contract, which was therefore terminated, with the consequence that the Appellant was no longer obliged to deliver the gearbox to the Respondent.

3. The situation then deteriorated further, leading to litigation in the United States and this country. In California, the Respondent obtained an order to restrain Canepa from disposing of the gearbox pending the proceedings here. In this country the Respondent commenced proceedings seeking an order for specific performance of the sale contract requiring the Appellant to deliver the gearbox to it.

4. These proceedings led to a multiplication of issues, as points which had previously been common ground became disputed. The list of issues agreed between the parties presented the judge with an exam paper comprising no less than 25 issues to be determined. These included disputes whether property in the gearbox had passed to the Respondent; whether the Respondent was entitled to inspect the gearbox before accepting it and, if so, where such inspection should take place; where delivery of the gearbox should take place; whether the Appellant was entitled to the further payment of US $500,000; whether the contract had been terminated for repudiation by the Respondent; and whether, if the contract remained in being, the Respondent was barred from enforcing it pursuant to the "unclean hands" principle. More fundamentally, a dispute arose whether the Respondent, which signed the sale contract as the Buyer but which was described in the heading as an "agent for an undisclosed principal", although in fact no such principal existed, was a party to the contract at all.

5. It is regrettable that what began as a relatively simple dispute between parties who had done business together in the past and who obviously share a love of classic cars should have mushroomed in this way. I cannot help thinking that it would have been very much in the interests of both parties, if they were unable to resolve matters themselves, to have engaged the services of a skilled mediator at an early stage. As they did not, however, the judge below had to determine the dispute and we must do likewise.

6. The judge, HHJ Pearce, sitting in the London Circuit Commercial Court, held that the contract remained in being and that the Respondent was entitled to enforce it. He held that the Appellant was obliged to procure the shipment of the gearbox to the Respondent's premises in London, paying the cost of shipment together with any sums lawfully due to Canepa, for delivery to the Respondent there, and made an order for specific performance to this effect. He held also that the Appellant was not entitled to the further payment of US $500,000.

7. The Appellant has complied with the judge's order and the gearbox is currently being stored by the Respondent at its London premises pending the outcome of this appeal.

8. On this appeal the Appellant's primary case has been that the Respondent is not a party to the contract and therefore is not entitled to enforce it, so that the judge's order for specific performance must be set aside. Consistently with that case, his Appellant's Notice invited this court to set aside the judge's order, but did not seek any further or alternative relief. In particular it did not seek an order for payment of the US $500,000. The Respondent was therefore entitled to conclude that the Appellant's objective in bringing this appeal was to obtain the return of the gearbox.

9. In his oral reply submissions, however, Mr Philip Shepherd QC for the Appellant (who at the court's request had taken specific instructions on the point before beginning his reply) told us that the Appellant's primary concern in this appeal was not to get the gearbox back but to obtain the fee of US $500,000, that he was no longer asking for the order for specific performance to be set aside, and that he was seeking an order for payment of the fee as a condition of delivery of the gearbox to the Respondent. This was the first time this had been made clear. It was, with respect, incoherent. If the Respondent is not a party to the contract, as the Appellant still maintained, it is hard to see how it could be liable for the fee (as Mr Shepherd accepted). The Appellant's professed objective in bringing this appeal was contradicted by the submissions which he had instructed his counsel to advance.

10. In a yet further twist, we were informed by Mr Shepherd in an email sent after the conclusion of the hearing that the Appellant's position was now (in summary) that (1) the Respondent is not entitled to enforce the contract, so that the appeal should be allowed and the gearbox should be returned to him; (2) alternatively, if the Respondent has standing to sue, we should hold that the Respondent repudiated the contract so that specific performance was not available; and (3) in the further alternative, if we should decide that the contract had not been repudiated and title to the gearbox had passed to the Respondent, we should order the Respondent to make the payment of US $500,000. Mr Shepherd volunteered to take responsibility for this *volte face*, suggesting that "I may have misunderstood my client's instructions in answer to the question", but I would not readily accept that an experienced leading counsel had misunderstood instructions on a specific point raised by the court as to the client's objective in bringing this appeal.

11. This is all very confused and unsatisfactory. It is not too much to expect of any appellant that it will know what it is asking this court to do. Unless that is made clear, there is a risk that the parties' submissions will pass in the night and any prospect that they may be able to resolve their differences will be remote. In the circumstances I propose to summarise the facts which have given rise to the parties' dispute and to determine those

issues which in my view are necessary for the resolution of this appeal. I shall then have something further to say about the conduct of these proceedings.

The facts

Negotiation of the contract

12. The Appellant is Mr Bernard Carl, a United States citizen, now retired and resident in Florida, who is a collector of classic cars. He purchased the GTO (including its original gearbox) in 1997. In 2016 he decided to sell it and marketed it for sale. At that time, the original gearbox was not in the GTO. It had been removed for repair and a replacement gearbox had been fitted. The judge was unable to make findings about the precise circumstances in which this happened or about the whereabouts of the gearbox until it was confirmed to be in the possession of Canepa. There was some suggestion that it had been removed from Canepa's premises by a disgruntled former employee, but the evidence did not enable the judge to say whether this was correct.

13. In about November 2016 the marketing of the GTO came to the attention of Mr Gregor Fisken, a classic car dealer who operates through the Respondent company, Gregor Fisken Ltd ("GFL"). Mr Carl and Mr Fisken had done business before and began to negotiate for the sale of the GTO. In most of the parties' previous dealings, GFL had acted as a broker and had been paid a disclosed commission, although on at least one occasion Mr Carl had sold a car directly to GFL as principal.

14. On this occasion Mr Fisken held himself out as acting on behalf of an unidentified buyer, a wealthy American collector of classic cars who was the owner of another classic Ferrari – a Cal Spyder – which was offered in part exchange for the GTO. The judge rejected Mr Fisken's evidence that there was merely "ambiguity" about who the buyer was to be, finding at [130] that "a clear but inaccurate picture was given that the intended buyer was someone other than Mr Fisken or [GFL]". Mr Carl's evidence was that it was important to him that he was not selling to GFL, but the judge did not accept this evidence either, saying at [131] that he was in doubt whether Mr Carl "was in fact as concerned as he purported to be as to who the contracting parties were".

15. In fact GFL was not acting as the agent for any unidentified buyer, but was negotiating as a principal with a view to reselling the GTO at a profit, as in fact it did. However, Mr Fisken did not tell Mr Carl that.

The contract

16. The contract of sale was concluded on or about 18th October 2017. Its heading described it as being made:

> "BETWEEN
>
> (1) **Bernard Carl** of 46 Chester Square, London SW1W 9EA ('**Seller**'); and
>
> (2) **Gregor Fisken Limited** of 14 Queen's Place Mews, London SW7 5BQ (as agent for an undisclosed principal) ('**Buyer**')

> Seller and Buyer are referred to jointly as 'the Parties' and singularly as a 'Party'."

17. In English law the term "undisclosed principal" refers to a principal whose existence is not disclosed. Strictly, where the fact that a party is acting as agent is disclosed, but the identity of the principal is not, the principal is referred to as an unidentified principal. However, nothing turns on this.

18. Recitals identified the car to be sold as "the 1962 Ferrari 250 GTO, chassis no. 3387GT ('GTO')" and its current location as Ferrari's premises in Modena, Italy, referred to as the "Location".

19. Relevant terms of the contract were as follows:

> "2. SALE AND PURCHASE
>
> Subject to the terms of this Agreement Seller hereby agrees to sell and Buyer agrees to buy the GTO for the cash consideration of USD$44,000,000 (forty-four million dollars).
>
> 4. PAYMENT
>
> …
>
> 4.4 Until Completion, the GTO will remain securely stored at the Location at Seller's risk whereby no-one except Seller or Buyer or their duly authorised agents will have access to the GTO; title and risk as to the GTO will remain with Seller until Completion has taken place. …
>
> 5. COMPLETION, TITLE, AND DELIVERY
>
> 5.1 Completion of this sale ('Completion') will take place immediately upon Seller notifying Buyer by email … that Goodman Derrick LLP, solicitors for Seller have received in to their client account the Balance Price, whereupon title to and insurance risk in the GTO will automatically pass from Seller to Buyer.
>
> 5.2 On signing this Agreement Seller shall forthwith deliver to Goodman Derrick LLP an executed Bill of Sale for the GTO in favour of Buyer in the form set out in the Schedule.
>
> 5.3 Seller and Buyer will reflect the passing of title by Goodman Derrick LLP forthwith after Completion delivering to Buyer the executed Bill of Sale for the GTO. Seller will forthwith after Completion procure the release of the GTO into the control of Buyer or his pre-notified collection agent.
>
> 7. THE GEARBOX

7.1 As at the date of this Agreement, Seller does not have possession of the Gearbox, numbered N2, originally delivered with the GTO (the 'Gearbox').

7.2 Seller believes the Gearbox to have been delivered to and to be in the care and/or custody of Bruce Canepa of Canepa Design of 4900 Scotts Valley Drive, Scotts Valley, CA 95066, United States of America ('Canepa'). Seller has corresponded with Canepa regarding the whereabouts of the Gearbox, but Canepa has advised that they have not been able to locate it.

7.3 It is agreed that the purchase price reflects adjustments for a diminution in value caused by Seller's inability to deliver the Gearbox with the GTO.

7.4 In consideration of Buyer accepting the GTO without the Gearbox, Seller agrees to use his best efforts to recover and deliver up the Gearbox to Seller [*sc. Buyer*], as further described below.

7.5 Following Completion Seller will formally engage with Canepa and such other third parties as shall be necessary in an attempt to locate and recover the Gearbox.

7.6 If Seller recovers the Gearbox from Canepa, he will promptly turn the Gearbox over to Seller [*sc. Buyer*] without additional compensation.

7.7 If Seller locates the gearbox in the possession or ownership of a third party other than Canepa, he shall promptly notify Buyer, provide his full cooperation to any efforts Buyer may undertake to recover the Gearbox and shall do so without additional compensation.

7.8 If the preparation of formal legal correspondence or the pursuit of litigation is required to secure the recovery of the Gearbox or compensation for its loss, the following terms shall apply:

7.8.1 if Seller incurs such legal costs in relation to the return of the Gearbox or related compensation, then Seller agrees not to incur more than USD$100,000 of legal costs without first obtaining Buyer's prior written consent to do so, such consent not to be unreasonably withheld. Any amounts incurred in violation of this covenant will not be subject to reimbursement pursuant to Clause 7.8.3 hereunder;

7.8.2 if Seller incurs such legal costs, but fails to secure custody of the Gearbox or compensation for its loss, then such legal costs shall be solely for the account of Seller or

> 7.8.3 if such formal correspondence or legal process secures a payment of compensation or court ordered damages are awarded, then such legal costs properly incurred in accordance with Clause 7.8.1 and evidenced to Buyer, shall be reimbursed to Seller from those proceeds.
>
> 7.9 If such formal correspondence or legal process secures a payment of compensation or court ordered damages are awarded, then any such sum, after the reimbursement of legal costs described in Clause 7.8.3 above, shall be allocated between Buyer and Seller equally, subject to a cap on the sums payable to Buyer under this Clause of USD$500,000 (five hundred thousand dollars).
>
> 7.10 If such formal correspondence or legal process secures custody of the Gearbox then, in consideration of Defendant's [*sc. Seller's*] services in locating and securing possession of the Gearbox, accepting the risk of unsuccessful litigation and sharing in the costs of successful litigation, upon being in receipt of the Gearbox, make a payment to Seller in the sum of USD$500,000 (five hundred thousand dollars) to compensate Seller for his efforts.
>
> 7.12 For the avoidance of doubt, nothing in this Agreement shall prevent Seller from taking whatever action he chooses against any third party (which specifically excludes Buyer) to procure the delivery up of the Gearbox or to recover any losses, claims and/or damages suffered by Seller not being able to deliver up the Gearbox pursuant to the terms of this Agreement."

20. The contract also included an entire agreement clause, and stated that it was governed by English law and subject to the exclusive jurisdiction of the courts of England and Wales.

21. It concluded:

> "AS WITNESS the hands of the Parties the day and year first above written.
>
> SIGNED by:
>
> BERNARD CARL
>
> SIGNED by:
>
> GREGOR FISKEN LIMITED

22. The contract was signed by Mr Carl against his name and by Mr Fisken against the name of GFL. The signature of Mr Fisken was unqualified, with nothing to indicate that he signed only as an agent.

23. The Schedule to the contract was the bill of sale, signed by Mr Carl. Its terms were as follows:

"BILL OF SALE

Bernard Carl

of

46 Chester Square, London SW1W 9EA

confirms the sale

to

Gregor Fisken Limited

of

14 Queen's Gate Place Mews, London SW7 5BQ

of

The 1962 Ferrari 250 GTO, chassis no. 3387GT

and confirms having received the price in full."

Recovery of the gearbox

24. The payment of US $44 million for the GTO was made smoothly and Completion took place as described in clause 5 of the contract. The bill of sale signed by Mr Carl confirming the transfer of title was delivered to GFL. Efforts to locate and retrieve the gearbox then continued. By January 2018 Mr Canepa was indicating that he had located it and that it was in his possession.

25. On 20th January 2018 Mr Carl's US attorney, Mr Capuder, wrote to Canepa offering a release from any liability and payment of US $25,000 towards the expenses which Canepa had incurred in return for Canepa's agreement to return the gearbox to Mr Carl free of any claims or liens. However, that offer was withdrawn on 22nd January 2018. Further correspondence followed. The upshot was that Canepa was willing to return the gearbox to Mr Carl or to hold it to his order, but wanted to be paid the US $25,000 which it said that it had incurred.

The dispute

26. This led to lengthy negotiations between Mr Carl and GFL. GFL wanted to inspect the gearbox to ensure that it was indeed the original gearbox, and said that it should be sent to Ferrari in Italy for inspection. Mr Carl was unwilling to pay the US $25,000 which Canepa was demanding and which would need to be paid if the gearbox was to be sent to Italy until GFL had confirmed that it would accept the gearbox. The parties were unable to resolve this issue and the situation deteriorated.

27. On 28th January 2018 Mr Carl indicated to Mr Joseph Macari, an associate of Mr Fisken who was acting on his behalf, that it might be necessary to have the gearbox inspected in California. As Mr Carl put it:

> "I am not going to pay Canepa and give him a release until I know you have accepted the gearbox and he is not going to release it without being paid and released."

28. Mr Carl also expressed concern that, if the gearbox went to Italy, a person called John Collins might try to "tie up the part or the money." He added that:

> "the agreement is really unclear about the way I am supposed to send you back the gearbox. I know I get paid $500,000 for the part, but it also says that I have no obligation to give Canepa a release to get it back. This creates some ambiguity about how to handle Canepa's demand for money and a release."

29. On 1st February 2018 Mr Carl emailed Mr Fisken asking for his thoughts on "how we deal with Canepa's demands for a release, reimbursement of his investigator and legal fees and storage etc."

30. At the same time, an issue had arisen between Mr Fisken and Mr Carl about the sale of another car, a Ferrari 599 GTO. On 7th February 2018 Mr Carl emailed Mr Macari, expressing concern about the unresolved disputes and saying that he needed a short-term loan "to take some pressure off with regard to the timing of the gearbox deal", in other words to deal with Mr Carl's needs pending payment of the US $500,000.

31. On 9th February 2018 Mr Carl emailed Mr Macari to explain what he said were the issues regarding the gearbox. This seems to have caused some confusion because, on 12th February 2018, Mr Carl sent an email to Mr Macari as follows:

> "Obviously I was completely inarticulate in explaining my frustration with the gearbox and short term funding issues. Here is my problem. Had Bruce not lost the gearbox, I would have had $500,000 in my hands more than four months ago. Even at a modest 10% p.a. interest rate, that cost me about $17,000. I have spent about $30,000 on lawyers trying to get the gearbox back. Bruce now wants another $25,000 as a bounty for finding the gearbox he lost. So I have effectively lost well over $70,000. If I borrow the $500,000 for a month from your 'hard money' guy while waiting to get paid by Gregor my loss would be closer to $100,000…."

32. Matters than became more heated. In an email sent on 14th February 2018 Mr Carl described the contract as "poorly drawn" and, later on the same day, described Mr Macari as "the smartest guy in the room" because he did not have a written contract with anyone. Mr Carl's proposal was that he and GFL should share the costs relating to getting the gearbox released from Canepa and verified.

33. Mr Macari responded on 16th February 2018 that:

> "the agreement was clear that you offer up the gearbox and get the 500k USD finished. You stored stuff with Bruce and now pay to get it back. It's called storage and time. This is normal."

34. Mr Carl replied to that email later on the same date, saying:

> "The 'storage' issue is a complete red-herring. Bruce is not charging for storage … What Bruce is asking for is reimbursement for the out-of-pocket costs he expended in finding the missing gearbox, which had been stolen by a disgruntled ex-employee and for getting it back. So, let's talk about what Bruce is actually being paid for – not something else. He paid his investigator and I paid my lawyer to get the gearbox back for Gregor's benefit and there is a provision in the agreement for me to recover costs like that – up to $100,000."

35. On 18th February 2018 Mr Carl emailed Mr Macari saying that he was convinced that the gearbox was worth a lot more than US $500,000. He proposed a new deal relating to the gearbox and another transaction between the parties. He said that the gearbox should be sent to Italy for inspection. Following inspection, either GFL would pay him US $500,000 or, if the gearbox was not authenticated, Mr Macari would be responsible for ensuring its return to Mr Carl.

36. On 19th February 2018 Mr Carl instructed Canepa to release the gearbox to Mr Macari, on the basis that the gearbox would be shipped at the direction and cost of Mr Macari and that a release fee of US $25,000 would be paid to Canepa from the sum of US $500,000 said to be due from GFL to Mr Carl. However, that instruction was not carried through and Mr Carl proposed further suggested terms later on 19th February 2018. The terms in respect of the Gearbox were substantially the same as proposed on the previous day, save that it was now GFL rather than Mr Macari who would be responsible for ensuring the return of the gearbox to Mr Carl if it was not authenticated.

37. On 20th February 2018 Mr Carl emailed Mr Canepa, directing him not to send the gearbox anywhere until confirmed with him.

38. Later on the same day, Mr Fisken emailed Mr Carl at 15:43, stating:

> "I am very happy that what looks like the original box for the GTO has turned up, Your issues with Canepa I can't get involved with, but I am as eager as you must be to have this gearbox inspected. Soon as Ferrari confirm it's the GTO's box the sooner I can send you the outstanding and I don't need another contract to achieve that."

39. On 21st February 2018 Mr Carl emailed Mr Fisken, stating:

> "The GTO gearbox issue has dragged on for too long. Our 18 October 2017 GTO purchase agreement provided for a simple transaction. If I could recover the missing GTO gearbox from Canepa Design and tendered possession to you, I was to receive a payment of $500,000 from you upon your taking delivery. You

> have now added a new element, a requirement that I surrender possession of the gearbox and allow it to be sent to Italy for a period of time before I get paid. This new requirement has added new costs, delays and risks to the GTO gearbox transaction and that is what necessitates a new agreement. I have provided you with a draft of that agreement. Accordingly, I think we now have three alternatives:
>
> 1. I have been and remain prepared to complete the transaction described in the purchase agreement. I will provide Canepa with a simple 'as-is, -where-is' Bill of Sale for the gearbox Canepa will be authorised to turn over the gearbox and this Bill of Sale to you or your authorised agent) upon the receipt from you of $500,000 on good funds. As you have suggested, I will undertake that $25,000 of the funds will be used to pay the $25,000 being demanded by Canepa as a condition to releasing the gearbox to you.
>
> 2. We can enter in an agreement providing for the gearbox to be delivered to you for inspection in Italy prior to my being paid, on condition that, on or before the end of this month you either (1) return the gearbox to the US or (2) pay me $475,000 and Canepa an additional $25,000 in good funds, with meaningful penalties for non-compliance. … I am providing you with a new version of the agreement I previously provided that … adds non-compliance penalties.
>
> 3. We can do neither in which case I would consider that I had tendered the GTO gearbox to you on the terms described in the purchase agreement as well as in an agreement reflecting the terms requested by your representative (providing for the inspection in Italy) and you had rejected those tenders. In that case, I would consider any obligations that I may have had under Part 7 of the Purchase Agreement to have been satisfied and that I was no longer under any obligations to you with regard to the GTO gearbox."

40. Later on 21st February 2018, at 11:53, Mr Fisken responded that no further agreement was necessary since the mechanism for dealing with the issue of the gearbox had already been agreed. He continued:

> "I suggest we go ahead as agreed. I would pay the outstanding $25,000 invoice to Canepa directly to him, he will ship the gearbox to Joe Macari in the UK as per your authorisation, Joe will ship it to Italy to have it verified and upon verification that it's the correct one I will release the £500,000 to you less the Canepa's invoice and the shipping costs. This will complete all matters related to the gearbox as per the agreement. If, on the contrary, after verification the gearbox turns out not to be the original one then I will absorb the cost of the $25,000 invoice

> paid to Canepa and I will return the gearbox to you by delivering it to your London address."

41. At 14:31 on 21st February 2018 Mr Fisken followed this up with a further email to Mr Carl stating:

> "You and I both want to get the gearbox matter resolved. As per the agreement, you deliver the gearbox to me without further compensation. I will pay the $25,000 Canepa invoice and shipping costs and will refund myself from the balance of $500,000 which I am holding. You offered to incorporate this into some kind of legal contract and this is unnecessary as this mechanism is in place in the original agreement. If you agree with this, please authorise Bruce to send the gearbox to me at 14 Queen's Gate Place Mews or JM directly and Joe will take it to the factory in Italy to have it verified as soon as possible. Upon verification that it's the correct one, I will release the USD 500,000 to you less Canepa's invoice and the shipping costs. This will complete all matters related to the gearbox as per the agreement. If on the contrary after verification the gearbox turns out not to be the original one then I will absorb the cost of the USD 25,000 invoice paid to Canepa and shipping costs and I will return that gearbox to you at your London address."

42. Six minutes later, at 14:37 on 21st February 2018, Mr Carl replied:

> "The answer is no. This is not what is provided in the agreement and is unacceptable. If you are not willing to accept either alternative I have provided, please consider this a formal notice of a rejection of my tender of delivery of the gearbox and a breach of your obligations under the GTO agreement. If this is not resolved within 24 hours, then anytime you or your client or anyone else wants to make an offer on the GTO gearbox, I will consider it, but not as a transaction governed by the GTO agreement."

43. By this stage the relationship between the parties had broken down. Mr Carl maintained that he had made a valid tender of the gearbox, which GFL had rejected, as a result of which he had lawfully terminated the contract and was under no further obligation to deliver the gearbox. It is not easy to see from the exchanges set out above quite how or why matters had come to this. It may be noted that it was common ground that Mr Carl would be entitled to the US $500,000 and it seems eventually to have been acceptable to both parties that the gearbox should be sent to Ferrari in Italy to be authenticated and that Mr Carl would bear the cost of paying the US $25,000 demanded by Canepa. The issue appears to have been whether GFL should be required to pay Mr Carl the US $500,000 before Ferrari had authenticated the gearbox, combined with general dissatisfaction on the part of Mr Carl with the terms of the contract which he had agreed.

44. In May 2018 Mr Carl paid US $25,000 to Canepa to reimburse its cost of recovering the gearbox. On 29th June 2018 GFL obtained an order from the court in California

restraining Canepa from parting with possession of the gearbox pending the trial of this action.

The proceedings

45. The claim form in this action was issued on 23rd July 2018. GFL sought an order for specific performance of the contract. Mr Carl defended that claim on the basis that the contract had been validly terminated as a result of GFL's wrongful refusal to accept delivery. He counterclaimed for a declaration that the contract had been validly terminated and that he was under no obligation to deliver the gearbox to GFL, which had no proprietary or possessory right to it. In the alternative, but only as a fallback position, he sought a declaration that, if the contract remained alive and capable of performance, delivery of the gearbox should take place at the premises of Canepa and that GFL would be liable to pay him the US $500,000.

46. The plea that GFL was not entitled to sue on the contract because it had contracted "as agent for an undisclosed principal" was only added by a later amendment. That amendment did not suggest that, because GFL had purported to contract as agent for an undisclosed principal when no such principal existed, there was no contract between the parties. Nor did Mr Carl seek the return of the GTO or offer to pay back the US $44 million which he had received. On the contrary, it continued to be his case that there had been a contract for the sale of the GTO, albeit not a contract with GFL, and that the contract was one to which the Sale of Goods Act 1979 applied.

47. However, by an application made very shortly before the trial, Mr Carl sought permission to amend his Defence to plead that the contract was void for mistake as a result of the fact that he did not intend to contract with GFL, or alternatively that he had been induced to enter into the contract by the misrepresentation made by Mr Fisken that he was acting as an agent for an unidentified principal. That application was refused by HHJ Keyser QC, principally on the ground that it was made far too late and would mean that the trial would have to be vacated. There has been no appeal from that refusal and it is hard to see how there could have been. As a result Mr Carl was rightly confined by the judge at trial to his pleaded case. It should be noted that leading counsel then appearing for Mr Carl expressly disavowed any case of fraud on the part of GFL or Mr Fisken. The judge's finding that "a clear but inaccurate picture was given" must be understood in this light. A finding of fraud was not open to him.

48. The trial before HHJ Pearce occupied four days in December 2019. Regrettably, judgment was not given until 1st June 2020. As I have indicated, the judge found in favour of GFL and made an order for specific performance, as a result of which the gearbox has been brought to London at Mr Carl's expense, although we were told that the cost of shipment was no more than about US $10,000. It is currently held by GFL subject to an undertaking to store it securely at its premises pending this appeal.

GFL's right to enforce the contract

49. The question whether GFL is entitled to sue on the contract occupied much of the time at the trial and by far the greater part of the parties' written submissions on appeal. As I have explained, that would make sense if Mr Carl's objective is to obtain the return of the gearbox, but the submission that GFL was not a party to the contract or entitled

to enforce it is fatal (as Mr Shepherd accepted) to any claim to obtain from GFL the payment of US $500,000 for which the contract provides.

The judgment

50. The judge held that GFL was entitled to sue on the contract. He identified the applicable principles as being those set out by Lord Justice Jackson (with whom Lord Justice Rix and Lord Justice McCombe agreed) in *Hamid v Francis Bradshaw Partnership* [2013] EWCA Civ 470, [2013] BLR 447:

> "57. In my view the principles which emerge from this line of authorities are the following:
>
> (i) Where an issue arises as to the identity of a party referred to in a deed or contract, extrinsic evidence is admissible to assist the resolution of that issue.
>
> (ii) In determining the identity of the contracting party, the court's approach is objective, not subjective. The question is what a reasonable person, furnished with the relevant information, would conclude. The private thoughts of the protagonists concerning who was contracting with whom are irrelevant and inadmissible.
>
> (iii) If the extrinsic evidence establishes that a party has been misdescribed in the document, the court may correct that error as a matter of construction without any need for formal rectification.
>
> (iv) Where the issue is whether a party signed a document as principal or as agent for someone else, there is no automatic relaxation of the parol evidence rule. The person who signed is the contracting party unless (a) the document makes clear that he signed as agent for a sufficiently identified principal or as the officer of a sufficiently identified company, or (b) extrinsic evidence establishes that both parties knew he was signing as agent or company officer."

51. The judge held that in the light of a long line of authority as to the effect of an unqualified signature which was reviewed and affirmed by this court in *The Elikon* [2003] EWCA Civ 812, [2003] 2 All ER (Comm) 760, the contract document did not make clear that GFL was signing as agent for a sufficiently identified principal and that although Mr Carl believed that GFL was signing as an agent, GFL itself knew that it was not. Accordingly he held that extrinsic evidence to identify the true contracting party was not admissible and that, in accordance with *The Elikon*, the unqualified signature of GFL meant that it was contracting as a principal despite the reference in the heading of the contract to its acting as an agent.

The parties' submissions

52. Mr Shepherd emphasised the statements made during the negotiations by Mr Fisken which led Mr Carl to believe that he was acting as an agent and not as a principal. He relied on these as part of the "factual matrix" in the light of which the contract should be construed, submitting that the signature cases had been decided before the new approach to the construction of contracts signalled by Lord Hoffmann's speech in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 and developed in later House of Lords and Supreme Court cases. He submitted that when the contract is viewed in this setting, GFL should be understood as signing as an agent on behalf of an unidentified principal. He submitted also that the signature cases are confined to the area of shipping law and have no wider application. Finally, Mr Shepherd invoked the *ex turpi causa* principle, submitting that it was not open to GFL to sue on a contract which it had induced by reprehensible conduct.

53. Mr William Hooper for GFL pointed out that it is common ground on the pleadings that there was a contract and that, as GFL was not in fact an agent for anybody, it must have concluded the contract on its own behalf and not as an agent. There is no other principal. He submitted that it follows from the signature cases, which are themselves part of the factual matrix, that GFL contracted as principal and has standing to sue on the contract. Alternatively, Mr Hooper relied on the principle in *Schmaltz v Avery* (1851) 16 QB 655 whereby a party who purports to contract as an agent is entitled to prove that he was in fact the true principal and to enforce the contract.

Analysis and conclusion

54. The signature cases demonstrate that where a person signs a contract with no qualification as to the capacity in which he signs, he will be a party to the contract unless the document makes it clear that he contracted as an agent. They demonstrate further that the mere description of that person as an agent in the heading of a contract will not be sufficient to outweigh the effect of an unqualified signature. The cases which so hold, including *Cooke v Wilson* (1856) 1 CB (NS) 153, *Parker v Winlow* (1857) 7 E & B 942 and *The Frost Express* [1996] 2 Lloyd's Rep 375, were reviewed by Lord Justice Rix in *The Elikon* in a judgment with which Lord Justice Mummery and Lord Justice Sedley agreed. Other cases, such as *Tanner v Christian* (1855) 4 E & B 591, *Paice v Walker* (1870) LR 5 Ex 173 and *H.O. Brandt & Co v H.N Morris & Co Ltd* [1917] 2 KB 784, are to the same effect.

55. *The Elikon* was a case in which a charterparty was signed by Internaut Shipping GmbH without qualification under the heading "Owners", but the box in the charterparty form for the insertion of the Owners' name had been completed by inserting "Sphinx Navigation Ltd, Liberia c/o Internaut Shipping GmbH". There was therefore an inconsistency between the way in which the charterparty had been signed and the definition of the Owners in the body of the charterparty.

56. Lord Justice Rix acknowledged that points could be made about each of the three cases which he had cited, but considered nevertheless that they stood for an important principle:

> "46. … What remains, however, is that in all three cases a party who was expressly said in the body of the contract to be an 'agent' or to be acting on behalf of a principal was nevertheless adjudged to have personal liability in circumstances where,

> again in all three cases, the agent signed without qualification. This permits the extraction of a principle, which in my view can be found stated as at least part of the reasoning in those cases, that the way in which a party named in a contract signs that contract may be of particular strength in the overall question of whether he is a party to that contract with personal liability under it. That is in effect the principle stated by *Scrutton on Charterparties* (20th ed, 1996) and cited by the judge; and it is to be found stated in similar terms by *Bowstead & Reynolds on Agency* at p. 577 and by *Cooke on Voyage Charters* (2nd ed, 2001), at para 2.9."

57. Lord Justice Rix described the decision of the House of Lords in *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492 as the *locus classicus* for this principle, in particular the speech of Lord Parmoor at 505-6:

> "In such a case the intention of the parties is to be discovered from the contract itself, and the rule laid down in *Smith's Leading Cases* has been adopted as the rule to be followed. 'That where a person signs a contract in his own name, without qualification, he is *prima facie* to be deemed to be a person contracting personally, and in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal'."

58. After discussing these cases, Lord Justice Rix returned to the problem that the signature "as Owners" and the definition of the Owners in the body of the charter party were inconsistent. In order to resolve the inconsistency, it was the signature which prevailed:

> "57. However, there is nothing whatsoever in the charterparty to say that Internaut, in signing under the designation of 'Owners', is signing 'as agents', i.e. in the sense accepted in *Universal Steam Navigation v. McKelvie* as meaning as agents only. In those circumstances there is every justification for construing the charterparty as a whole as one in which Internaut is accepting personal liability for the owner, even if perhaps Sphinx rather than Internaut is the registered owner or even if Sphinx is in fact Internaut's principal. When one adds the long established principle that the characterisation of a signature plays, *prima facie* at any rate, a predominant or dominating role for the purposes of this issue in the construction of the contract as a whole, or, to put the matter the other way round, that it must be clear from the body of the contract that the person signing without qualification does not intend to contract with personal liability, then, in my judgment, Internaut's liability is firmly established."

59. Lord Justice Rix considered that this "long established principle" was soundly based in commercial common sense:

> "53. It may be asked, indeed the question was raised in the course of argument, why the principle whereby particular attention is paid to the form of the signature, which is in effect a maxim of construction and not a rule of law, exists: from where does it take its force? I would answer that it reflects the commercial facts of life, the promptings of commercial common sense. The signature is, as it were, the party's seal upon the contract; and that remains the case even where, as here, the contract has already been made (in the fixture telexes). *Prima facie* a person does not sign a document without intending to be bound under it, or, to put that thought in the objective rather than subjective form, without properly being regarded as intending to be bound under it. If therefore he wishes to be regarded as not binding himself under it, then he should qualify his signature or otherwise make it plain that the contract does not bind him personally."

60. It was this principle which Lord Justice Jackson invoked in the passage from his judgment in *Hamid v Francis Bradshaw Partnership* which I have already set out.

61. In my judgment the signature principle as described in *The Elikon* is a long-standing, firmly established and recently confirmed principle of English law which must be taken to form part of the background against which the parties in this case contracted. It is not confined to shipping cases. Although many of the cases in which it has been applied have been shipping cases, not all of them have been (*Hamid v Francis Bradshaw Partnership* was not) and there is nothing in the cases to confine it in this way. Nor is there anything in the *Investors Compensation* and succeeding cases to suggest that the signature cases should have no continuing application. While *Investors Compensation* signalled a greater emphasis in the construction of contracts on the background knowledge which contracting parties would have, the principle that contracts should be construed in the light of that background was not new. Indeed the term "factual matrix" was coined by Lord Wilberforce in *The Diana Prosperity* [1976] 1 WLR 989.

62. Ultimately it is necessary to have some principle of construction to resolve the inconsistency where a person signs a contract as a contracting party without qualification but is described in the body of the contract as an agent. If the contract contains no other means of resolving the inconsistency, English law has decided that the signature is the predominating consideration and has maintained that position over the last 150 years or so. It is too late to change that now without introducing considerable uncertainty into our law of contract.

63. In the present case GFL's signature as a party to the contract was unqualified, despite the description of GFL "as agent for an undisclosed principal" in the heading of the contract. That would suggest that the signature should prevail to resolve the inconsistency. Moreover, the draft bill of sale attached to the contract expressly "confirms the sale to Gregor Fisken Limited" and transfers title in the GTO to GFL. Accordingly, far from making clear that the contract was intended to be with an unidentified principal of GFL, the document as a whole tends to confirm that GFL's signature was indeed as a contracting party. To that extent I agree with the judge.

64. I would not, however, endorse the judge's reason for concluding that extrinsic evidence of the parties' understanding is inadmissible. The second limb of Lord Justice Jackson's

fourth principle in *Hamid v Francis Bradshaw Partnership* allowed that extrinsic evidence would be admissible to show that a party was not to be taken to have signed as a principal where "both parties knew he was signing as agent or company officer." However, Lord Justice Jackson had been careful to make clear in an earlier passage that it is not the subjective knowledge of the parties which matters and that such evidence is admissible "where the identity of a contracting party was unclear". His statement of principle goes no further than that. This accords with the general principle that "factual matrix" material is admissible to clarify the meaning of a contract, but not to contradict it (*Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919 at [49], *Arnold v Britton* [2015] UKSC 36, [201] AC 1619 at [17]). In my judgment, once account is taken of the well-established signature principle, the identity of GFL as the contracting party is clear.

65. Finally on this issue, I am not persuaded that the *ex turpi causa* principle on which Mr Shepherd relies has any relevance to the construction of the contract or the identification of the contracting party. In any event this argument is not open to Mr Carl. It was not in play in the court below where any case of fraud was expressly disavowed and the judge was not invited to, and did not, make any findings with reference to such an argument. There was an issue whether GFL was barred from obtaining the remedy of specific performance pursuant to the "unclean hands" doctrine, but the judge rejected that argument, noting that to have accepted it would be to give effect to the case of fraudulent misrepresentation which Mr Carl had not been allowed to plead. Permission to appeal on that issue was refused. There is, therefore, no factual basis on which an argument founded on the *ex turpi causa* principle could be advanced.

66. For these reasons I conclude that GFL is the contracting party to the contract in this case and is entitled to enforce it. I note that any other conclusion would in effect lead to something of a legal black hole in circumstances where Mr Carl accepts that there was a binding contract pursuant to which he sold the GTO and obtained US $44 million but where, if GFL was not his counterparty, nobody else was either. It seems to me that if Mr Carl had any remedy as a result of the pre-contractual statements made as to the capacity in which GFL was acting, his remedy was in misrepresentation. But he was rightly refused permission to make that case when he sought to do so by a very late amendment.

67. As a result of this conclusion it is unnecessary to consider Mr Hooper's alternative submission based on the principle in *Schmaltz v Avery*. That case has been held to lay down a principle "that where a person purports to contract as agent he may nevertheless disclose himself as being in truth a principal. If he entered into a contract as agent he can bring an action in his own name and show that he was in fact the principal" (*Harper & Co v Vigers Brothers* [1909] 2 KB 549, *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45). As we heard very little argument about this principle and were not taken to the relevant cases, I prefer to express no view as to whether this constitutes an alternative route to the conclusion which I have already reached that GFL is entitled to enforce the contract.

The application of the Sale of Goods Act

68. An issue arose whether there was a sale of the gearbox, in which case the provisions of the Sale of Goods Act 1979 would apply, or whether Mr Carl undertook, as Mr Shepherd put it, "a personal obligation aimed at locating it and then turning the gearbox

over to the Buyer" which was something different as a matter of legal analysis. The significance of this issue is that the Act contains provisions dealing with a buyer's right to examine the goods and a seller's obligation concerning delivery, as well as with the passing of property in the goods sold. It was common ground on the pleadings that the Act applied but, despite this, it was submitted on behalf of Mr Carl that it did not.

The judgment

69. The judge held at [149] that the contract was a contract for the sale of goods which included the gearbox. It contemplated that Mr Carl had title to the GTO, including its original gearbox, which he intended to transfer to the Buyer. Accordingly the contract fell within the definition of a contract of sale of goods in section 2(1) of the Act:

> "A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price."

The parties' submissions

70. Mr Shepherd submitted that the provisions of the contract concerning the gearbox should be viewed separately from those concerning the GTO, and did not fall within the statutory definition. There was no agreement by Mr Carl to transfer property in the gearbox and the payment of US $500,000 was a fee for services rendered in locating and recovering it, not a payment in consideration of a transfer of property. Mr Hooper supported the reasoning of the judge.

Analysis and conclusion

71. I agree with the judge. This was a contract for the sale of goods within section 2(1) of the Act. The goods sold consisted of the GTO with its original gearbox. It was plainly intended that property in the gearbox would be transferred to the Buyer. There was never any question of Mr Carl making a gift of it. The consideration for the transfer of property was not the payment of US $500,000, which might or might not be payable, but the contract price of US $44 million. The parties recognised that the gearbox was physically separated from the GTO and that Mr Carl was not in a position to transfer possession of it to the Buyer, but he was able to (and in my judgment did) transfer his ownership of the gearbox. That was so regardless of whether it would prove possible to recover the gearbox from Canepa or any third party.

Passing of property in the gearbox

72. The next question is whether, and if so when, property in the gearbox passed to GFL. Mr Carl contends that this never happened, with the consequence that he remains the owner of the gearbox and, because the contract has been terminated for repudiation, he is discharged from any obligation to turn it over or deliver it to GFL. GFL contends that ownership of the gearbox passed on Completion in accordance with clause 5 of the contract, so that the gearbox is its property, entitling it to an order for specific performance or (in the alternative) an order for delivery up under section 3 of the Torts (Interference with Goods Act) 1977.

The judgment

73. The judge held at [180] that property in the gearbox had not passed to GFL. He held that the terms of clause 7.12 of the contract were inconsistent with an intention to pass property until such time as the gearbox was "turned over" to GFL after its recovery from whomever was holding it. That was because clause 7.12 reserved a right for Mr Carl to take action against any third party for the recovery of the gearbox which, the judge thought, was consistent only with title remaining with him.

The parties' submissions

74. Mr Hooper submitted that property in the gearbox passed on Completion pursuant to clause 5 of the contract. That was when property in the GTO was to pass and there was nothing in the contract to suggest a contrary intention with regard to the gearbox. The fact that clause 7.12 reserved a right for Mr Carl to sue a third party to recover the gearbox was neither here nor there. Mr Shepherd supported the reasoning of the judge.

Analysis and conclusion

75. Section 17 of the Sale of Goods Act 1979 provides that:

> "(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case."

76. Section 18 goes on to provide rules for ascertaining the parties' intention where no different intention appears, but the fundamental rule is that what matters is the intention of the parties, ascertained as described in section 17(2).

77. Clearly the parties intended the property in the GTO to pass on Completion. Clause 4.4 says so in terms. There is in my judgment no reason to suppose that they had a different intention with regard to the gearbox. The fact that Mr Carl would be unable to transfer possession of the gearbox to GFL on Completion does not mean that the parties intended that he should retain ownership of it. On the contrary, the purchase price of US $44 million was the price paid in consideration of a transfer of property in the GTO including its original gearbox.

78. Further provisions of the contract support this conclusion. The bill of sale refers to the GTO without qualification. The contract made no separate provision for a further bill of sale relating to the gearbox as might have been expected if property in the gearbox was intended to pass at some later time. Moreover, clause 7.7 of the contract required the Seller to provide his full cooperation to any efforts which the Buyer might undertake to recover the gearbox from a third party. That suggests that the Buyer would be entitled to make such a claim as owner of the gearbox.

79. Clause 7.12 does not in my view detract from this conclusion. It provides that nothing in the contract will prevent the Seller from taking whatever action he chooses against a third party, but says nothing about the legal basis for any such action. It is in any event

a puzzling clause. The first thing which the Seller reserves the right to do is to take action against a third party "to procure the delivery up of the Gearbox". But any such action must be taken on behalf of and for the benefit of the Buyer, to whom the gearbox must be turned over on its recovery from any third party, as the preceding parts of clause 7 make clear. The second thing which the Seller reserves the right to do is to seek damages from a third party as a result of not being able to deliver the gearbox. But that does not require the Seller to have any continuing ownership of the gearbox.

80. Accordingly I would hold that property in the gearbox passed to GFL on Completion.

Examination of the gearbox

81. As appears from the parties' exchanges in January and February 2018 which I have set out above, it was at one time accepted that GFL should have an opportunity to examine the gearbox in order to ensure that it was indeed the original N2 gearbox, and it was contemplated that such examination might take place at the premises of Ferrari in Italy. However, the parties were unable to agree how this would take place and, by the time of the trial, were standing on their legal rights.

The judgment

82. The judge held at [147] and [148] that GFL was entitled to a reasonable opportunity to examine the gearbox in accordance with section 34 of the Sale of Goods Act and that "one appropriate place was the Ferrari factory in Italy". He did not address the question whether Mr Carl had an obligation to allow examination in Italy or, if so, who would bear the expense of shipping the gearbox from California to Italy.

The parties' submissions

83. As already indicated, Mr Shepherd disputed the application of the Sale of Goods Act, but he submitted in the alternative that Mr Carl was under no obligation to allow the gearbox to be sent to Italy for examination or to bear the expense of sending it there. Mr Hooper emphasised the apparent common ground between the parties as to examination in Italy and submitted that this was the appropriate place for examination, either in accordance with the Act or pursuant to an implied term.

Analysis and conclusion

84. Section 34(1) of the Act provides:

> "Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract and, in the case of a contract for sale by sample, of comparing the bulk with sample."

85. Accordingly GFL was entitled to "a reasonable opportunity of examining the goods" in order to ensure that the gearbox was indeed the original gearbox. However, the judge made no finding that such an examination could not have taken place at the Canepa premises in California. If the expertise of Ferrari was necessary to establish whether the gearbox was authentic, the examination could have taken place by sending somebody

to California. This would have afforded GFL a reasonable opportunity of examining the gearbox and was all that section 34 required. I would not accept that Mr Carl was under any obligation to allow the gearbox to be sent to Italy, let alone to pay for it to be sent there. There is no necessity to imply any such term. The position would, or at least might, have been different if the Ferrari premises in Italy had been the agreed place for delivery of the gearbox, but neither party contended that it was.

86. We were told that there is now no issue as to the authenticity of the gearbox.

The place of delivery of the gearbox

87. The next issue concerns the place of delivery of the gearbox to GFL.

The judgment

88. The judge held at [150] that Mr Carl's obligation was to deliver the gearbox to GFL at its address in London and not merely to tender it for collection at the premises of Canepa in California. He regarded this as the natural meaning of the words "turn the Gearbox over to [sc. Buyer]" in clause 7.6 of the contract.

The parties' submissions

89. Mr Shepherd challenged this conclusion, submitting that Mr Carl's obligation was to tender the gearbox for collection by GFL at the premises of Canepa in California and that Mr Carl had no obligation to pay for sending the gearbox to London. Mr Hooper submitted that Mr Carl's obligation was to deliver the gearbox to GFL at its address in London. He submitted that, as the judge held, this was the meaning of clause 7.6 of the contract, or alternatively that a term should be implied to this effect. Alternatively, section 29(2) of the Act provides for delivery at "the seller's place of business if he has one, and if not, his residence", which in this case meant the address in Chester Square referred to in the contract.

Analysis and conclusion

90. Section 29 of the Sale of Goods Act provides:

> "(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties.
>
> (2) Apart from any such contract, express or implied, the place of delivery is the seller's place of business if he has one, and if not, his residence; except that, if the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that places the place of delivery. …
>
> (4) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until the third person acknowledges to the buyer that he holds the goods on his behalf; but nothing in this section affects the

> operation of the issue or transfer of any document of title to the goods. …"

91. Accordingly section 29(2) provides a default rule when the contract is silent on the issue, but the fundamental rule is in section 29(1) and is that the place of delivery depends on the true construction of the contract. The applicable term in this case is clause 7.6 which requires the Seller to "turn the Gearbox over to [sc. Buyer]". The natural meaning of those words, in my judgment, is that the Seller is required to make the gearbox available for collection by the Buyer wherever it may be. That is consistent with the scheme of the contract as a whole. "Delivery" of the GTO itself was to be accomplished at the place where the car was located, i.e. the Ferrari premises in Italy, by the Seller procuring "the release of the GTO into the control of Buyer or his pre-notified collection agent": see clause 5.3. It is consistent also with the position at common law: see *Benjamin's Sale of Goods* (11th Ed, 2021), para 8-018.

92. This being the effect of clause 7.6, there is no scope for any implied term requiring Mr Carl to send the gearbox to London.

93. It is unnecessary to consider what the position would have been pursuant to section 29(2). I would wish to leave open the question whether, if that subsection applied, this was a case of a "sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place". Although the gearbox constituted specific goods and, to the knowledge of the parties, it was not located at Mr Carl's place of business (if he had one) or residence, the parties did not know for sure (as clause 7.2 recorded) where it was.

94. I would note, however, that the effect of section 29(4) is that when goods are in the possession of a third person, there can be no valid delivery unless and until that third person acknowledges to the buyer that he holds the goods on the buyer's behalf. Here the goods were held by Canepa, albeit that it is not entirely clear whether they were in the possession of Canepa at the time when the contract of sale was concluded.

The US $500,000

95. As we have seen, it was common ground at the time that Mr Carl would be entitled to the payment of US $500,000 referred to in clause 7.11 of the contract for his services in locating and securing possession of the gearbox. By the time of the trial, however, GFL was disputing this entitlement, contending that clause 7.11 only applied when the gearbox was recovered from somebody other than Canepa.

The judgment

96. The judge accepted GFL's submission. He found as a fact at [163] and [164] that custody of the gearbox had been secured by formal legal correspondence so as to trigger the entitlement to payment under clause 7.11, but held nevertheless that the clause did not apply. This was because, as the judge held at [158], clause 7.6 dealt with recovery from Canepa and provided for the gearbox to be turned over to Canepa "without additional compensation", while clause 7.11 applied only if the gearbox was recovered from a party other than Canepa.

The parties' submissions

97. Mr Shepherd submitted that the judge had drawn the wrong distinction. The right distinction was not between recovery from Canepa and recovery from a third party, but rather between recovery without the need for formal legal correspondence or litigation (when no payment would be due) and recovery as a result of formal legal correspondence or litigation (when it would). Mr Hooper supported the judge's reasoning, submitting that clause 7.6 constituted a complete code so far as recovery from Canepa was concerned.

Analysis and conclusion

98. In my judgment clauses 7.6 and 7.7 have to be read together. Clause 7.6 deals with recovery of the gearbox from Canepa, while clause 7.7 deals with the situation where the gearbox is located in the possession or ownership of a third party other than Canepa. In both clauses the words "without additional compensation" appear. That is merely another way of saying that recovery of the gearbox will not affect the price of US $44 million paid for the GTO. But it does not address the distinct question whether the Seller should be remunerated for his efforts in locating and recovering the gearbox.

99. That is dealt with in clauses 7.8 to 7.11. Those clauses deal first with the incurring of legal costs (clause 7.8), next with the allocation of any compensation or damages recovered from any third party (clause 7.9), and finally with remuneration to the Seller for his services in locating and securing possession of the gearbox (clause 7.11). They do not distinguish between a case where the gearbox is recovered from Canepa and a case where it is recovered from somebody else, but apply equally in either case. In either case they provide an incentive to Mr Carl to assist in the recovery of the gearbox, in circumstances where it is in GFL's interest that Mr Carl should do what he can to recover it so that it can be reunited with the GTO. There is no commercial sense in saying that Mr Carl should be incentivised to assist and should be remunerated in the event that the gearbox is recovered from a third party other than Canepa, but not in the event of its recovery from Canepa where, according to clause 7.2, Mr Carl believed it to be.

100. Accordingly the judge was wrong, in my judgment, to hold that Mr Carl was not entitled to the further payment of US $500,000 although, as Mr Hooper pointed out, that sum would only become payable under clause 7.11 once GFL was "in receipt" of the gearbox.

101. The true construction of the contract is of course a matter to be determined objectively and the subjective views of the parties are irrelevant. Nevertheless it would be surprising if the contract on its true construction provided that the US $500,000 was not payable when at the time it is clear that both parties thought that it was.

Repudiation

102. This brings me to the question whether the contract was terminated as a result of repudiation by GFL. In opening the appeal, Mr Shepherd said, when asked what difference this question would make, that it would not make much difference but might be relevant to questions of costs. It is apparent, however, in the light of the post-hearing correspondence to which I have referred, that Mr Carl views this as a critical issue enabling him to contend that, because the contract has been terminated, an order for specific performance was not available to the judge.

The judgment

103. The judge dealt with the issue of repudiation at [174] on the basis of his conclusions on the issues which I have already discussed, namely that Mr Carl was obliged to agree to shipment of the gearbox to Ferrari in Italy, to be inspected prior to it being either accepted by GFL or returned to Mr Carl at his London address. On that basis he held that GFL's email sent at 14:31 on 21st February 2018 was not repudiatory because it accorded with the parties' obligations under the contract. At [176] he rejected a further argument on repudiation, that GFL was in repudiation by advancing a case in these proceedings that it was not obliged to make the payment of US $500,000. As he held that GFL was not obliged to make that payment, there could be no question of repudiation by advancing such a case.

The parties' submissions

104. Mr Shepherd submitted in his skeleton argument (but did not develop the point orally) that GFL's email of 21st February 2018 was a repudiation of the contract because (1) the payment of US $500,000 would only be made after verification of the authenticity of the gearbox by Ferrari in Italy and (2) there was no right for GFL to insist on examination of the gearbox either in Italy or at all. He submitted also that if Mr Carl was entitled to the payment of US $500,000, it was repudiatory conduct to advance the case in these proceedings denying that entitlement. Mr Hooper submitted that the judge was right in his analysis of the parties' contractual obligations and accordingly that no question of repudiation could arise.

Analysis and conclusion

105. I have held, disagreeing with the judge, that GFL had a right to examine the gearbox, but that this could have been done at Canepa's premises in California and did not require shipment to Italy, and that Mr Carl was entitled to the payment of US $500,000. It is relevant also that property in the gearbox had passed to GFL. Accordingly the basis on which the judge approached the question of repudiation cannot stand. Nevertheless I have no doubt that his conclusion was correct.

106. As to GFL's email of 21st February 2018, it is clear that this was sent in an attempt, as Mr Fisken put it, "to get the gearbox matter resolved". It is clear from the email that GFL was prepared to pay the US $500,000, but did not want to do so until the authenticity of the gearbox had been confirmed. That was both reasonable and in accordance with the contract. It wanted the examination to take place in Italy and maintained that the cost of shipment to Italy should be for Mr Carl's account. To that extent, GFL was mistaken as to the contractual position, but the difference (essentially, who should bear the cost of shipment to Italy) was trivial in the context of a contract worth US $44.5 million and at an earlier stage Mr Carl had been prepared to contemplate shipment to Italy. In the circumstances it is impossible to say that the email amounted to a repudiation of the contract.

107. It is equally impossible to say that it was a repudiation to dispute liability for the payment of US $500,000 in these proceedings. That was a point which GFL was entitled to take once the matter headed to litigation, and on which it succeeded before the judge, even though I have taken a different view.

108. It follows that the contract was not repudiated and that the judge was entitled to make an order for specific performance.

An order for delivery up

109. In these circumstances it is unnecessary to say much about GFL's alternative claim for an order under section 3(2) of the Torts (Interference with Goods) Act 1977. That section provides:

> "(1) In proceedings for wrongful interference against a person who is in possession or in control of the goods relief may be given in accordance with this section, so far as appropriate.
>
> (2) The relief is—
>
> (a) an order for delivery of the goods, and for payment of any consequential damages, …"

110. On the basis that property in the gearbox had passed to GFL and that GFL was entitled to possession of it, Mr Hooper submitted that an order for delivery up could be made under this section even if the contract had been terminated. Such termination would not have caused the property in the gearbox to revert to Mr Carl. I would accept that such an order could have been made, but it would not have entitled GFL to any greater relief than could have been obtained by an order for specific performance. I did not understand Mr Hooper to submit otherwise. Accordingly, on the basis that the place of delivery of the gearbox under the contract of sale was in California, I am not persuaded that an order under section 3 would do more than require Mr Carl to make the gearbox available for collection by GFL there (see *Clerk & Lindsell on Torts*, 23rd Ed (2020), para 16-92). It is, however, unnecessary to reach a final conclusion about this.

Disposal

111. An order for specific performance under section 52 of the Sale of Goods Act 1979 "may be unconditional, or on such terms and conditions as to damages, payment of the price and otherwise as seem just to the court". In my judgment an order for specific performance is appropriate in this case, having regard to the unique nature of the original gearbox, but it needs to be made conditional in order to give effect to the conclusions as to the parties' contractual obligations which I have reached. Accordingly I would affirm the order for specific performance made by the judge but, recognising that the gearbox is now in the possession of GFL in London and held subject to an undertaking to the court, I would order that GFL be released from its undertaking on payment to Mr Carl of (1) US $500,000 together with interest and (2) the cost incurred by Mr Carl in shipping the gearbox from Canepa's premises in California to GFL's premises in London. Mr Carl must bear the cost of the US $25,000 paid to Canepa. Save to that extent, I would dismiss this appeal.

112. We were informed that GFL proposes to hand over the gearbox once it is free to do so to the buyer to whom it sold the GTO. We were informed also by Mr Shepherd that Mr Carl contemplates further proceedings against GFL arising out of the fact that GFL sold the GTO to this buyer, making a profit of US $3 million. Such proceedings are not before us but, for my part, I consider that there is a real prospect that any such claim

would constitute an abuse of process, in particular having regard to the dismissal of the application to amend to plead a case of misrepresentation and mistake.

113. Before parting with this appeal I wish to mention some further points.

The List of Issues

114. It appears that the list of issues agreed by the parties in this case was produced as a result of a trawl through the pleadings, picking up every point where there was a dispute between the parties. That is not in general likely to be a helpful approach and was not in this case. Nor is it in accordance with the Circuit Commercial Court Guide, which provides at para 6.11 that "the list of issues is intended to be an agreed record of the principal issues of fact and law arising in the case" and, as such, is a key document for case management purposes. I would emphasise the word "principal". I would draw attention also to the more detailed provisions set out at para D6.1 of the Commercial Court Guide, which also make clear that "the list should identify the principal issues in a structured manner, such as by reference to headings or chapters. Long lists of detailed issues should be avoided, and sub-issues should be identified only when there is a specific purpose in doing so".

115. As these provisions explain, the list of issues is intended to be the servant of good case management. There is a danger, not altogether avoided in this case, that rigid adherence to the terms of an unduly detailed and unstructured list will obscure rather than reveal what the case is really about. At the case management conference stage when the list of issues has to be prepared by the parties and approved by the court, the court has little choice but to rely heavily on the co-operation of the parties to provide a useful list. But judges should not feel fettered by the list of issues agreed at this stage if, as the case develops, it becomes apparent that it is not serving its purpose.

Mediation

116. I have already observed that it would have been in the interests of both parties, if they were unable to resolve matters themselves, to have engaged the services of a skilled mediator at an early stage, and before this dispute escalated to court proceedings. When giving permission to appeal to this court I observed that:

> "The case does not fall within the [Court of Appeal] pilot scheme for mediation, but the parties are strongly encouraged to consider attempting to resolve their dispute by mediation."

117. When we asked Mr Shepherd what steps had been taken in the light of this observation, his answer was succinct. He told us that the answer was "none". When we asked Mr Hooper the same question, he told us that in view of Mr Carl's failure to respond to settlement offers in the past (including a Part 36 offer which had been beaten at the trial), it was not thought worthwhile to pursue this suggestion. This is highly unsatisfactory. Strong encouragement from the court to consider mediation merits careful consideration and is not simply to be ignored or rejected out of hand. Also unsatisfactory is the way in which Mr Carl's case has changed during the hearing of the appeal. I would invite submissions as to the consequences which should follow.

Lady Justice Simler:

118. I agree.

Lord Justice Peter Jackson:

119. I also agree.

ADDENDUM

Lord Justice Males:

1. This is an Addendum to our judgment dated 28th May 2021 with which all members of the court agree.

2. It is clear in my judgment that the Respondent, GFL, has been the successful party in these proceedings both at first instance and in this court, albeit that the Appellant, Mr Carl, has improved his position on appeal in that he has succeeded in obtaining an order for payment of the fee of US $500,000, together with the cost of shipping the gearbox to London in the sum of US $6,410. Nevertheless, it is now clear that what these proceedings have really been about is Mr Carl's attempt to retain the gearbox, presumably because he believes that he can obtain considerably more for it than the US $500,000 payment referred to in the parties' contract. That attempt has failed, both at first instance and in this court.

3. It follows in my judgment that GFL should have its costs of these proceedings. However, the position is complicated to some extent by a Part 36 offer to settle the proceedings made by GFL on 18th December 2018 and by the parties' failure to respond to the court's encouragement to mediate when granting permission to appeal.

4. The Part 36 offer made by GFL reflected almost precisely the decision which we reached on appeal, namely that GFL was entitled to take delivery of the gearbox in California but would be liable to pay the US $500,000 together with the cost of shipping it to London. However, the offer capped GFL's liability for interest up to the date of the offer at US $20,000.

5. In the court below, where HHJ Pearce held that GFL was not liable to pay the US $500,000, GFL comfortably beat the terms of its offer and accordingly recovered indemnity costs from the date when that offer ought to have been accepted, together with an enhanced rate of interest on those costs and the additional payment specified in CPR 36.17(4)(d)(ii) calculated by reference to the costs which it had incurred.

6. There is a dispute between the parties as to the rate of interest to be awarded to Mr Carl on the sums which we have found to be due to him. Although Mr Carl contends for a higher rate, I would award such interest at the rate of 2% over US Prime rate. The result, however, is that as a result of the judgment on appeal Mr Carl has beaten, albeit not by very much, the offer made by GFL. Even up to December 2018, the interest to which Mr Carl was entitled exceeded the sum of US $20,000 which was offered. Accordingly I would set aside the orders made in the court below which were made on the basis that GFL had beaten its offer and would order instead that Mr Carl must pay GFL's costs below on the standard basis, together with interest.

7. The position in this court, as I have said, is that GFL has been the successful party. *Prima facie*, therefore, it is entitled to its costs of the appeal. I would make no discount from these to reflect the issues on which Mr Carl has succeeded. I would order the costs of the appeal to be paid on the indemnity basis to reflect the court's disapproval of Mr Carl's failure to take any steps in response to the suggestion of mediation. In this regard it is notable that my order granting permission to appeal not only contained the strong encouragement to mediate to which I have referred, but also indicated a provisional view that the outcome of the appeal might well prove to be exactly as it has been. If the suggestion of mediation had been taken up in good faith in the circumstances of this case, it is hard to think that the costs of the appeal would have needed to be incurred.

8. I would therefore make an order in the terms set out below.

SCHEDULE

IN THE COURT OF APPEAL (CIVIL DIVISION) **Case No.: A4/2020/1466**
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)
HHJ PEARCE
[2020] EWHC 1385 (Comm)

Before:
Lord Justice Peter Jackson
Lord Justice Males
and Lady Justice Simler
11th June 2021

B E T W E E N:

GREGOR FISKEN LIMITED

Respondent / Claimant

-and-

BERNARD CARL

Appellant / Defendant

ORDER

UPON the Appellant's appeal made by Appellant's Notice filed on 25 August 2020

AND UPON the Respondent's cross-appeal made by Respondent's Notice dated 16 December 2020

AND UPON the order of His Honour Judge Pearce dated 29 June 2020 ("**the 29 June 2020 Order**")

AND UPON the Appellant having complied with paragraph 1 of the 29 June 2020 Order by procuring the shipment of the Gearbox to the Respondent's premises in London at the Appellant's expense

AND UPON the Respondent having given the Undertaking referred to in the Recitals to the 29 June 2020 Order to store the Gearbox securely at its premises pending the outcome of this appeal ("**the Undertaking**")

AND UPON considering written submissions on consequential matters

IT IS ORDERED THAT:

1. The appeal is dismissed and the 29 June 2020 Order is affirmed save as set out in this order.

2. The Respondent must pay to the Appellant the sum of US $506,410 being:

   (1) US $500,000 payable pursuant to clause 7.10 of the parties' contract; and
   (2) US $6,410 in respect of the cost of shipment of the Gearbox to the Respondent's premises in London;

   together with interest thereon as specified in paragraph 3 below.

3. The Respondent must pay interest thereon at the rate of 2% above US Prime rate to the Appellant as follows:

   (1) from 19 February 2018 until payment on the sum of US $500,000 referred to in paragraph 2(1) above; and
   (2) from 3 September 2020 until payment on the sum of US $6,410 referred to in paragraph 2(2) above.

4. Upon payment of the sum of US $506,410 referred to in paragraph 2 together with the interest referred to in paragraph 3 above, whether by payment or by setting off such liability against the costs of these proceedings for which the Appellant is liable pursuant to the provisions of this order, the Respondent is released from the Undertaking.

5. Paragraphs 5 to 9 of the 29 June 2020 Order are set aside. The Appellant must pay the Respondent's costs of the proceedings below on the standard basis together with interest thereon at 1% over base rate from the date when those costs were incurred until 29th June 2020.

6. The Appellant must pay the Respondent's costs of the appeal on the indemnity basis together with interest thereon at and thereafter at the Judgment Act rate until payment rate from the date when those costs were incurred until 11th June 2021 and thereafter at the Judgment Act rate until payment.

7. The Appellant must pay the Respondent the sum of £60,000 by way of interim payment on account of the costs mentioned in paragraph 6 above by 16 July 2021.