

Neutral Citation Number: [2020] EWHC 1385 (Comm)

Case No: LM-2018-000138

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Rolls Building.
Fetter Lane
London
EC4A 1NL

Date: 01/06/2020

Before:

HIS HONOUR JUDGE PEARCE

Between:

GREGOR FISKEN LIMITED

Claimant

- and -

MR BERNARD CARL

Defendant

MR WILLIAM HOOPER (instructed by **ROSENBLATT LIMITED**) for the **Claimant**
MR JEREMY COUSINS QC (instructed by **DAVIS WOOLFE LIMITED**) for the **Defendant**

Hearing dates: 5, 6, 9 and 10 December 2019

JUDGMENT

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

Introduction

1. This case arises from a contract (“the Agreement”) dated 18 October 2017 for the sale of a Ferrari 250 GTO (“the GTO”). Whilst the GTO has been delivered to the Claimant’s order, its original gearbox numbered N2 (“the Gearbox”), which was not with the car at the time of delivery, has not. The Gearbox is currently with a Ferrari specialist in California, Canepa Group Inc (“Canepa”), held to the Defendant’s order, subject to a court order obtained by the Claimant preventing its disposal.
2. The Claimant seeks an order that the Defendant secure delivery up of the Gearbox. The Defendant resists an order for delivery up, at least without the payment of a fee \$500,000 (“the Fee”). He also seeks damages for loss of use of the Fee.

Background

3. The GTO is one of a small number of Ferrari 250 GTO Series 1 coupés. It is common ground that these are rare and valuable classic sports cars. By way of example, the Defendant refers in his statement to one being sold for \$70 million. The purchase price in this case, \$44 million, is an indication of their high value.
4. The Defendant purchased the GTO in 1997. In 2016, he marketed the GTO for sale through a Ferrari dealer, Talacrest. At this time, the Gearbox was not in the GTO. It seems that the Gearbox had been removed for repair and a replacement put in. The precise circumstances of this happening and the whereabouts of the Gearbox until it was confirmed to be in the possession of Canepa are not entirely clear. In any event, the absence of the original gearbox was declared during the negotiations between the Claimant and the Defendant.
5. The marketing for sale of the GTO came to the attention of Mr Gregor Fisken, a classic car dealer who, since 1997, has operated through the Claimant company. Mr Fisken and the Defendant had been involved in previous classic car sales.
6. Mr Fisken’s evidence was to the effect that he was purchasing the GTO for a customer of his, a person introduced by an associate of Mr Fisken and another Ferrari dealer, Mr Joe Macari. Mr Macari operates through Joe Macari Car Company Limited.
7. On or about 18 October 2017, the Claimant and the Defendant entered in the Agreement. The Agreement defines the contracting parties as being, as “*seller*”, the Defendant, and as “*buyer*”, the Claimant “*as agent for an undisclosed principal.*” The price of the GTO is stated to be \$44,000,000. The document is signed by the

Defendant and the Claimant. At this point in the document there is no repetition of the statement that the Claimant is acting as agent.

8. It should immediately be noted that an issue arises as to the terminology used in the Agreement. The phrase “*agent for an undisclosed principal*” is inherently contradictory – the fact of describing a party as an agent discloses the existence of a principal. The better phrase to use, where the fact that a party is acting as agent is disclosed but the identity of the principal is not is “*agent for an unidentified principal.*”

9. Section 7 of the Agreement deals with completion, title and delivery as follows:

“5.1 Completion of this sale (‘completion’) will take place immediately upon Seller notifying Buyer by email .. that Goodman Derick 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 of 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 Bills 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.”

10. As for the Gearbox, the Agreement provides:

“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...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 Seller¹, 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 without additional compensation.

7.7 If Seller locates the Gearbox in the possession or ownership of a third party other than Canepa, he shall 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 the Seller incurs legal costs in relation to the return of the Gearbox or related compensate, then Seller agrees not to incur more than USD\$100,000 of legal costs without first obtaining Buyer's prior written consent to 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

¹ The reference to "seller" here and in the second use of the word in clause 7.6 is clearly erroneous. Mr Carl agreed in cross examination that this was intended to be a reference to the buyer.

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, Seller shall forthwith deliver the Gearbox to Buyer.

7.11 If such formal correspondence or legal process secures custody of the Gearbox then, in consideration of Defendant's services in locating and securing possession of the Gearbox, accepting the risk of unsuccessful litigation and sharing in the costs of successful litigation Buyer shall, 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 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."

11. On the next day 19 October 2017, the Claimant entered into an agreement for the sale of the GTO to the buyer introduced by Mr Macari.
12. Subsequently it became apparent that the Gearbox was in Canepa's possession. The delivery up of the Gearbox and the liability for any fee in that regard have become the subject of this litigation.

The proceedings

13. The Claimant pleads a contract between it and the Defendant for the sale of the GTO contending that the Defendant was in breach of contract in failing to deliver up the Gearbox.
14. In the original Defence, the Defendant pleaded a contract between the Defendant and the Claimant as intermediary on behalf of "*an undisclosed principal.*" The Amended Defence pleaded that the Claimant is described in the contract as "*agent for an undisclosed principal*" and that "*the Claimant acted on behalf of a principal whose existence was disclosed to the Defendant, but whose identity was not.*" The Claimant's entitlement to sue on the Agreement was denied. However, the enforceability of the agreement itself was not questioned. The Defendant pleaded that he had tendered the Gearbox by email at 09.24 on 21 February 2018, and by an email timed at 09.31 on the same day, the Claimant rejected the tendered performance, thereby repudiating the contract and entitling the Defendant to accept the breach and

treat the Agreement as terminated. Alternatively, the Claimant is in repudiatory breach by denying the Defendant his entitlement to the Fee, a breach that the Defendant has accepted as terminating the Agreement during the litigation.

15. On 23 October 2019, the Defendant applied to re-amend the Defence, adding causes of action and parties, and to vacate the trial. A significant part of the application was that the Agreement was void for mistake as a result of the fact that the Defendant did not intend to contract with the Claimant and/or there was no consensus as to the consenting parties. In the alternative, the Defendant pleaded that Mr Fisken, Mr Macari and/or their respective companies induced the Defendant to enter into the Agreement by misrepresentation. That application was refused by His Honour Judge Keyser QC on 26 November 2019. It follows that these arguments are not available to the Defendant and he is confined to his pleaded case.
16. The matter came on for trial in front of me on 5, 6, 9 and 10 December 2020. Oral evidence was given by the following:
 - (a) For the Claimant, Mr Gregor Fisken (two relevant statements dated 24 September 2019 and 8 November 2019) and Mr Joe Macari (statement dated 25 September 2019);
 - (b) For the Defendant, Mr Carl himself (three relevant statements, his first in these proceedings dated 24 September 2019, his fourth, dated 21 November 2019, and his sixth, dated 6 December 2019).

The Issues

17. The parties have agreed the issues in the case as follows:
 - (a) Issue 1 - Does the Claimant have title to sue on the Agreement? In particular:
 - (i) Did the Claimant enter the Agreement as principal?
 - (ii) In entering the Agreement, did the Claimant act on behalf of a principal whose existence was disclosed but whose identity was not?
 - (iii) Did the Claimant enter the Agreement as “mere agent”?
 - (b) Issue 2 - In what circumstances did the Agreement entitle the Defendant to the Fee?
 - (c) Issue 3 - Did the Defendant act so as to trigger an entitlement to the Fee? In particular:-

- (i) Was the Gearbox recovered in the circumstances specified in clause 7.11 of the Agreement, such that the Defendant was entitled to the Fee?
- (ii) Further or alternatively, does clause 7.6 of the Agreement assist the Claimant so as to deprive the Defendant of the Fee in the circumstances of the case?
- (d) Issue 4 - Were Mr Macari and/or the Claimant mistaken as to the meaning and effect of the Agreement when engaging in communications indicating that the Defendant might be entitled to the Fee upon verification of the Gearbox?
- (e) Issue 5 - To what extent if at all was Mr Macari acting as the Claimant's agent?
- (f) Issue 6 - Is the Claimant estopped from asserting that in the circumstances the Defendant is not entitled to the Fee?
- (g) Issue 7 - Did title to the Gearbox pass at Completion as defined in the Agreement?
- (h) Issue 8 - Was consideration paid for the Gearbox?
- (i) Issue 9 - Was the purchase price of the GTO reduced as a consequence of the inability to deliver the Gearbox with the GTO?
- (j) Issue 10 - Did the Claimant have a right to verify the Gearbox prior to accepting the same?
- (k) Issue 11 - If so, where?
- (l) Issue 12 - What were the delivery obligations in respect of the Gearbox?
- (m) Issue 13 - Did the Defendant tender delivery of the Gearbox?
- (n) Issue 14 - What were the obligations as to the costs of shipment of the Gearbox (including to the Factory as applicable)?
- (o) Issue 15 - Was the Claimant's email dated 21 February 2018 a repudiatory or anticipatory repudiatory breach of contract?
- (p) Issue 16 - Was the Defendant's email dated 21 February 2018 acceptance of that repudiatory breach or a breach of contract itself and/or did the Defendant otherwise act in breach of contract?
- (q) Issue 17 - Does the Claimant advancing the case that the Defendant is not entitled to the Fee constitute a continuing breach (or anticipatory breach) of a

fundamental term of the Agreement, which the Defendant is entitled to treat as a repudiatory breach of contract and terminate the Agreement by notice in his Reply to Defence to Counterclaim?

- (r) Issue 18 - Was or is the Agreement terminated?
 - (s) Issue 19 - Is, by virtue of his refusal to authorise the delivery of the Gearbox, the Defendant wrongfully holding and possessing the Gearbox and/or wrongfully preventing the Claimant's recovery thereof?
 - (t) Issue 20 - Is the Claimant the Owner of the Gearbox and entitled to it and/or does the Claimant have a right to immediate and exclusive possession of the Gearbox and/or delivery up?
 - (u) Issue 21 - Is the Claimant entitled to specific performance of the Agreement including that the Defendant instruct Canepa to release the Gearbox to the Claimant?
 - (v) Issue 22 - Alternatively, what damages, if any, are payable to the Claimant as a result of the Defendant continuing to deny the Claimant possession of the Gearbox and, if payable, are these damages the damages of the Claimant or of the Claimant's "principal" (in respect of which word the Claimant makes no admissions, it being the Claimant's case that it did not act for or on behalf of a "principal" and that any loss was suffered by the Claimant), or the damages of both, in differing parts?
 - (w) Issue 23 - Is the Defendant entitled to the declaratory relief to the effect that the Agreement has been terminated due to the Claimant's breach, and consequently, that the Defendant is free to deal with the Gearbox and forfeit the Fee?
 - (x) Issue 24 - If the agreement has not been terminated, is the Defendant entitled to declaratory relief to the effect that he is entitled to the Fee upon the Claimant's taking possession of the Gearbox?
 - (y) Issue 25 - What damages (if any) is the Defendant entitled to for loss of use of the Fee?
18. Issues 1 to 19 relate to liability; issues 20 to 22 relate to relief on the Claim; and issues 23 to 25 relate to relief on the Counterclaim. They have been conveniently grouped as follows:

- (a) Issue 1 - Is the Claimant entitled to sue on the Agreement? (The Standing Issue)
 - (b) Issues 10, 11, 12, 13, 14 and 19 - What were the obligations under the Agreement in respect of inspection and delivery of the Gearbox? (The Inspection and Delivery Issues)
 - (c) Issues 2, 3, 4, 5, 6, 19 and 24 – Does the Agreement entitle the Defendant to payment of the fee in return for delivering the Gearbox to the Claimant in the circumstances which have arisen and/or is the Claimant estopped from denying such entitlement? (The Fee Issue)
 - (d) Issues 15, 16, 17 and 18 – Did the Claimant act in repudiatory breach of Agreement; if so, did the Defendant accept that repudiation and was the Agreement terminated? (The Termination Issue)
 - (e) Issues 7, 8, 19 and 20 - Has title in the Gearbox passed to the Claimant? (The Title Issue)
 - (f) Issues 20, 21, 22, 23, 24 and 25 - What is the appropriate form of relief? (The Relief Issue)
19. In this judgment, I have adopted this grouping save that:
- (a) Issue 19, whether by virtue of his refusal to authorise the delivery of the Gearbox, the Defendant is wrongfully holding and possessing the Gearbox and/or wrongfully preventing the Claimant's recovery thereof, has been separated as a separate issue (which I have called the “Wrongful Withholding Issue”) dealt with after the Termination Issue, since the answer to the question that is posed depends upon a number of findings on other issues.
 - (b) Issues 20 and 24 are dealt with only as part of the Relief Issue and not separately as part of the Title Issue and the Fee Issue respectively, to avoid repetition.

The evidence

20. Much of the evidence is either not disputed or, in so far as it is not accepted by the opposing party, is of no relevance to the determination of the case. I set out here the uncontroversial history and identify those parts where there is a relevant factual dispute.
21. Mr Fiskens describes his business and that of the Claimant as “*acting as an agent for buyers and/or sellers with high-value classic automobiles or buying these cars*”

ourselves as principal with a view to then selling them (hopefully) for a profit.” He states that he and the Defendant have known each other and have been doing business since 1997. Whilst in some of their dealings Mr Fisken had acted as a broker and earned a disclosed commission, it was common ground that there had been at least one occasion when Mr Carl had sold a car directly to Mr Fisken as principal.

22. Mr Fisken states that he became aware of the GTO being marketed by Talacrest in around November 2016. The vehicle had not sold by May 2017, by when it seems any contract with Talacrest had terminated. Mr Fisken says that the Defendant was not willing to give Mr Fisken and his company the exclusive right to market the GTO and was proposing a sale either to a private buyer or via auction.
23. At this time, Ferrari Financial Services (“FFS”) had a lien over the GTO pursuant to a loan agreement. Mr Fisken understood that there was a limited opportunity to inspect the GTO because, although it was then in London where the Claimant is based, FFS wished to take control of it pursuant to the lien and transport it to Italy.
24. Mr Fisken and Mr Carl arranged that, when the GTO was being transported to Italy, the transporter would stop at Mr Macari’s premises in South London, where two potential buyers could inspect it. In fact, neither of these potential purchasers was interested in the GTO, but Mr Macari stated that another client of his might be.
25. It became apparent that the GTO did not have its original Gearbox. Mr Carl refers in his witness statement to this authenticity of the Gearbox in the GTO being raised when it was examined at Mr Macari’s workshop on 5 June 2017. Mr Fisken states that he understood from the Defendant that the Gearbox had been removed when the GTO was with Canepa for repair. Mr Carl gives a more detailed (and slightly different) account of the movements of the Gearbox at paragraph 36 of his statement. Nothing turns on the difference between the accounts.
26. Thereafter negotiations began between the Claimant and the Defendant regarding sale of the GTO. Mr Fisken’s case was that he took the decision that he would purchase the GTO and sell it to the prospective purchaser, this being one of the two ways in which he did business as described above. Mr Carl’s account of the proposed deal was that Mr Fisken said he was acting for a wealthy customer whose identity he was not prepared to disclose but whose collection of cars was managed by Mr Macari. Mr Carl states that Mr Macari described the unidentified buyer as *“an American involved in the natural resource sector.”*
27. Mr Carl states at paragraph 14 of his witness statement: *“I was reassured by the fact that I was dealing with a buyer whom both Gregor and Macari had represented to be*

a wealthy American family in the natural resources sector and the owner of the other two multi-million-dollar Ferraris I inspected at Macari's premises. On the basis of this information, I was convinced that this buyer would have the funds to complete the purchase of the Car and was equally certain that Gregor could not do so on his own. Without this level of comfort, I would have required at least a 10% non-refundable deposit as a condition to entering into a contract for the sale of the Car to ensure that it was a real contract as opposed to a simple option agreement (such a deposit being the standard term on which I conduct deals of this nature)."

28. The original proposed price was, according to Mr Fisken, \$44.5 million or \$31.5 million plus a 1959 Ferrari 250 GT California Spyder ("the Cal Spyder") owned by the intending purchaser. Mr Carl's account was that the unidentified buyer proposed the part exchange deal involving the Cal Spyder. Initially Mr Carl said he preferred the cash plus Cal Spyder deal, whereas latterly he favoured the cash deal. Nothing turns on who proposed the various terms.
29. However the discussions about the proposed deal are of some significance in considering who the parties believed were contracting. In an e-mail on 7 July 2017, Mr Fisken referred to "*our client's offer of 31.5 m dollars plus the California Spyder for your GTO.*" In an email of 18 July 2017 from Mr Bennion, the solicitor from Goodman Derrick acting on behalf of the Claimant, to Mr Carl, it is stated that "*Gregor has asked me confirm that the Buyer wishes to use a Channel Island Company to purchase the GTO.*"
30. In cross examination, Mr Fisken was asked about what had been said as to the identity of the buyer. Mr Fisken said of this that "*We contemplated forming the Channel Islands Company controlled by myself to contract with Mr Carl.*" Mr Fisken said that, at this time, the part exchange of the Cal Spyder was under consideration. Mr Fisken accepted that the email of 18 July described the owner of the Cal Spyder as the buyer, but that Mr Bennion had not indicated that it was going to be a Channel Islands company owned by the Claimant rather than the then owner of the Cal Spyder who was to be the buyer of the GTO.
31. Shortly afterwards, at page 15 of the transcript for the second day of the trial, the following exchange occurs:

"Mr COUSINS QC: "... Mr Carl was left throughout, wasn't he, with the impression that the buyer from him was going to be the person who had been the owner of the Cal Spyder

Mr Fisken: That is correct, sir.

Q. Yes, thank you.

JUDGE PEARCE: And that that was not Gregor Fisken Limited?

A: It would have been a company formed under my control, sir.

JUDGE PEARCE: No, but the impression that he had was that it wasn't Gregor Fisken Limited?

A. Sorry, my Lord?

JUDGE PEARCE: The impression he would have had was that it was not Gregor Fisken Limited?

A. Not Gregor Fisken –

JUDGE PEARCE: Or indeed a company under your control?

A. That is correct, sir.

MR COUSINS QC: And it remained thus, didn't it?

A. It remained until such time as Mr Carl did not want to contract with a Jersey company. Mr Carl had rejected the California Spyder and Mr Carl was happy to contract with Gregor Fisken Limited for the full price that he wanted.

Q. You never told him about the identity swap, did you, Mr Fisken? Point out, will you, please, where you -- if you say you did, point it out?

A. I didn't say I did.

Q. Right. Well, in that case you accept you didn't

A. I accept I didn't.

Q. Right. So the impression given to Mr Carl by all the communications that actually took place between you and him was that the buyer from him was going to be Mr Macari's contact who, in July 2017, was the owner of the Cal Spyder?

A. At that time, correct, sir."

32. Thus, at this stage in his evidence, Mr Fisken appeared to be agreeing that Mr Carl had been told that the buyer of the GTO from Mr Carl was the person who owned the Cal Spyder. But shortly afterwards Mr Fisken said that "*Mr Carl was told right from the beginning that Gregor Fisken were acting as a principal and we, in turn, were selling the car on for a profit.*"
33. In terms of the parties to the proposed purchase, Mr Carl's account was that Mr Fisken represented (and Mr Macari confirmed) that the Claimant was acting solely as broker and would be paid a fixed commission \$500,000 by the unidentified buyer; Mr Macari was said not to be receiving any commission. Mr Carl maintains that his written communications with Mr Fisken were consistent with the Claimant acting as broker. For example, in an email of 7 August 2017, Mr Fisken refers to having spoken with "*our buyer regarding the missing gearbox issue and I have done my very best to persuade him to incorporate within the contract a proposal that we hope can work for you.*"
34. Whilst of course the reference to Mr Fisken discussing matters with the buyer supposes that the buyer and Mr Fisken (or the company through which he deals) are

not the same person, the language is consistent with Mr Fisken's account that his intention was for the Claimant to purchase the car and sell it immediately to the prospective buyer introduced by Mr Macari, this being the person referred to in the email of 7 August 2017 as "*our buyer.*"

35. In his oral evidence, Mr Carl repeatedly asserted that his contract was with Mr Fisken as agent for an arm's length purchaser. In a lengthy answer to why it mattered that he was contracting with the Claimant as agent, he said: "*I wanted to know that the car was going to an end user and was, to use simplistic language, therefore paying the retail price for the car rather than was a dealer trying to get a hold of the car and see much, how much he could mark it up for in a resale. I have never engaged in that kind of transaction and if I had what I would have asked for is that Mr Fisken put up a substantial deposit at risk and if he could not resell the car that he lose the deposit. What I was unwilling to let him do is to have an agreement where he took no risk and could in effect mark up the car and sell it to someone else which to me is giving him a free option. Had he come to me and said, 'I want to resell the car, here is the price I will pay for it. I will put up 10% of the price as a non-refundable deposit, in effect an option price', I would probably, if we agreed on the number, have said, 'If you are willing to give me 10% of the purchase price for having 60 days to go and market the car, fine'. But for him to come and say, 'I am going to remarket the car to make not a commission, but in effect equity profit and I am not paying you anything for that option and I am not telling you I am doing it' is a course of conduct I would never have agreed to and I don't believe I did agree to it to be clear.*"
36. In any event, Mr Fisken says that Mr Carl seemed confident that he could retrieve the Gearbox but would not promise that he could deliver it up. Accordingly, on Mr Fisken's version of events, he suggested that \$1 million of the purchase price be held in escrow pending delivery up of the Gearbox, to be released to Mr Carl when this was achieved. Mr Fisken says that Mr Carl was not keen on this adjustment to the purchase price and that it seemed increasingly likely that the Gearbox might not be retrieved from Mr Canepa.
37. On Mr Fisken's version of events at paragraph 23 of his witness statement, "*Mr Carl seemed eager to sue Mr Canepa for losing the gearbox and wanted to seek damages from him to reflect his inability to sell the GTO with the gearbox. To do this, however, Mr Carl needed to be able to demonstrate that he had received less money for the GTO without the gearbox than he would otherwise would have achieved with the gearbox. In this regard, Mr Carl did not want the wording of the Purchase Agreement to in any way cap the amount he could recover from Mr Canepa. To the contrary; Mr*

Carl wanted the purchase Agreement to include wording which would assist him in any legal claim. Mr Carl told me he saw this as an opportunity to make money from Mr Canepa – which he was prepared to share with” the Claimant.

38. The Defendant’s account was that the initial proposal was a reduction of \$1 million on the sale price, with him remaining under an obligation to take every reasonable step to retrieve the Gearbox. Mr Carl did not think this was reasonable. He sets out at some length in his witness statement, from paragraphs 37 to 57, the negotiations that he says took place.
39. On 2 September 2017, a meeting took place between the Defendant, Mr Fisker and Mr Bennion. During this meeting Mr Fisker proposed a retention from the purchase price to reflect the fact that the Gearbox was missing, but Mr Carl would not agree to this. Following negotiations, an agreement was reached by which Mr Carl would be paid \$44 million for the GTO without the Gearbox. If (contrary to the expectation at this time) the Gearbox was retrieved from Canepa, the Defendant would deliver it up without further charge; if on the other hand the Gearbox had to be retrieved from a third party, the Defendant would deliver it up but be paid \$500,000 for the time, trouble and cost involved in retrieving it. This was the deal that Mr Fisker says was incorporated into the Agreement.
40. The precise terms of the purchase agreement were negotiated between Mr Bennion on behalf of the Claimant and the Defendant. It was Mr Fisker’s evidence that the original intention of the Claimant was to buy through a subsidiary/shell company and that this was why the Agreement was worded in the way that it was, recording the Claimant was acting “*as agent for an undisclosed principal.*” On the other hand, Mr Carl was not willing to contract with such a subsidiary/shell company and insisted on contracting directly with the Claimant. Mr Carl and Mr Bennion had what Mr Fisker described as “*lengthy and rather confusing discussion*” about the Gearbox and by the time of the signing of the Agreement, Mr Fisker said “*I really did not know what had been agreed in this respect.*”
41. The Agreement was executed on 18 October 2017 and the deal completed on 20 October 2017, with delivery up of the GTO to the Claimant’s order. Payment was as follows:
 - (a) The Claimant transferred \$28,093,101.69 to FFS, pursuant to an agreement between the Claimant, the Defendant and FFS, thereby releasing the lien and security interest that FFS held;

- (b) The Claimant transferred \$15,906,898.31 to Goodman Derrick, to hold to Mr Carl's order. That money was released.
42. Meanwhile, on 19 October 2017, the Claimant entered into an agreement to sell the GTO to a further party². That contract is silent about the issue of the Gearbox.
43. Thereafter, attempts to retrieve the Gearbox continued. By January 2018, Mr Canepa was indicating that he had located it. On 20 January 2018, the Defendant's attorney, Mr Capuder, of Capuder Fazio Giacoia LLP, wrote to Mr Canepa noting that the Gearbox seemed to have been traced to him, and going on: "*I would like to arrange for the recovery of the transmission. We are prepared to offer you a complete release from any liability to my client and a payment of \$25,000 towards the expenses you incurred in response to his request of assistance in full payment for return of the transmission and a representation that it can be returned to my client with no adverse claims or liens on that transmission. The payment would be made as soon as the authenticity of the transmission can be confirmed.*" In his witness statement, Mr Carl describes this as a "*formal demand*" for the return of the Gearbox. I shall return to that description below.
44. That offer was subsequently withdrawn by letter from Mr Capuder dated 22 January 2018. That letter makes clear that it is the authenticity of the Gearbox that was in issue and asks Canepa to "*specify the terms on which you are willing to return the gearbox to my client.*"
45. On 22 January 2018, Mr Capuder wrote again to Mr Canepa requesting photographs of the Gearbox. These were sent by Mr Canepa to Mr Fisken. Mr Fisken said that he forwarded these to Mr Macari who confirmed that it appeared to be the original.
46. The Claimant's case is that it was entitled to have the Gearbox delivered up for inspection in Italy. However several problems were apparent:
- (a) How should Canepa's demand for \$25,000 be dealt with?
- (b) Was it necessary and/or appropriate for the Gearbox to go to Italy for inspection, rather than being inspected at Canepa's premises in California?
- (c) Who should pay for shipment to Italy?
47. There followed lengthy negotiations between the Claimant and the Defendant, in which Mr Macari and Mr Fisken both supported the Claimant's position. It is

² That party has not been identified and the purchase price has been redacted.

unnecessary to set out all of the email exchange. The principal issues can be seen from these:

- (a) On 28 January 2018, Mr Carl indicated to Mr Macari 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.”* 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 mentions 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.”*
- (b) On 1 February 2018, Mr Carl emailed Mr Fiskens 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.”*
- (c) At the same time, an issue had arisen between Mr Fiskens and Mr Carl about the sale of another car, a Ferrari 599 GTO.
- (d) On 7 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 Fee.
- (e) On 9 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 12 February, Mr Carl sent an email to Mr Macari (which Mr Fiskens said was forwarded to him) in the following terms: *“Obviously I was completely inarticulate in explaining my frustration with the gearbox and short term funding issues. Here is my problem. Had Bruce (sc. Canepa) 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 (sc. Fiskens) my loss would be closer to \$100,000....”*

- (f) Matters seem to have become very heated in the days that followed. In an email on 14 February 2018, Mr Carl described the agreement as “*poorly drawn*” and in a later email on the same day to Mr Macari, Mr Carl described Mr Macari as “*the smartest guy in the room*” because he did not have a written agreement with anyone. Mr Carl’s proposal was that he and the Defendant should share the costs relating to getting the Gearbox released from Canepa and verified.
- (g) Mr Macari responded on 16 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.*” 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-employee³ 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.*” At paragraph 15 of his witness statement, Mr Macari said that his belief that the Defendant was entitled to \$500,000 arose from his involvement in the contract negotiations that there were some circumstances in which such a fee was payable and Mr Carl’s email of 28 January 2018 had referred to his being entitled to payment of a fee following recovery from Canepa.
- (h) On 18 February 2018, Mr Carl emailed Mr Macari saying that he had been convinced that the Gearbox was worth a lot more than \$500,000 and proposing a new deal relating to the Gearbox and another transaction between the Claimant and the Defendant. In respect of the Gearbox, it provided that the Gearbox would be sent to Italy for inspection. Following inspection, either the Claimant would pay the Defendant \$500,000 or, if the Gearbox was not authenticated, Mr Macari would be responsible for ensuring its return to the Defendant.

³ The assertion that the gearbox was not in Canepa’s possession because it had been taken by a disgruntled ex-employee is one that has not otherwise been addressed in evidence. In particular, Mr Carl has not explained where that account came from nor in what circumstances it was given to him.

- (i) On 19 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 \$25,000 would be paid to Canepa from the sum of \$500,000 said to be due from the Claimant to the Defendant.
- (j) However that instruction was not carried through and Mr Carl proposed further suggested terms later on 19 February 2018. The terms in respect of the Gearbox were substantially the same as the draft of the previous day, save that it was now the Claimant rather than Mr Macari who was responsible for ensuring return of the Gearbox to the Defendant if it was not authenticated. There are other differences of detail in the proposed terms.
- (k) On 20 February 2018, Mr Carl emailed Mr Canepa directing him not to send the Gearbox anywhere until confirmed with him.
- (l) Later on the same day, Mr Fiskens emailed the Defendant 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.*”
- (m) On 21 February 2018, Mr Carl emailed Mr Fiskens in a letter headed with his address, 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. To avoid conflating the issue with the 599 GTO gearbox, I am providing you with a new version of the agreement I previously provided that removes all references to the 599 GTO and 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.”*

This email is asserted by Mr Carl to have been sent at 09.24.

- (n) Later on the morning of 21 February 2018, at 11.53, Mr Fiskens emailed the Defendant, in what appears to be a reply to the letter referred to in the previous sub-paragraph, stating that no further agreement was necessary since the mechanism for dealing with the issue of the Gearbox had already been agreed. Mr Fiskens said, *“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 than 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.”*
- (o) At 14.31 on 21 February 2018, Mr Fiskens emailed 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." In his witness statement, Mr Carl describes this as a rejection of his tender of the Gearbox "on the proposed terms."

- (p) At 14.37 on 21 February 2018, Mr Carl emailed Mr Fiskens stating that, "*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 t(o) make an offer on the GTO gearbox, I will consider it, but not as a transaction governed by the GTO agreement.*"

48. On 1 March 2018, Mr Macari emailed Mr Scaletti, a Ferrari employee, saying, "*I have a small issue with the GTO gearbox as I have to pay for it before I collect it. I do not want to do this until I know I am paying for the correct article. Please can you confirm your findings before I buy it and then will have it sent over to you.*" As the Defendant points out, the assertion by Mr Macari that it was necessary to pay for the Gearbox before it was collected is inconsistent with what Mr Macari and Mr Carl had been discussing, namely verification of the Gearbox before the Fee was paid.
49. Following the exchange, the relationship between Mr Fiskens and Mr Carl broke down. In May 2018, Mr Carl paid \$25,000 to Canepa to reimburse the cost of recovering the Gearbox. The Gearbox remains with Canepa and indeed on 29 June 2018, the Claimant obtained an order in California restraining Canepa from parting with possession of the Gearbox.

50. Mr Carl maintains in this sixth statement that the following costs will have to be paid to Canepa:
- (a) The reimbursement of \$8,165 for legal fees incurred in connection with the Claimant's application for an injunction in the California courts as at 26 August 2019, subject to an increase if Canepa is required to incur additional such costs in the pending California proceedings;
 - (b) The sum of \$4,200 in respect of storage fees from July 2018 to August 2019, and \$300 per month thereafter until the right to possession of the Gearbox is resolved and the California Injunction is lifted; and
 - (c) A reimbursement for insurance for the Gearbox (the amount of which is unknown) from April 2018 until the right to possession of the Gearbox is resolved and the California Injunction is lifted.
51. In his second statement, Mr Fisken says a little of the importance of reuniting the Gearbox with the car: *“Without the gearbox, the GTO is not truly complete. The original car, with its original parts is, itself, a unique and special thing. Its provenance will be restored when it is reunited with the gearbox. The gearbox is a unique and special thing in itself, but its reunion with GTO will allow the original GTO to be made whole.”* Mr Fisken maintains that if he is not able to retrieve the original gearbox, he will suffer reputational damage.
52. In his fourth statement, Mr Carl acknowledges that the Gearbox is a unique part but says that its absence from the GTO was a matter of indifference to the Claimant and that it is not unusual for classic cars to be traded without original parts.

The Claimant's case - General

53. The Claimant contends that Mr Carl was argumentative and verbose in giving evidence. He is accused of using cross-examination as an opportunity to argue his case rather than simply to give evidence. In so far as there are factual disputes, the Claimant contends that I should prefer the evidence of Messrs Fisken and Macari to that of Mr Carl.

The Claimant's case – the Standing Issue

54. On the standing issue, the Claimant contends that it was clearly acting as principal:
- (a) The Defendant has accepted that - see paragraph 78 of the witness statement of Ms Gemma Dreyfuss of the Defendant's solicitors, dated 23 October 2019, in which she says, *“It is not disputed that there was, in fact, no unidentified*

principal and that GFL were in fact, contrary to the plain words of the agreement, contracting as principal.” The same point was conceded by leading counsel for the Defendant in his skeleton argument in support of the unsuccessful amendment application heard by HHJ Keyser QC.

(b) Further, the fact that the Defendant concedes that there was no unidentified principal leads to the position in which the Claimant is the only possible contender; absent the Claimant being the principal to the contract, there would be none. This would render the contract a nonsense. As the Claimant puts it in closing submissions, *“In order for Mr Carl to make his defence good, his argument has to be:*

- (i) *There was a contract between Mr Carl and a party for the sale of the GTO.*
- (ii) *As a matter of fact, GFL contracted under that contract, as principal: it did not contract as agent, and as a matter of fact, was a contracting party.*
- (iii) *This notwithstanding, as a matter of law, GFL is not a party to that contract.”*

The Claimant describes this as *“a feat of legal ingenuity devoid of all common sense.”*

55. The Claimant relies on the principle that, where a party signs a contract in his own name, he is a party to that contract, notwithstanding how he might be described in the heading to the contract (see Cooke v Wilson (1856) 1 CB (NS) 153, Parker v Winlow (1857) 7 El & Bl 942, Paice v Walker (1869-70) LR 5 Ex 173 and H O Brandt & Co v H N Morris & Co [1917] KB 784).
56. As Kelly CB put it in Paice v Walker, *“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.”* In the same case, Pigott B cited Cresswell J in Cooke v Wilson, and said that when a party signs a contract in his own name *“he is a contracting party; and there must be something very strong upon the face of the instrument to prevent that liability from attaching to him”*. Mr Hooper for the Claimant contends that it is of significance that the defendants in that case, who sought to avoid liability on the basis that they were agents and were described such in the contract, were nevertheless

found liable as principals because they had assigned the contract without qualification. As Kelly CB said, “*numerous cases ... have decided that the use of these words (sc. agents) in the body of the contract does not prevent the liability of a party who signs as principal.*”

57. In Parker v Winlow, Crompton J at page 949 stated, “*Mere words of description attached to the name of a contractor, such as are used here, saying he is agent for another, cannot limit his liability as contractor. A man, though agent, may very well intend to bind himself; and he does bind himself if he contracts without restrictive words to shew that he does not do so personally. It is important that mercantile men should understand that, if they mean to exclude personal recourse against themselves on contracts which they sign, they must use restrictive words, as if they sign per procuration, or use some other words to express that they are not to be personally liable.*”
58. The authorities were reviewed by the Court of Appeal in The Elikon [2003] EWCA Civ 812. As explained by Rix LJ at paragraph 46, “*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.*” He referred at paragraph 52 to “*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.*”
59. Applying these principles to the facts of this case, Mr Fiskem, in signing the Agreement on behalf of the Claimant, did not state that he was signing as agent. Accordingly, he is to be taken as signing as principal, whatever the description of the Claimant elsewhere in the document.

The Claimant’s case – The Inspection and Delivery Issues

60. Where, as would have happened here but for the order in California, the Gearbox was recovered from Canepa, the Claimant contends that the Defendant’s obligation under clause 7.6 of the contract is to “*turn over*” the Gearbox to the Claimant as buyer. The words “*turn over*” can only mean the same as “*deliver*” namely that seller causes the goods to come into the possession of the buyer, rather than simply having them available for the buyer to collect. The Claimant draws attention to the fact that, in clause 7.10, the word “*deliver*” is used, giving the sense that the obligation on the

Seller is an active one, to provide the Gearbox to the buyer, rather than a passive obligation of offering it up.

61. In the alternative, it contends that there was an implied term to deliver up the Gearbox to the buyer. Such an implied term is necessary to give business efficacy to the contract, in accordance with the principles set out in Marks and Spencer v BNP Paribas [2015] UKSC 72, since the location of the Gearbox was something outside of the control of the Defendant and was due to a problem on the Defendant's side.
62. As to place of delivery, the Claimant relies on Section 29(1) of the Sale of Goods Act 1979 in support of the contention that the place of delivery was the Claimant's premises.
63. Given the obligation as to delivery to the Claimant, the Claimant contends that the obligation to pay for shipment correspondingly lies with the Defendant. Indeed, the obligation in clause 7.6 to "*turn the gearbox over ... without additional compensation*" is consistent only with this interpretation of the contract.
64. In the alternative, the Claimant relies on paragraph 8.005 of Benjamin's Sale of Goods (10th edition) for the proposition that "*at common law...the rule is that the expenses of and incidental to making delivery fall on the seller.*" Chitty on Contracts (33rd edition) at paragraph 44.256 makes the same point.
65. The Claimant contends that the Claimant had a right to inspect the Gearbox on tender prior to acceptance either as an implied term of the contract or pursuant to section 34 of Sale of Goods Act 1979 which 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 ...*"
66. In the context of this case, conformity with the contract required the gearbox tendered to be N2, the original gearbox for the GTO. Thus says the Claimant, it was entitled on request to have the Gearbox examined to ensure that it was the authentic item.
67. The Claimant contends that prima facie the place of examination is the place of delivery but this may be displaced where the terms of the contract or the circumstances of the case indicate a different intention (see Chitty on Contracts, paragraph 44.276 and Benjamin on Sale of Goods, paragraph 20.115). In this case the Claimant argues that examination was necessarily to be in Italy at the Ferrari factory. The Claimant's request by email of 21 February 2018 for the delivery of the Gearbox to it so that the Gearbox could be shipped at the Claimant's expense to Italy is

consistent with this interpretation, as is the Defendant's instruction of 19 February 2018 to Canepa to release the Gearbox to Mr Macari's order.

68. The Claimant's case is that the Defendant's purported tender of delivery as set out in the letter of 21 February 2018 was not a valid tender, in that it was not a tender of delivery to the Claimant's premises; it did not acknowledge the Claimant's right to inspect the Gearbox; and it required the payment of a fee. In consequence, the Defendant is wrongly retaining the Gearbox.
69. In summary, the Claimant contends:
- (a) Issue 10 – the Claimant had the right to verify that the Gearbox was authentic before accepting it.
 - (b) Issue 11 – the Claimant had the right to have the Gearbox inspected in Italy, subject to paying for its shipment to and from there.
 - (c) Issue 12 - the Defendant's obligation was to deliver the Gearbox to the Claimant at its premises.
 - (d) Issue 13 – the Defendant did not validly tender the Gearbox.
 - (e) Issue 14 – the Defendant was obliged to pay the cost of shipment to the Claimant.

The Claimant's case – The Fee Issue

70. The Claimant's case is that the Defendant's obligation under clause 7 of the Agreement was to use his best efforts to recover the Gearbox and, if he recovered it, to deliver it up.
71. As to an entitlement to a fee, this arose only if the Gearbox were recovered from someone other than Canepa. This is a consequence of clause 7.6 which states "*if seller recovers the gearbox from Canepa, he will promptly turn the gearbox over to [Buyer] without additional compensation.*" The only natural meaning of the final three words is that no sum was payable if the Gearbox was recovered from Canepa.
72. The Fee was only payable if the Gearbox was recovered following "*formal legal correspondence or the pursuit of litigation*" pursuant to clause 7.11, but then only if the Gearbox were recovered from someone other than Canepa, given the express exclusion of liability to pay any sum to the Defendant under clause 7.6 if the Gearbox were recovered from Canepa.
73. Even if clause 7.11 is capable of applying to recovery of the Gearbox from Canepa:

- (a) The Claimant notes the letter of 20 January 2018 from the Defendant's attorney, Mr Capuder, but says that this does not give rise to any liability under Clause 7.11. That clause refers to the position where "*formal legal correspondence or legal process secures custody of the gearbox.*" There has been no legal process securing custody of the Gearbox and the letter of 20 January 2018 is not formal legal correspondence that has secured custody; it relates only to the arrangements for delivery of the Gearbox by Mr Canepa.
- (b) It would only give rise to liability to pay the sum of \$500,000 "*upon being in receipt of the gearbox*" that is to say on delivery, not prior to it. Since delivery has not been tendered, the obligation to pay the \$500,000 has not yet arisen.

74. In so far as the Defendant relies on the argument that the Gearbox has been recovered not from Canepa but from "*a disgruntled ex-employee*", the Claimant contends that the mere fact (which it does not accept as being established) that Canepa may have had to recover the Gearbox from a third party does not mean that the Defendant has not recovered it from Canepa.

75. The Claimant denies the Defendant's alternative claim that an estoppel by convention has arisen. My attention is drawn to the summary of the relevant law on estoppel by convention at paragraph 49 of the judgment of Akenhead J in Mears Ltd v Shoreline Housing Partnership [2015] EWHC 1396 (TCC), as follows:

- (a) "*An estoppel by convention can arise when parties to a contract act on an assumed state of facts or law. A concluded agreement is not required but a concluded agreement can be a 'convention'.*"
- (b) "*The assumption must be shared by them or at least it must be an assumption made by one party and acquiesced in by the other. The assumption must be communicated between the parties in question.*"
- (c) "*At least the party claiming the benefit of the convention must have relied upon the common assumption, albeit it will almost invariably be the case that both parties will have relied upon it. There is nothing prescriptive in the use of 'reliance' in this context: acting upon or being influenced by would do equally well.*"
- (d) "*A key element of an effective estoppel by convention will be unconscionability or unjustness on the part of the person said to be estopped to assert the true legal or factual position...*"

- (e) *“Whilst estoppel cannot be used as a sword as opposed to a shield, analysis is required to ascertain whether it is being used as a sword. In this context, the position of the party claiming the benefit of the estoppel as claimant or indeed as defendant is not determinative or does not even raise some sort of presumption one way or the other. While a party cannot in terms found a cause of action on an estoppel, it may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on the estoppel, it would necessarily have failed.”*
 - (f) *“The estoppel by convention can come to an end and will not apply to future dealings once the common assumption is revealed to be erroneous.”*
76. The alleged convention, pleaded at paragraph 25 of the Amended Defence and Counterclaim, is that *“The parties have proceeded on the shared and expressed understanding that the recovery of Gearbox from Canepa following ‘formal legal correspondence’ would entitle the Defendant to the Fee, from which understanding it would be unconscionable for the Claimant to resile.”*
77. The Claimant makes the following points:
- (a) It denies that Mr Macari was acting as its agent during negotiations;
 - (b) In any event, Mr Macari’s belief that the Defendant was entitled to payment of \$500,000 expressed in his email of 16 February 2018 arose from what the Defendant said to him, not from any other shared understanding – see paragraph 15 of his witness statement;
 - (c) The correspondence relied on by the Defendant is said to post-date the attempts by the Defendant to retrieve the Gearbox therefore such acts could not be said to have been carried out in reliance on the correspondence.
 - (d) The email of 21 February 2018 relied on by the Defendant is treated as a repudiatory breach of contract by him. He could not consistently argue that a communication that he treated as a repudiatory breach of contract also amounted to the expression of a shared understanding upon which he relied.
 - (e) It denies that the Gearbox was recovered following *‘formal legal correspondence’* and accordingly the alleged shared understanding does not avail the Defendant since it was an understanding as to what would happen in circumstances that did not come to pass;
 - (f) The Defendant has no coherent case that he acted in reliance on the common assumption.

(g) There is no basis for a finding of unconscionability.

78. The Claimant therefore contends:

- (a) Issue 2 – the Defendant would be entitled to the fee if the Gearbox were recovered from a party other than Canepa following the sending of formal legal correspondence or the pursuit of legal proceedings, but not otherwise.
- (b) Issue 3 – since the Gearbox was recovered from Canepa and in any event without the sending of formal legal correspondence or the pursuit of legal proceedings, there is no entitlement to the fee.
- (c) Issue 4 – Mr Macari and Mr Fisken were mistaken in considering that the Defendant might be entitled to the fee in the circumstances that have come to pass.
- (d) Issue 5 – Mr Macari was not acting as the Claimant’s agent.
- (e) Issue 6 – the Claimant is not estopped from asserting that the Defendant is not entitled to the fee.

The Claimant’s case – The Termination Issue

79. Given the Claimant’s case on the obligations as to delivery and payment for shipment, the Claimant denies that Mr Fisken’s email of 21 February 2018 was a repudiatory breach of contract. The failure to accept a tender of delivery which does not accord with the sellers’ contractual obligations cannot amount to a repudiatory breach. It follows that the Defendant was not entitled to accept such a breach and the contract was not terminated. Whilst the Defendant himself was in repudiatory breach by asserting that the contract was terminated, the Claimant did not accept such a breach and it has no relevant consequences for this case.

80. The Claimant therefore contends:

- (a) Issue 15 - the email of 21 February 2018 was neither a repudiatory nor anticipatory breach.
- (b) Issue 16 – the Defendant did not accept the repudiatory breach because there was no breach to accept; his purported acceptance of the repudiatory breach was itself a breach of contract.
- (c) Issue 17 – the Claimant’s case that the Defendant is not entitled to the Fee is correct and therefore there is no question of it being in breach of contract, repudiatory or otherwise, by advancing this case.

- (d) Issue 18 – the Agreement has not been terminated.

The Claimant’s case – the Title Issue

81. The Claimant relies on Rule 1 in Section 18 of the Sale of Goods Act 1979 for ascertaining the intention of the parties as to when property in the goods was to pass to the buyer: “*Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.*”
82. The Claimant’s case is that title to the Gearbox passed with the GTO. All that the Agreement provided was for delivery at a later occasion. This is said to be consistent with section 7 of the Agreement and the negotiations over price. The Claimant draws attention to the fact that it first offered \$44.5 million for the GTO without realising that the Gearbox was not original. The proposed retention of \$1 million pending recovery of the Gearbox indicated that the part had (at least in the Claimant’s eyes) the value of \$1 million. But in the event, the Claimant agreed to pay \$44 million, with the hope of recovering the Gearbox from Canepa at no extra cost, and the risks that the Gearbox was not recovered (without any further adjustment to the price) or that it would have to pay \$500,000 as compensation for the expenses and time involved if the Gearbox could be recovered but only with effort from a third party.
83. The Claimant contends that Clause 7.4 is a waiver of the right to reject the GTO due to the absence of the original gearbox, not an assertion that title to the Gearbox did not pass with delivery of the GTO.
84. The Claimant therefore contends:
- (a) Issue 7 – title to the Gearbox passed on completion of the contract.
 - (b) Issue 8 – consideration was paid for the Gearbox in that it formed part of the goods for which the Claimant paid \$44 million.

The Claimant’s case – the Wrongful Withholding Issue

85. The Claimant’s case on issue 19, flows from its contentions on other issues:
- (a) The Defendant is obliged by the terms of the Agreement to deliver the Gearbox to the Claimant if it is in his possession or control;
 - (b) It is common ground that the Gearbox is currently held in California to his order;

- (c) His failure to arrange delivery up to the Claimant renders him in breach of contract;
- (d) Accordingly he is wrongfully withholding possession of the Gearbox.

The Claimant's case – the Relief Issue

- 86. Most of the conclusions on the Relief Issues flow from the findings above.
- 87. The Claimant seeks an order for delivery up on the basis that it has title to the Gearbox and that the Defendant has wrongfully withheld it. Alternatively the Claimant seeks specific performance of the Agreement. On either basis the contract was for the sale of an item that is unique and damages would not amount to an adequate remedy, and that the failure by the Claimant to recover the Gearbox would damage its reputation as a classic car dealer.
- 88. The Claimant contends:
 - (a) Issue 20 – the Claimant is entitled to immediate and exclusive possession of the Gearbox and/or delivery up on the ground both that it is owner of the item and that the Defendant is contractually obliged to arrange its delivery up.
 - (b) Issue 21 – the Claimant is entitled to specific performance of the Agreement including an order that the Defendant instruct Canepa to deliver up the Gearbox to the Claimant.
 - (c) Issue 22 – damages could only be nominal. They are not an adequate remedy.
 - (d) Issue 23 – the Defendant is not entitled to declaratory relief that the Claimant has been in breach of the Agreement.
 - (e) Issue 24 – the Defendant is not entitled to declaratory relief that he is entitled to the Fee upon the Claimant taking possession of the Gearbox.
 - (f) Issue 25 – the Defendant is not entitled to damages for loss of use of the Fee.

The Defendant's case - General

- 89. The Defendant describes Mr Fisker as “*a profoundly unsatisfactory witness.*” He lays emphasis on the contradiction within the Claimant's case and apparent from the passages quoted at paragraphs 29 and 32 above as to whom Mr Carl was told was to the intended buyer.
- 90. The Defendant is equally critical of Mr Macari for being party to an attempt to hide from the Defendant the true intention of the Claimant as to who was to purchase the GTO. He also criticises Mr Macari for saying to Mr Scaletti that the Fee was due

before the Gearbox was collected, when this was not the situation that Mr Macari was advocating in his discussions with Mr Carl.

91. The Defendant draws from the evidence of the dealings of Mr Fisken and Mr Macari that Mr Macari was acting as Mr Fisken's agent during these negotiations, both in the lead up to the Agreement being executed and in subsequent discussion about the Gearbox.
- (a) Mr Macari was from an early stage acting as a go-between between the Claimant and the unidentified buyer, as he acknowledged in cross examination.
 - (b) Repeatedly during the dealings between the Claimant and the Defendant, Mr Macari was copied into Mr Fisken's email and Mr Macari spoke on behalf of the Claimant.
 - (c) The agreement to pay a commission of \$1.37 million following the Claimant signing the Agreement is redolent of a partnership with Mr Macari receiving a profit share.
 - (d) At the very least the exchanges summarised in paragraph 47 above are indicative of Mr Macari acting as the Claimant's agent in dealings with the Defendant himself.
92. The Defendant therefore argues that, even if this is not a case on which it can prove actual agency, there is clear evidence of ostensible or apparent agency within the terms of article 72 of Bowstead and Reynolds on Agency (21st Edition), that: "*Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority.*"
93. The Defendant invites the Court to draw adverse inferences from the failure to call Mr Bennion. Mr Bennion was the author of the email of 18 July 2017 referred to at paragraph 29 above. If indeed, that reference was intended to be a reference to a company that Mr Fisken was going to establish (rather than a company established by an arm's length buyer), Mr Bennion could have spoken to that issue. He could further have given evidence on the intention of the Claimant in referring to itself as an agent for an undisclosed principal within the contract. My attention is drawn to the principles set out in Wisniewski v Central Manchester [1998] PIQR P324.

94. In contrast, the evidence of Mr Carl is said to have been straightforward. The Defendant contends that he is a witness upon whose evidence the court can place emphasis.

The Defendant's case – the Standing Issue

95. The starting position for the Defendant's case is that the Claimant contracted as an agent for an unidentified principal. The Defendant contends that such a party is not permitted to sue on the contract as if it were the principal.
96. The Defendant contends that, in this case as well as in previous instances of dealing between him and the Claimant, he understood that the Claimant was contracting to purchase as agent for purchaser. In support of this, he relies on:
- (a) The previous transactions that he had entered into with the Claimant which involved Mr Fisken acting as broker and earning a disclosed commission.
 - (b) His belief that Mr Fisken did not have the means to purchase the GTO;
 - (c) Mr Fisken's statement that he was acting for a wealthy purchaser, whose identity he was unwilling to disclose.
 - (d) Mr Fisken's and Mr Macari's representations that the buyer was part of a wealthy American family who operated in the natural resources sector and who owned two other multi-million dollar Ferraris that he had inspected at Mr Macari's premises.
97. In so far as the Claimant's witnesses suggest otherwise, the Defendant draws attention to the inconsistencies and weaknesses in their evidence identified above.
98. The Defendant acknowledges a line of authorities by which an agent was permitted to stand in the shoes of a principal and sue on the contract.
- (a) In Schmaltz v Avery (1854) 16 QB 654, Patteson J held that a Claimant, who had entered into a charter party in terms stating that it was agent for an unnamed freighter, could in fact sue on the contract for the failure by the Defendant shipowner to carry the goods. At trial, the Claimant was found to be the true freighter. Patteson J held that it was open to the Claimant to sue on the contract. *"the names of the supposed freighters not being inserted, no inducement to enter into the contract from the supposed solvency of the freighters can be surmised. Anyone who could prove himself to have been the real freighter and principal, whether solvent or not, might most unquestionably have sued on the charter party. The Defendant cannot have*

been in any way prejudiced in respect to any supposed reliance on the solvency of the freighter, since the freighter is admitted to have been unknown to him, and he did not think it necessary to enquire who he was. It is indeed possible that he may have been content to take any freighter and principal provided it was not the present plaintiff and may have relied on the terms of the charter party indicating that the plaintiff was an agent only, being willing to accept of anyone else, be he who he might, as principal. After all therefore the question is reduced to this: whether we are to assume that the Defendant did rely on the character of the plaintiff as agent only and would not have contracted with him as principal if he had known him so to be, and are to lay it down as a broad rule that a person contracting as agent for an unknown and unnamed principal is precluded from saying, I am myself that principal.”

The court found that, strictly as a matter of language, a person could not be their own agent, but that there was no absurdity in holding that an agent could contract on behalf of a freighter whosoever that might be, even if that turned out to be the agent itself.

- (b) In Harper & Co v Vigers Brothers [1909] 2 KB 549, Pickford J followed the decision in Schamltz v Avery, whilst noting that it might be considered “*somewhat curious*” that a person contracting as agent without having a principal might be considered to be agent for themselves.
- (c) In Newborne v Sensolid (Great Britain) Limited [1954] 1 QB 45, Lord Goddard CJ described the principle in Schamltz v Avery as “*well established.*”

99. This line of authorities leads the authors of Chitty on Contracts to state at paragraph 13-128 that “*where a person describes himself in a contract as agent of an unnamed principle, either he or the other contracting party may bring evidence to show that, although described as agent, he is in fact principal.*”

100. However, the Defendant contends that the principle in Schamltz v Avery is no longer good law in light of two decisions of the House of Lords and one of the Inner House of the Court of Session:

- (a) In Universal Steam Navigation Co v McKelvie [1932] AC 942, the House of Lords considered whether Defendants, who had signed a charter party as agents for the owners, were nevertheless liable as principals for demurrage because they were described in the body of the charter party as charterers. In rejecting that argument, Lord Shaw put it thus: “*The appending of the word*

'agents' to the signature of a party to a mercantile contract is in all cases, the dominating factor in the solution of the problem of principal or agent. A highly improbable and conjectural case (in which this dominating factor might be overcome by other parts of the contract) may by an effort of the imagination be figured, but apart from that, the appending of the word 'agent' to the signature is a conclusive assertion of agency and a conclusive rejection of the responsibility of a principal, and is and must be accepted in that twofold sense by the other contracting party." (It is worth noting that there was no issue in that case but that there was in fact a principal for whom the Defendant was capable of being the agent. Had it been the case that there was no principal in that case, any such defence that the Defendant was not liable because it was declared to be agent would have been met with the reply that, if those circumstances were true, the Defendant was in breach of a warranty of authority, thereby enabling the Claimant to recover from the Defendant as if it were the principal.)

- (b) In Hill v Hugo Stinnes [1941] SC 324, the Inner House considered a charter-party for the carriage of coal entered into by managers on behalf of the shipowners and the Defenders, a coal exporting company. The Defenders were described in the charter party as *"agents to charterers"* and signed the agreement as *"agents only."* No principal was disclosed. On the issue of whether the defenders were entitled to argue in defence of a claim for freight that they were in fact the principals and could rely on a cessor clause, the majority held that, following the reasoning in McKelvie, it was not open to the defenders, by oral evidence, to argue that they were in fact the principal. This applied just as much where the person described as agent sought to argue that they were in fact principal (the situation in that case) as it did in the case, such as McElvie, where the opposite party to the contract sought to argue that the person who was named as agent was in fact the principal.
- (c) The second decision of the House of Lords to which the Defendant refers on this issue is Shogun v Hudson [2004]1 AC 919. The case related to the classic situation of a rogue obtaining a motor vehicle on hire purchase by fraud and subsequently selling the vehicle to an innocent third party. The fraud involved the rogue representing that he was one Durlabh Patel of an identified address with an identified date of birth and driving licence number. It was common ground that this was not his true persona. The innocent third party sought to argue that, notwithstanding the terms of the contract that was made between

the finance company and the supposed Mr Patel, the true nature of the contract was that the rogue was a contracting party. The majority in the House of Lords rejected this approach. As Lord Hobhouse put it at paragraph 49, *“The agreement is a written agreement with Mr Durlabh Patel. The argument seeks to contradict this and make it an agreement with the rogue. It is arguable that other evidence is always admissible to show who the parties to an agreement are. Thus, if the contents of the document are, without more, insufficient unequivocally to identify the actual individual referred to or if the identification of the party is non-specific, evidence can be given to fill any gap. Where the party signing is also acting as the agent of another, evidence can be adduced of that fact. None of this involves the contradiction of the document...But it is different where the party is, as here, specifically identified in the document: oral or other extrinsic evidence is not admissible. Further the rogue was no one’s agent (nor did he ever purport to be). The rule that other evidence may not be adduced to contradict the provisions of a contract contained in a written document is fundamental to the mercantile law of this country; the bargain is the document; the certainty of the contract depends on it. The relevant principle is well summarised in Phipson on Evidence (15th Ed (200), pp1165-1166, paras 42-11 and 42.12: ‘when the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves and their privies that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith or treacherous memory.’ ...This rule is one of the great strengths of English commercial law and is one of the main reasons for the international success of English law in preference to laxer statements which do not provide the same certainty.”* Lord Phillips agreed that *“the identity of the parties to a contract in writing fall to be determined by a process of the construction of the contract.”* (It is notable that the decision in Shogun v Hudson also involved consideration of issues of mistake and offer and acceptance. In principle, such issues might also be arguable on the facts of this case. Given the refusal of the Defendant’s application to re-amend the Defence and Counterclaim to plead a lack of consensus of offer and acceptance sufficient to render the contract binding and/or mistake as to the identity of the contracting parties, these are not arguments available to the Defendant.)

101. The authors of Bowstead and Reynolds on Agency state the following proposition at Article 108(2): “*where a person who enters into a contract professedly as an agent is in fact the real principal he may (perhaps) sue on the contract*” as being “*probably generally accepted*”. However, they go on to describe this principle as “*doubtful*” and one that “*should be viewed with caution and even suspicion*” in light of the decision of the House of Lords in Universal Steam Navigation Co v McKelvie.
102. In so far as the Claimant raises the argument that the wording of the contract is ambiguous as to whether it contracted as principal or agent, the Defendant contends that regard must be had to the extrinsic evidence. That evidence was to the effect that Mr Carl both believed that he was dealing with the Claimant as agent and intended to do so. Given the failure of the Claimant to reveal the true intention of a sub-sale to another party, the objective bystander would have concluded that the contract was with the Claimant as agent, in which case the Claimant cannot sue on the contract (see Shogun v Hudson).
103. In applying those principles to this case, the Defendant contends on issue 1 that:
- (a) The Claimant is unequivocally described as an agent for an undisclosed (meaning unidentified) principal in the Agreement;
 - (b) The contract is conclusive as to the role of the Claimant;
 - (c) Therefore the Claimant is conclusively to be treated as an agent for an unidentified principal;
 - (d) An agent for an unidentified principal cannot sue as the principal;
 - (e) Therefore the Claimant does not have title to sue.
104. The remainder of the Defendant’s case is without prejudice to the primary position that the Claimant is not permitted to maintain this action at all.

The Defendant’s case – The Inspection and Delivery Issues

105. The Defendant rightly asserts that there was no express contractual provision as to inspection of the Gearbox. He disputes that the right of examination provided for by section 34 of the Sale of Goods Act 1979 Act applied to the contract:
- (i) The right to examine applies in relation to a sale of goods, which means a contract whereby a seller transfers or agrees to transfer the property in goods to the buyer for a money consideration; see sections 1(1) and 2(1) of the 1979 Act. That was not the nature of the arrangement under clause 7. The obligation was in certain circumstances to turn the Gearbox over without

additional compensation, and in other circumstances to turn it over in consideration of a fee not for the Gearbox but for the efforts made in recovering it. The Defendant points to the kind of *sui generis* contract considered by the Supreme Court in PST Energy 7 Shipping LLC v OW Bunker Malta Ltd [2016] UKSC 23.

- (ii) However, examination as contemplated by the 1979 Act does not extend to the kind of verification process contemplated by the Claimant with transportation to another jurisdiction for examination by third parties. The obligation to effect payment arose upon receipt of the Gearbox under clause 7.11. There is no basis to conclude that it was to be deferred pending verification.

106. The Defendant rejects the suggestion that there was any obligation on his part to pay the costs of shipment to Italy or anywhere else. The Defendant's case is that the place for delivery of the Gearbox was Canepa's premises in California or alternatively the Defendant's premises in London. He relies on Section 29 of the 1979 Act:

“(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 place is the place of delivery.

(3) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3A) ...

(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 goods.

(5) ...

(6) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.”

107. This contract did not, on the Defendant's case, provide for the place of delivery. The best information available to the parties was that the Gearbox was at Canepa's premises. Thus, once Canepa acknowledged that it held the Gearbox on the buyer's behalf, delivery was to take place there. The Defendant's obligation was to tender the Gearbox as being available at Canepa's premises. He duly did this by the email of 21 February 2018 which tendered the Gearbox on payment of the \$500,000 fee.

108. The Defendant therefore contends:
- (a) Issue 10 – the Claimant did not have a right to verify the Gearbox prior to acceptance.
 - (b) Issue 11 – the question of place of inspection does not therefore arise.
 - (c) Issue 12 – the obligation of the Defendant was to tender the Gearbox at Canepa’s premises.
 - (d) Issue 13 – the Defendant did tender delivery of the Gearbox.
 - (e) Issue 14 – the Defendant was under no obligation to pay any costs of shipment.

The Defendant’s case – The Fee Issue

109. The Defendant’s primary position is that the Gearbox has only become available for delivery because of the use by him of formal legal correspondence. That may be viewed as either the letters from Mr Capuder or the Defendant’s own correspondence, but either way the possibility of delivery arises from that correspondence. Thus, the Defendant contends, clause 7.11 has effect to give rise to the obligation on the part of the Claimant to pay the Fee.
110. In so far as the Claimant argues that the terms of clause 7.11 only apply where the Gearbox is recovered from someone other than Canepa, the Defendant’s case is:
- (a) This is not correct. The contract contemplates that recovery of the Gearbox might be difficult and that the Defendant might incur cost in recovering it. This is part of the relevant factual matrix.
 - (b) In any event, the Gearbox was not in the possession of Canepa. It was in the possession of its disgruntled ex-employee. It is only through the Defendant engaging with and paying Canepa that it has recovered the Gearbox from the third party and that therefore the Gearbox can be recovered from Canepa to pass on to the Claimant.
111. On the issue of estoppel, the Defendant draws attention to the speech of Lord Steyn in *The Indian Endurance* [1998] AC 878 at page 913 D-G: *“It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption: K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd*

[1985] 2 Lloyd's Rep. 28; Norwegian American Cruises A/S v Paul Mundy Ltd [1988] 2 Lloyd's Rep. 343; Treitel, The Law of Contract, 9th ed. (1995), pp. 112-113. It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

112. Further, he draws attention to the judgment of Hildyard J in Blindley Heath Investments Ltd v Bass [2017] Ch 389 at paragraph 79 in support of the principle that it does not matter whether the convention arises from a mistake or forgetfulness.
113. The Defendant says that it is clear that Mr Carl and Mr Fiskens worked on the assumption that Mr Carl was entitled to his Fee upon offering up the Gearbox: see emails to Mr Carl from Mr Macari (who was on the Defendant's case, the Claimant's agent) on 16 February 2018 at 17.01, and from Mr Fiskens's on 20 February 2018 at 15.43 and on 21 February 2018 at 14.31. There was clearly a common understanding of a liability to pay the money if the Gearbox was recovered from Canepa.
114. Paragraph 25 of the Amended Defence and Counterclaim pleads the estoppel as preventing the Claimant "*from asserting in the circumstances which have eventuated [that] Mr Carl is not entitled to the fee.*" That convention appears to be posited upon Mr Fiskens's alleged understanding as evidenced by the email of 21 February 2018 that the Fee was payable upon verification of the Gearbox at the Ferrari factory in Italy.
115. The Defendant now contends that the convention is that stated by Mr Macari in an email to Mr Scaletti (a Ferrari employee) dated 1 March 2018 in which he speaks in terms of the Claimant having to pay for the Gearbox before it was collected.
116. As to reliance, the Defendant asserts that he relied on that in committing himself to make payment to Canepa, in addition to the significant efforts that he had made to locate the Gearbox and ensure its availability. It would be inequitable for the Claimant to be permitted to resile from the convention.
117. The Defendant therefore contends:
- (a) Issue 2 – the Defendant was entitled to the Fee in circumstances where formal legal correspondence or the pursuit of litigation/legal process secured the recovery of the Gearbox regardless as to whether that is from Canepa or anyone else. .
 - (b) Issue 3 – the Defendant has acted so as to trigger the fee by sending formal legal correspondence that secured the delivery of the Gearbox.

- (c) Issue 4 – Mr Macari and Mr Fiskens were not mistaken as to the effect of the Agreement when they acknowledged that the Defendant was entitled to payment on verification of the Gearbox.
- (d) Issue 5 – Mr Macari was, throughout the negotiations, but most particularly when he sent the email of 16 February 2018, acting as the Claimant’s agent.
- (e) Issue 6 – the Claimant is estopped from asserting that the Defendant is not entitled to the fee.

The Defendant’s case – The Termination Issue

118. The Defendant contends that the Claimant was in repudiatory breach in refusing to accept delivery upon the terms of Mr Carl’s tender of 21 February 2018. Mr Fiskens’s email response was to impose different terms by which Mr Carl had to arrange for shipping to the Claimant or Mr Macari, whereupon the Gearbox would be taken to Italy for verification, and payment of \$500,000 be made on verification. This imposed different terms as to delivery and payment than were provided in the contract. Since by clause 8.2 of the contract, both time for payment and performance were of the essence of the contract, the failure to agree to the delivery tendered by the Defendant amounted to a repudiatory breach.
119. The Defendant contends that his response to that email, giving 24 hours to the Claimant to accept the tender, was an acceptance of such breach bringing the contract to an end.
120. The Defendant maintains that the Claimant continues to be in repudiatory breach by disputing the Defendant’s entitlement to the Fee. This is described as an “*even more serious breach than the breach which caused Mr Carl to assert repudiation in February 2018.*” If the contract was not already terminated by acceptance of the Claimant’s repudiatory breach in February 2018, the Defendant is said to have accepted the further repudiatory breach and terminated the contract on service of the Reply to the Defence to the Counterclaim. Such a case is pleaded at paragraph 6 of the Reply.
121. The Defendant therefore contends:
- (a) Issue 15 – the email of 21 February 2018 was a repudiatory breach of contract.
 - (b) Issue 16 – the Defendant’s email in response to that repudiatory breach was an acceptance of the breach.

- (c) Issue 17 – the Claimant continues to be in repudiatory breach by disputing the Defendant’s entitlement to the Fee.
- (d) Issue 18 – the contract was terminated on the Defendant’s acceptance of the Claimant’s repudiatory breach.

The Defendant’s case – the Title Issue

122. The Defendant contends that, because the Gearbox was not fitted to the GTO at the time of completion, any delivery obligation relating to the Gearbox was excluded because of inability to deliver. Accordingly Rule 1 of Section 18 of the Sale of Goods Act 1979 does not apply. In any event, the 1979 Act does not apply on the Defendant’s argument that this is not a contract for the sale of goods.

123. In any event, any implied provision that title to the Gearbox would not pass on completion given that:

- (a) This would mean that risk passed at a time when the goods were not in the buyer’s control;
- (b) The contract contemplated that the Defendant could bring proceedings relating to recovery of the Gearbox;
- (c) The buyer expressly accepted the GTO without the Gearbox;
- (d) The Gearbox is not referred to in the agreement for sale on of the GTO by the Claimant;
- (e) Mr Carl had previously rejected a draft Agreement which provided for title in the Gearbox to pass.

124. As to consideration for the Gearbox, Mr Carl contends that the purchase price reflected the fact that Gearbox was not in the GTO and the Agreement recorded that the buyer accepted the GTO without the Gearbox, with Mr Carl using his best endeavours to recover it. This is the polar opposite to consideration being given for the Gearbox.

125. The Defendant therefore contends:

- (a) Issue 7 - title to the Gearbox did not pass on completion.
- (b) Issue 8 - consideration was not paid for the Gearbox.

The Defendant’s case – the Wrongful Withholding Issue

126. As with the Claimant, the Defendant contends that the findings on this issue flow from other issues. The Defendant is not wrongfully withholding the Gearbox because:

- (a) The Claimant does not have title to the Gearbox;
- (b) The Defendant is no longer obliged to turn over the Gearbox to the Claimant because it has accepted the Defendant's repudiatory breach of contract;
- (c) In any event, the Defendant is only obliged to deliver up the Gearbox on payment of the Fee. The Claimant has not tendered the Fee so the Defendant is not obliged to deliver up the Gearbox.

The Defendant's case – the Relief Issue

127. Most of the conclusions on Relief Issues flow from the findings for which the Defendant contends above. However the Defendant makes the following additional points:

- (a) If the Claimant's case on title were correct, title to the Gearbox would have passed to the sub-purchaser of the GTO and hence the Claimant would not have title to sue.
- (b) The Claimant has sold the Gearbox on and cannot show some strong personal reason to take possession of it, nor any contractual obligation to deliver it to the sub-purchaser.
- (c) There are likely to be difficulties in recovering the Gearbox from Canepa in California.

128. The Defendant contends:

- (a) Issue 20 – the Claimant is neither the owner of the Gearbox nor entitled to delivery up under the terms of the Agreement, it having been discharged because of the Defendant's acceptance of the Claimant's repudiatory breach;
- (b) Issue 21 – even if the Claimant is entitled to delivery up of the Gearbox, specific performance should be refused. As an alternative specific performance should be ordered on condition of payment of the Fee on the Claimant taking receipt of the Gearbox.
- (c) Issue 22 – the Claimant fails to show that it has suffered any loss compensable in damages.
- (d) Issue 23 – he is entitled to the declaratory relief sought so as to permit him to do as he wishes with the Gearbox.
- (e) Issue 24 – this issue is addressed at issue 21 above.

- (f) Issue 25 - the Court should consider ordering compound interest for the loss of use of the fee.

Discussion - The witnesses

129. The Defendant's criticism of Mr Fisken's evidence on the issue of what was said as to the contracting parties was well made. The documents to which Mr Fisken was referred are inconsistent with his suggestion that Mr Carl was told that the Claimant was acting as an intermediate purchaser with a proposed sub-sale. The cross examination of Mr Fisken, in particular the part cited at paragraphs 29 to 35 above, indicate that he was at best ambivalent about his exact relationship with a third party buyer. Mr Fisken's explanation of the reference to the Channel Islands company is particularly telling. The documentation clearly implies that that company was being contemplated as a vehicle for the buyer, the buyer being the owner at that time of the Cal Spyder. Yet, at that time, the Cal Spyder was owned by the party to whom Mr Fisken said that he intended to sub-sell the GTO.
130. I do not accept the Claimant's case in closing that there was merely "*ambiguity*" as to the description of the buyer. A clear but inaccurate picture was given that the intended buyer was someone other than Mr Fisken or the Claimant.
131. I see some force in the Claimant's contention that Mr Carl exaggerated the extent to which he was concerned during negotiations that he was selling to a third party rather than to Mr Fisken or his company. Mr Carl's repeated emphasis that he believed he was dealing with Mr Fisken as agent suggested that he was trying to act as an advocate for his case rather than simply answer the questions that were asked of him. This left me under some doubt as to whether Mr Carl was in fact as concerned as he purported to be as to who the contracting parties were.
132. Further, the Defendant's evidence as to why he was concerned about the identity of the purchaser moved from his written evidence, in which he laid emphasis on the importance of the purchaser's financial standing, to his oral evidence, where he laid emphasis on an alleged desire to ensure that the Claimant was not making a profit on a sub-sale. This too raised some doubt in my mind as to whether Mr Carl was accurately recalling what had happened, rather than applying a gloss to it that suited the case that he was advancing.
133. However, neither point taken against Mr Carl is inconsistent with his evidence that he believed he was contracting with the Defendant as agent. On balance, given the contemporary communications put to Mr Fisken, I think it more likely than not that

the Claimant did not tell the Defendant of a proposed sub-sale and rather purported to act as agent for an unidentified principal in the transaction.

134. The Defendant seeks to make great play of the payment of a commission by Mr Fisken to Mr Macari. He suggests that the commission of \$1 million to Mr Macari, the true detail of which became apparent during cross examination, is likely only to have been payable on a successful sale. If Mr Macari and Mr Fisken both knew that the Mr Carl objected to a sale to a sub-buyer and was concerned about commission payments, they had common cause in being less than truthful to Mr Carl about the identity of the intended buyer. Whilst this all may be correct, it seems to me to add nothing to the Defendant's case and it is unnecessary to resolve the question of Mr Fisken's motivation in keeping quiet about the commission.
135. The sequence of communications summarised at paragraph 47 above are clear evidence that Mr Macari was acting as the Claimant's agent in its dealing with the Defendant. He repeatedly spoke on Mr Fisken's behalf. It is apparent from the drafts of emails that went between them that Mr Macari was involved in drafting some of them. Whilst the Claimant denies that Mr Macari was an actual agent, I have no hesitation in concluding that, in particular the email of 16 February 2018 was sent with the authority of Mr Fisken that Mr Macari was speaking on behalf of the Claimant as agent with apparent if not actual authority.
136. In so far as it is relevant to determine the understanding of Mr Fisken and Mr Macari as to the Defendant's entitlement to the Fee, I have no hesitation in concluding that they believed that Mr Carl was entitled to the Fee in the circumstances that had come to pass. Whilst they were both somewhat equivocal about what their understanding had been, this conclusion is inevitable given the contents of their emails referred to above.
137. On the issue of the failure to call Mr Bennion, I do not accept that any meaningful inferences can be drawn from this. Mr Bennion's evidence is, at least on the Claimant's case, not relevant to the issues that the Court has to decide.
138. The only other potentially relevant factual issue that needs to be resolved is whether the Defendant proves the assertion that Canepa retrieved the Gearbox from "*a disgruntled ex-employee.*" I have noted above the paucity of evidence on this issue. I see no reason to disbelieve the assertion of Mr Carl that he believed this to be so. Further, it is a reasonable inference that he believed it to be so because this is what he was told. However, I have no evidence from which to conclude how likely it is that this account was true, such as who told him it. There are many reasons why someone

might not want to tell Mr Carl the truth as to the whereabouts of the Gearbox. Further, without knowing the source of the information, it is possible that this was a misunderstanding. I cannot on this evidence be satisfied on the balance of probabilities that the Gearbox was in fact recovered from a “*disgruntled ex-employee.*”

Discussion - The Standing Issue

Issue 1 - Does the Claimant have title to sue on the Agreement?

139. It is common ground that the Claimant was not in fact acting for a principal. The Defendant concedes as much. This is pretty much an unavoidable conclusion given the existence of a sub-sale contract. Unless that document is a forgery (which has not been suggested to be the case), it is consistent only with the Claimant having intended to be the principal on the contract with the Defendant and therefore the person able to pass on title in the GTO to the sub-buyer.
140. However following Shogun v Hudson, the fact that the Claimant intended to be the principal on the contract cannot be decisive as to whether it was the principal. I accept the Defendant’s contention that if a party signs a contract as agent then a finding that it was in fact agent is almost inevitable.
141. The difficulty posed in this case though is whether the Claimant in fact signed as agent. It is true that the contract describes the Claimant as agent. But his signature is not signed against that description.
142. I have been referred to the judgment of Jackson LJ in Hamid v Francis Bradshaw [2013] EWCA Civ 470 where, having considered amongst other cases Shogun Finance v Hudson, he states at paragraph 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 mis-described in the document, the court may correct that error as a matter of construction without the need for formal rectification.*
- (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.”*

143. It is the last sub-paragraph which is of particular importance here. In signing the contract, the Claimant stated itself to be buyer. Certainly the text describes it as agent, but having regard to the judgment of the Court of Appeal in The Elikon, it cannot in my judgment be said that a description of a party in the body of the contract trumps the role assigned to that party in its signature to the contract. Therefore I am not persuaded that this document can be said to make clear that the Claimant signed as agent.
144. Looking to the extrinsic evidence, it is for the reasons set out above more probable than not that the Defendant signed the contract believing the Claimant to be acting as agent. It is also more probable than not, given Mr Fiskens’s ambiguity on the issue in the passages of cross examination cited above, that he realised that the Defendant so believed. However, that alone does not mean that the parties “*knew*” that the Claimant was acting as agent. In the Claimant’s case, it was quite the contrary – Mr Fiskens knew that it was not.
145. In those circumstances, following paragraph (iv) of the judgment of Jackson LJ in Hamid v Francis Bradshaw [2013] EWCA Civ 470, extrinsic evidence is not in my judgment admissible so as to determine the true identity of the contracting party. This is not inconsistent with the judgment of the House of Lords in Shogun v Hudson. As the passage from Lord Hobhouse cited above makes clear, his statement of the principle that extrinsic evidence is not admissible to contradict the express terms on which a party contracts supposes that the description of the party is unequivocal. But here, the distinction between the Claimant being described as agent but signing as principal leads to the conclusion that on Lord Hobhouse’s terms, the contents of the document are “*insufficient unequivocally to identify the actual individual referred to*”

unless the principle of The Elikon is applied so as to fix the identity of the parties by the manner in which they sign the contract.

146. It follows that the Claimant does have “*title*” to sue on this contract. Of course if the Defendant were misled by the Claimant or acted on an assumption as to the true nature of the contracting parties that has turned out to be incorrect, that does not leave him without remedy. He has already identified potential remedies, but the order of HHJ Keyser QC has prevented him from raising them in this action.

Discussion - The Inspection and Delivery Issues

Issue 10 - Did the Claimant have a right to verify the Gearbox prior to accepting the same?

147. The Defendant’s obligation was specifically to deliver the N2 gearbox - no other gearbox would suffice. Verification of the item was therefore obvious and essential. The Claimant was therefore entitled to a reasonable opportunity to examine the goods in accordance with Section 34 of the Sale of Goods Act 1979.

Issue 11 - If so, where?

148. As for the place of examination, it appears to have been common ground that one appropriate place was the Ferrari factory in Italy – indeed, in his email of 18 February 2018 to Mr Macari, the Defendant acknowledged the prospect of the Gearbox being sent to Italy for inspection.

Issue 12 - What were the delivery obligations in respect of the Gearbox?

149. In my judgment, the Agreement was one for the sale of goods that included the Gearbox. It is true that the obligations as to payment for the Gearbox under the Agreement varied depending upon who was in possession of it. But there is no doubt that the Agreement supposed that the Defendant owned the GTO including the Gearbox and that he was intending to pass ownership of the GTO including the Gearbox to the buyer, the classic situation of a sale of goods contract.
150. Further, I agree with the Claimant’s submission that the terms of the Agreement created an obligation on the Defendant to deliver the Gearbox to the Claimant not merely tender the Gearbox for collection at the premises of Canepa. I reach that conclusion on the basis of the natural meaning of the words “*turn over*” (which imply more than merely tendering) and the fact that the location of the Gearbox was something more in the control of the Defendant (as the person who had allowed Canepa to have custody of the Gearbox) than the Claimant.

151. I am not satisfied that the Claimant is separately able to make out the requirement for an implied term to this effect in accordance with Marks and Spencer v BNP Paribas but given my finding on the issue of contractual interpretation it is not necessary to explore this point further.

Issue 13 - Did the Defendant tender delivery of the Gearbox?

152. The Defendant's tender in the email of 21 February 2018 was an offer to the Claimant to collect the Gearbox from Canepa's premises. This was not a tender of delivery and did not accord with the obligations of the Defendant as established above.

Issue 14 - What were the obligations as to the costs of shipment of the Gearbox (including to the Factory as applicable)?

153. I further agree with the Claimant's contention that the Defendant was obliged to pay for shipment of the Gearbox to the Claimant. This is consistent with both the common law rule referred to at paragraph 8.005 of Benjamin's Sale of Goods and clause 7.6 of the Agreement, which refers to turning over the Gearbox "*without additional compensation.*" There is no basis for displacing the common law rule.

154. The Agreement does not, either expressly or by necessary implication, oblige the Defendant to pay the costs of shipment to Italy. Were it the case that the Claimant had refused to accept delivery in England and required the Defendant to fund delivery to Italy, it may well be that the Claimant would have been in repudiatory breach of the Agreement. However, this is not what happened. In fact, in responding to the Defendant's tender of the Gearbox, the Claimant agreed to fund the shipment costs to Italy. It cannot sensibly be argued that, where the Claimant was entitled to have the Gearbox inspected in Italy, it was in breach of contract because it requested or required delivery there at its expense rather than delivery to its premises in London. It follows that nothing turns on the fact that the Defendant's obligation as to pay for shipment to London not to Modena.

Discussion - The Fee Issue

Issue 2 - In what circumstances did the Agreement entitle the Defendant to the Fee?

155. On the face of the terms of part 7 of the Agreement, there is a potential inconsistency between clauses 7.6 and 7.11. Whereas clause 7.6 taken on its own can only mean that, if the Gearbox is recovered from Canepa, the Claimant is entitled to delivery up without additional payment to the Defendant, clause 7.11 provides for an obligation on the Claimant to pay the fee to the Defendant where formal legal correspondence or legal process secures custody of the Gearbox without qualification as to whom the

Gearbox is secured from. Thus, subject to whether formal legal correspondence here has secured custody of the Gearbox, clause 7.11 would appear to give an entitlement on the Defendant to the fee.

156. In interpreting the terms of the Agreement, I bear in mind the judgment of the House of Lords in Chartbrook v Persimmon Homes [2009] UKHL 38 to the effect that, where the court is driven to conclude that something has gone wrong with the language of the contract, the court was not required to attribute to the parties an intention which a reasonable person would not have understood them to have had. Thus, where there was a mistake on the face of the document and it is clear what a reasonable person with all of the background knowledge available to the parties would have understood the language of the contract to have meant, the court can correct the error as a matter of construction.
157. However, in my judgment, that is not the position here. On the evidence before me, a person with all of the background knowledge available to the parties would not have been clear as to whether the entitlement to recover the fee was thought to include recovery from Canepa. It is clear from the evidence and indeed from the terms of the Agreement (for example clause 7.12) that Mr Carl was contemplating legal action against Canepa arising from the disappearance of the Gearbox. In those circumstances, it is by no means obvious that the parties intended the Fee to be payable if the Gearbox were recovered from Canepa, since Mr Carl might have been looking to Canepa for any recompense caused by the Gearbox having gone missing.
158. The more natural reading of the Agreement is that clause 7.6 applies where the recovery is from Canepa in any circumstances (including following the sending of formal legal correspondence):
- (a) The parties believed that the Gearbox was most likely to be with Canepa and the Agreement begins with that scenario before dealing with the situation where the Gearbox is in the possession of someone else. The words of clause 7.11 fall into the second scenario and there is no obvious reason to carry them over to the first scenario.
 - (b) Clause 7.6 is absolute in its assertion that, where recovery is from Canepa, this will be without addition compensation to the Defendant. There is simply no basis for introducing the later qualification into the earlier term.
159. This conclusion is consistent with the sixth canon of construction set out in paragraph 7.06 of Lewison on The Interpretation of Contracts (sixth edition), namely that “*where the contract expressly mentions some things, it is often to be inferred that*

other things of the same general category which are not expressly mentioned were deliberately omitted.”

Issue 3 - Did the Defendant act so as to trigger an entitlement to the Fee?

160. Given my finding on issue 2, the Defendant can only show an entitlement to the Fee if he shows both that recovery of the Gearbox was achieved from someone other than Canepa and that recovery was secured by formal legal correspondence.
161. On the first point, as indicated above, I am not satisfied on the balance of probabilities that the reason that Canepa did not acknowledge custody of the Gearbox sooner was that it was in the custody of a third party, be it a disgruntled ex-employee or otherwise. It follows that the Defendant cannot show an entitlement to the Fee under Clause 7.11, subject to the estoppel issue.
162. If I were factually wrong on the issue of the Gearbox being in the custody of a third party, I would still not have found that there was entitlement to the Fee. The recovery from the putative third party was achieved not by the Defendant but by Canepa. Whilst it would be possible to conceive of circumstances where the Defendant persuaded the court that its actions were the cause of the third party delivering the Gearbox to Canepa such that Canepa were merely the conduit through which the Gearbox returned to the Defendant, I do not see that any such argument arises here.
163. If I were wrong on both of these issues or on the interpretation of the Agreement for the purpose of issue 2, the question would arise as to whether recovery of the Gearbox was secured by formal legal correspondence. I have no hesitation finding that the letter of 20 January 2018 amounted to “*formal legal correspondence*” – it is self-evidently that.
164. Arguably the more difficult question is whether the correspondence has secured the recovery of the Gearbox. On balance, it seems to me that it has. The Defendant’s proposal was followed by the payment of \$25,000 to Canepa. This has led to the position where Canepa is holding the Gearbox to the Defendant’s order (subject to the order of the Californian Court). Whilst it may be that the return of the Gearbox would have been secured without the sending of this letter, it has contributed to the position in which the Gearbox can now be recovered.

Issue 4 - Were Mr Macari and/or the Claimant mistaken as to the meaning and effect of the Agreement when engaging in communications indicating that the Defendant might be entitled to the Fee upon verification of the Gearbox?

165. It follows from the finding on issue 2 that Mr Macari and Mr Fisker were mistaken as to the entitlement of the Defendant to the Fee.

Issue 5 - To what extent if at all was Mr Macari acting as the Claimant's agent?

166. As I have indicated above, at least in the email of 16 February 2018, Mr Macari was acting as the Claimant's agent. It is not necessary on my analysis of the issues to consider whether he acted as agent more generally, though I would have been minded to draw the inference that he did.

Issue 6 - Is the Claimant estopped from asserting that in the circumstances the Defendant is not entitled to the Fee?

167. In my judgment, the evidence clearly shows a common understanding and assumption of the parties that, were the Gearbox to be recovered from Canepa in the circumstances that had come to pass by the time of Mr Macari's email of 16 February 2018 (which included that Mr Carl had incurred legal fees and that Canepa was demanding payment of monies for the return of the Gearbox), the Defendant would be entitled to the fee of \$500,000. Mr Macari was then acting as the Claimant's agent and the circumstances are well capable of making out an estoppel by convention and, realistically, the Claimant focuses in the issues of whether the Defendant is able to show reliance and whether it would be inequitable to allow the Claimant to resile from the common understanding. Even the second of these is in my judgment not difficult for the Defendant to establish, if he shows detrimental reliance on the convention.

168. As noted above, the convention pleaded by the Defendant appears to be that the Fee was payable upon verification of the Gearbox at the Ferrari factory in Italy. The Defendant seeks in closing to argue a convention, based upon what Mr Macari said to Mr Scaletti, that the fee was due before delivery of the Gearbox. However, there is no evidence of any such suggestion crossing the line between the parties during their discussions. Both Mr Macari's and Mr Fisker's emails which are said to show the convention are clear that inspection should precede payment. In light of that, I see no basis for a finding of estoppel by convention in the terms that the Defendant now argues at paragraph 55 of his closing submissions – the Defendant's best case is that the convention was that pleaded by him.

169. The Defendant's most obvious argument for detrimental reliance on the common assumption is his instruction of 19 February 2018 to 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 \$25,000 would be paid to Canepa. It is clear that this offer was made in circumstances in which Mr Carl understood the Claimant to be agreeing that it was liable to pay the \$500,000 fee to him if the Gearbox were recovered from Canepa. That understanding may have influenced Mr Carl in making this proposal and, as demonstrated by the passage from the judgment of Akenhead J in Mears Ltd v Shoreline Housing Partnership referred to above, "influence" would probably suffice for an estoppel.
170. However, he had already offered the payment of \$25,000 to Canepa in January 2018, before the February instruction was given. Mr Cousins QC said in closing submissions that Mr Carl had "*crossed the Rubicon, in terms of taking on a responsibility for payment of Canepa.*" In supplemental submissions after the draft judgment was sent out, Mr Cousins QC has made clear that his case is that the Rubicon was crossed when the instruction of 19 February 2018 was given to Canepa, that is to say after the email of 16 February 2018 which I have found to be the time at which there can first be said to have been a common understanding sufficient to found an estoppel by convention.
171. However, the email on 19 February 2018 is no more than an arrangement as to how Canepa's fee is to be paid. In fact of course the fee was not paid pursuant to the arrangement referred to in the email of 19 February 2018 but rather was paid later by Mr Carl in circumstances where he was not permitting the Claimant to recover the Gearbox. At the time of the shared understanding, on and following 16 February 2018, Mr Carl had already indicated a willingness to pay for the release of the Gearbox. I see no basis for finding that the email of 19 February 2018 created any fresh liability on his part to pay for it. Therefore, whilst evidence of a shared understanding that "*crossed the line*" prior to that communication might well have led to a finding of detrimental reliance sufficient to found an estoppel, that finding is not available here where the only plausible detrimental reliance pre-dates any evidence of the shared understanding.
172. There is further evidence of the common understanding in the emails of 20 and 21 February 2018 from Mr Fiskens, but given that these again postdate the Defendant's instruction not to deliver the Gearbox to the Claimant's order (and in the latter case are said to have been a repudiatory breach of contract), I do not see that the Defendant

can rely on them as a common understanding on which he acted at that time, merely as evidence of the existence of the common understanding earlier.

173. Therefore the Defendant is not able to rely on estoppel by convention so as to show an entitlement to the fee.

Discussion - The termination issue

Issue 15 - Was the Claimant's email dated 21 February 2018 a repudiatory or anticipatory repudiatory breach of contract?

174. The terms of the Claimant's email of 21 February 2018, inviting the Defendant to agree to shipment of the Gearbox at the Claimant's expense to Modena with the Gearbox to be inspected prior to it either being accepted by the Claimant or returned to the Defendant in London accorded precisely with the Claimant's obligations and rights under the Agreement as I have found above. It follows that this was not a repudiatory or anticipatory breach of contract.

Issue 16 - Was the Defendant's email dated 21 February 2018 acceptance of that repudiatory breach or a breach of contract itself and/or did the Defendant otherwise act in breach of contract?

175. It follows from my finding on issue 15 that the Defendant's email was not an acceptance of any such breach, but itself was a breach of contract. Were I to have been wrong on issue 15, it does however seem to me that this was acceptance of the supposed breach by the Claimant.

Issue 17 - Does the Claimant advancing the case that the Defendant is not entitled to the Fee constitute a continuing breach (or anticipatory breach) of a fundamental term of the Agreement, which the Defendant is entitled to treat as a repudiatory breach of contract and terminate the Agreement by notice in his Reply to Defence to Counterclaim?

176. The argument that the case advanced by the Claimant that it is not obliged to pay the fee in the circumstances that have come to pass amounts to a repudiatory breach of contract supposes that it is a breach of contract not to pay the fee. I have found that it was not a term of the Agreement that the Claimant would pay the fee in the circumstances that have come to pass. Accordingly, there is no breach of contract that the Defendant is entitled to accept and it follows that the Defendant was not entitled to treat the failure to pay the fee as a repudiatory breach entitling him to terminate the Agreement by the terms of Paragraph 6 of the Reply to Defence to Counterclaim.

Issue 18 - Was or is the Agreement terminated?

177. It follows from the above findings that the Agreement has not been terminated.

Discussion - The Title Issue

Issue 7 - Did title to the Gearbox pass at Completion as defined in the Agreement?

178. I note the Defendant's arguments as to why title to the Gearbox did not pass with completion of the Agreement. I have already rejected the argument that this was not a contract for the sale of goods such that the 1979 Act does not apply. I also do not accept the argument that either the GTO or the Gearbox was not in a deliverable state such that rule 1 under Section 18 of the 1979 Act is not relevant – there is nothing undeliverable about either the GTO or the Gearbox; they simply were not united in one place.

179. Furthermore, I do not see that issues as to risk or express acceptance of the GTO without the Gearbox affect the passing of title. If the parties intended title to pass with the contract (or would be taken as intending that by the reasonable bystander), such factors would not prevent title passing.

180. However, I do see force in the argument that the express terms of Clause 7.12, contemplating that Mr Carl was at liberty to initiate proceedings for the recovery of the Gearbox, are inconsistent with title having passed. It is likely that this clause was included to preserve the option for Mr Carl to seek consequential damages from Canepa. But whatever its purpose it seems consistent only with title to the Gearbox remaining with the Defendant until it was “*turned over*” to the buyer in accordance with the Agreement.

181. Accordingly I find that title to the Gearbox did not pass on completion of the sale of the GTO.

Issue 8 - Was consideration paid for the Gearbox?

182. Given my finding on issue 2, it is clear that consideration was paid for the Gearbox in that, in certain circumstances, the buyer was entitled to it without the payment of any further sum. Given that finding, the obligation to pay a further fee in certain specified circumstances is far more consistent with it being compensation for the services and expenses of Mr Carl in recovering the Gearbox than it is as being seen as consideration payable in certain circumstances only. If the payment of the Fee were interpreted in that way, it would give rise to a difficult issue of interpretation as to whether the agreement to turn over the Gearbox if it was recovered from Canepa without further compensation was in fact an obligation for which no consideration

was proved and which was therefore not enforceable. Given the careful negotiation over price including over the issue as to what should be paid in the various circumstances, this would be an illogical interpretation and it is one that I reject.

F - The Withholding Issue

Issue 19 - Is, by virtue of his refusal to authorise the delivery of the Gearbox, the Defendant wrongfully holding and possessing the Gearbox and/or wrongfully preventing the Claimant's recovery thereof?

183. The following consequences flow from my findings on other issues above:

- (a) The Claimant does not have title to the Gearbox so does not have the right to delivery up on that ground.
- (b) However, the Defendant is obliged by the terms of the Agreement to deliver the Gearbox to the Claimant if it is in his possession or control;
- (c) It is common ground that the Gearbox is currently held in California to his order;
- (d) His failure to arrange delivery up to the Claimant renders him in breach of contract;
- (e) Accordingly he is wrongfully withholding possession of the Gearbox.

Discussion - The Relief Issue

184. In large part, the relief issues flow from other decisions set out above.

Issue 20 - Is the Claimant the Owner of the Gearbox and entitled to it and/or does the Claimant have a right to immediate and exclusive possession of the Gearbox and/or delivery up?

185. The Claimant does not have title to the Gearbox and is not entitled to possession on that ground. However, the Defendant is contractually obliged to deliver up the Gearbox.

Issue 21 - Is the Claimant entitled to specific performance of the Agreement including that the Defendant instruct Canepa to release the Gearbox to the Claimant?

186. The argument for specific performance is based on the contention that both the GTO and the Gearbox are unique and should be reunited. This would both give effect to the historical importance of the original items being reunited and tend to enhance the reputation of the Claimant as a dealer that seeks to enhance historical value.

187. In my judgment, the argument in favour of making an order for specific performance of the Agreement is strong. If someone is willing to pay \$44 million for a car and the Gearbox is suggested to have a value of \$500,000 to \$1 million, I have considerable difficulty in accepting that the uniting of the two originals is not thought to enhance the importance of the GTO. Equally, the reuniting of the two is likely to enhance the Claimant's reputation in the market. In a situation where the Claimant has a contractual right to the item and the Defendant can readily give it up, I see no good reason not to order specific performance.

188. I note the Defendant's contention that the Claimant does not come to equity with clean hands. The Defendant says that the Claimant's attitude to the true identity of the contracting parties, as demonstrated in my finding that the Claimant did not correct the Defendant's belief that he was contracting with a third party, means that an order for specific performance ought not to be made. Whatever consequences flow from the conduct of the Claimant in this respect, it does not seem to me to deprive it of the right to an order for specific performance. To come to that conclusion would be to give effect to the remedy that the Defendant sought in the case that it has not been allowed to plead, that of fraud/misrepresentation. The alleged misconduct should not affect the enforceability of the contract.

Issue 22 - Alternatively, what damages, if any, are payable to the Claimant as a result of the Defendant continuing to deny the Claimant possession of the Gearbox and, if payable, are these damages the damages of the Claimant or of the Claimant's "principal" (in respect of which word the Claimant makes no admissions, it being the Claimant's case that it did not act for or on behalf of a "principal" and that any loss was suffered by the Claimant), or the damages of both, in differing parts?

189. It is common ground that the Claimant has suffered no more than nominal damages.

Issue 23 - Is the Defendant entitled to the declaratory relief to the effect that the Agreement has been terminated due to the Claimant's breach, and consequently, that the Defendant is free to deal with the Gearbox and forfeit the Fee?

190. In light of my findings above, the Defendant is not so entitled.

Issue 24 - If the agreement has not been terminated, is the Defendant entitled to declaratory relief to the effect that he is entitled to the Fee upon the Claimant's taking possession of the Gearbox?

191. Given my findings on the contractual obligations and the issue of estoppel, the Defendant is not so entitled.

Issue 25 - What damages (if any) is the Defendant entitled to for loss of use of the Fee?

192. In failing to pay the Fee, the Claimant was not in breach of contract and the Defendant is not entitled to damages in that regard.

Events subsequent to the judgment being sent out in draft

193. The judgment was sent out in draft to the parties. In the usual way, they have responded with suggested corrections of typographical and other obvious errors, for which I am obliged.

194. The parties raised two points of greater substance:

(a) There was some inconsistency between my finding on the estoppel issue and the wording of paragraphs 174, 183 and 185 of the draft judgment⁴. I have sought to remove that inconsistency.

(b) The Defendant has sought to clarify its case on detrimental reliance in a note of 29 May 2020. The Claimant has responded in a note of the same date to the effect that the Defendant is seeking re-run the case on this issue. It is unnecessary for me to comment upon whether this is the case. Suffice it to say that, for the reasons set out above as amplified in the light of the Defendant's note, I am not persuaded of the Defendant's case on detrimental reliance and that consequently its case on estoppel is not made out.

Conclusion

195. In conclusion, I propose to make an order giving specific performance of the terms of the Agreement by requiring the Defendant to secure the delivery of the Gearbox to the Claimant.

196. The precise terms of that order will need to be addressed by the parties, if necessary at a further hearing. Given the alterations to the final version of this judgment, in particular on the issue of estoppel, I have agreed to extend time for applying for permission to appeal to 4pm on 8 June 2020, with any such application to be adjourned to the hearing of consequential matters. The time for filing an Appellant's Notice under CPR 52.12 will be extended so that it shall start to run from the hearing on consequential matters.

⁴ Paragraphs 176, 185 and 187 of this finalised judgment.