MONCKTON CHAMBERS

Gregor Fisken Limited v Mr Bernard Carl

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Will Hooper of Monckton Chambers appeared on behalf of Gregor Fisken Limited.

The widely reported case of Gregor Fisken Limited v Mr Bernard Carl [2020] EWHC 1385 (Comm) involved one of the world's rarest and most expensive cars, a $44m Ferrari 250 GTO Series 1 coupé, and its lost (and found) original gearbox. After a week-long trial in the High Court, it was held that the defendant seller was acting in breach of contract in failing to deliver the GTO's original gearbox to the claimant buyer. The Court made an order for specific performance, requiring the seller to secure the delivery of the original gearbox to the buyer.

Factual background

The dispute concerned a contract for the sale of a rare Ferrari 250 GTO Series 1 coupé ("**the Agreement**", "**the GTO**"). The Agreement defined the contracting parties as being, (1) as "*seller*", Mr Bernard Carl ("**the Defendant**"), and, (2) as "*buyer*", Gregor Fisken Limited ("**the Claimant**") "*as agent for an undisclosed principal*". However, the Claimant's signature did not indicate that the Claimant was signing as agent.

The GTO was delivered without its original gearbox ("**the Gearbox**"). The fact that the GTO was missing the Gearbox had been declared during the negotiations. In consideration of the Claimant accepting the GTO without the Gearbox, the Defendant agreed to use his best efforts to recover and deliver up the Gearbox. Clause 7.6 of the Agreement ("**Clause 7.6**") provided that if the Defendant recovered the Gearbox from Canepa Group Inc ("**Canepa**"), the Californian Ferrari specialist thought to have possession of the Gearbox, the Defendant would "*promptly turn the Gearbox over*" to the Claimant "*without additional compensation*".

After the Agreement was entered into, it transpired that Canepa was indeed in possession of the Gearbox. At the time of the trial, Canepa held the Gearbox to the Defendant's order. The Claimant sought an order that the Defendant secure delivery up of the Gearbox.

The Defendant opposed the claim on the basis that the Claimant did not have title to sue on the Agreement. The Defendant also argued that he was entitled to an additional fee of $500,000 for the Gearbox ("**the Fee**"), that the Claimant

had committed a repudiatory breach of the Agreement by (inter alia) refusing to accept delivery of the Gearbox at Canepa's premises in California, and that the Defendant had accepted the alleged repudiatory breach, terminating the Agreement.

Decision

His Honour Judge Pearce held that the Claimant did have title to sue on the Agreement and proposed to make an order for specific performance requiring the Defendant to secure the delivery of the Gearbox to the Claimant.

Title to sue on the Agreement

The Court applied the following principles set out in *Hamid v Francis Bradshaw* [2013] EWCA Civ 470 at [57(iv)]:

"Where the issue is as to whether a person signed a document as principal, or as agent for someone else, there is no automatic relaxation of the parole evidence rule. The person who signed is the contracting party unless (a) the document makes clear that he signed as agent of a sufficiently identified principal or as the officer of a sufficiently identified company or (b) the extrinsic evidence establishes that both parties knew he was signing as agent or company officer."

As to (a), the Court held that the Agreement did not make it clear that the Claimant signed the Agreement as agent (at [143]). Although the Claimant was described as an agent in the body of the Agreement, applying *The Elikon* [2003] EWCA Civ 812; [2003] 2 All ER (Comm) 760, the Court found that the description in the body of the Agreement did not trump the role assigned to the Claimant in its signature (which made no reference to the Claimant signing as agent).

As to (b), while the Court found that it was more probable than not that the Defendant signed the Agreement believing the Claimant to be acting as agent, and that it was more probable than not that the Claimant realised that the Defendant so believed, it did not follow that the parties "*knew*" that the Claimant was acting as agent (at [144]). The Claimant's representative who signed the Agreement on the Claimant's behalf knew that the Claimant was not acting as agent.

Following paragraph 57(iv) of Jackson LJ's judgment in *Hamid v Francis Bradshaw*, the Court held that extrinsic evidence was otherwise inadmissible (at [145]). In circumstances where the Agreement did not make it clear that the Claimant signed as agent, and where it had not been established that both parties knew that the Claimant signed as agent, it was held that the Claimant did not sign the Agreement as agent.

Terms as to delivery and additional compensation

The Court held that while the Defendant may have been entitled to the Fee in certain circumstances, the wording of Clause 7.6 was absolute in its assertion that the Defendant would not be entitled to additional compensation where the Gearbox was recovered from Canepa.

The Court also accepted the Claimant's submission that the Defendant had an obligation to deliver the Gearbox to the Claimant (at [150]). This conclusion was based on the natural meaning of the words "*turn over*" in Clause 7.6 and the fact that the Defendant, who had allowed Canepa to have custody of the Gearbox, had more control over the location of the Gearbox than the Claimant.

The Defendant was also held to have an obligation to pay for the shipment of the Gearbox to the Claimant (at [153]). The Court noted that Clause 7.6 referred to turning over the Gearbox "*without additional compensation*" and held that there was no basis for displacing the common law rule that the expenses of and incidental to delivery fall on the seller.

The Claimant's rejection of the Defendant's offer to collect the Gearbox from Canepa's premises in California was therefore held not to have been a repudiatory breach of the Agreement.

Relief

The Court held that the Claimant was entitled to an order for specific performance, requiring the Defendant to secure the delivery of the Gearbox to the Claimant for (inter alia) the following reasons (at [187]):

(i) The GTO and the Gearbox were unique and should be reunited. In the context of a $44m car and a gearbox said to be worth $500,000 to $1m, the reuniting of the two originals was likely to enhance the importance of the GTO, as well as the Claimant's reputation in the market.

(ii) There was no good reason not to order specific performance. The Claimant had a contractual right to the Gearbox and the Defendant could readily secure its delivery.

Comment

This case serves as a reminder that a party's signature, previously described as a party's "*seal upon the contract*" (*The Elikon* [2003] EWCA Civ 812; [2003] 2 All ER (Comm) 760), plays a predominant role in determining the identity of the parties and the capacity in which the relevant signatory signed the contract.

A party seeking to trump the role assigned to a party in its signature is likely to face an uphill battle. As between a description of a party in the body of the contract and the signature, the latter will generally prevail. Moreover, as regards the question whether a person or entity signed a document as agent, extrinsic evidence is only admissible in so far as it goes to the issue whether both parties knew that the relevant party was signing as agent

The judgment is available here.

The case has been widely reported in the media: Daily Mail, The Times.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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