

Summary

Proactive Sports Management Limited v Rooney & Others 8LS90350

Note:

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Judge:

His Honour Judge Hegarty QC sitting in the Manchester Mercantile Court at the Civil Justice Centre, Manchester.

Background:

Mr Wayne Rooney ("WR") is a well-known professional footballer. In addition to his earnings as a player, he has been able to enhance his earning capacity by exploiting what are termed his "image rights". Since early 2003, he has chosen to do so through the medium of a limited company known as Stoneygate 48 Limited ("Stoneygate"), to which he has assigned the rights in question.

Proactive Sports Management Limited ("Proactive") is a sports agency which provides various services to sports professionals including footballers. Until May 2008, one of its directors was Mr Paul Stretford who was registered with the FA in his own name as a sports agent. In July 2002, when the player was still only 16 years of age, Proactive, WR and his parents entered into a Representation Agreement under which Proactive was entitled to act as WR's agent for a period of eight years in respect of both his playing, or "on-field", activities and his commercial or "off-field" affairs. On the face of it, this was a breach of FIFA and FA regulations for two reasons: the maximum permitted term for an on-field representation agreement was two years; and WR had already entered into such an agreement with a company known as Proform Sports Management Limited which was still apparently in force, though it was subsequently held to be unenforceable on the grounds that the player was a minor when he executed it. But both Proactive and Mr Stretford have always maintained that, at all material times, they were unaware that the 2002 Agreement extended to on-field representation, though this was not accepted by an FA Regulatory Commission which in 2008 found that Mr Stretford was guilty of certain regulatory offences and imposed a substantial fine and a period of suspension upon him.

In late 2002 and early 2003, however, Proactive and WR entered into various further agreements. The first was a two-year representation agreement dated 14th December 2002 which covered both on-field and off-field activities and which was subsequently renewed on two further occasions. But they also entered into a new Image Rights Representation Agreement dated 16th January 2003 (but probably signed only on or about 3rd February 2003). This was largely modelled on the July 2002 Agreement. But, in this case, the principal parties were Proactive and Stoneygate (to which WR'S image rights were assigned at or about the same time); and the new Agreement

covered only off-field activities. Nonetheless, the 2002 Agreement was not simply rescinded. Instead, a Variation Agreement was entered into which stripped out the provisions governing off-field representation, leaving the 2002 Agreement in place in respect of on-field activities.

This new Image Rights Representation Agreement was for a term of eight years and provided for Proactive to receive remuneration in return for various services at the rate of 20% of the gross sum payable under any contract or arrangements for the promotion, endorsement or advertisement of its client and/or the exploitation of certain intellectual property rights and/or any products, goods or services to which its client was a party.

These arrangements were highly successful. A number of lucrative sponsorship contracts and other financial opportunities were secured for the player; and both Stoneygate and Proactive have derived a substantial income from the exploitation of his image rights. But in 2008, at or about the time of the FA disciplinary hearing, Proactive and Mr Stretford fell out and he resigned as a director. Eventually, in October 2008, he left Proactive's service in fairly acrimonious circumstances. But he has retained the loyalty of WR and his family and has continued to act for them both personally and through a new company which he has since set up.

Accordingly, from the end of October 2008, Stoneygate and WR refused to co-operate with Proactive or to pay any commission under the Image Rights Representation Agreement; and Proactive was unable to provide any of the contractual services. Eventually, in December 2009, there was an exchange of letters between solicitors by which Stoneygate and WR purported to terminate the Agreement and Proactive elected to treat this as a repudiatory breach of contract.

Prior to the breakdown in relations, Proactive had also acted on behalf of WR's wife, Mrs Coleen Rooney and her own image rights company, Speed 9849 ("Speed"). Though there was no written contract between these parties, Proactive had, in practice, levied a commission of 20% on all sums received by Speed in just the same way as in the case of Stoneygate. But Mrs Rooney and Speed also took their business to Mr Stretford from about the end of October 2008 and refused to pay any further commission to Proactive.

The Issues:

In these proceedings, Proactive asserted a contractual right to commission at the rate of 20% on all sums payable to Stoneygate under any contracts with third parties which Proactive had procured for WR during the subsistence of the Image Rights Representation Agreement, whenever they might fall due, whether before or after the expiration of the eight-year term of the Agreement. The amount said to be due and owing at trial was in excess of £1m and judgment was sought in the appropriate sum. But Proactive also sought a declaration that it was entitled to commission on all further sums receivable by Stoneygate in respect of any relevant contract; and sought damages in addition for breach of contract on Stoneygate's part. It was common ground that the assessment of any such damages would have to take place on a later occasion. But estimates of between £3m and £4m were put forward at trial, though it was ultimately conceded that any recovery should be capped in accordance with the

provisions of clause 8 of the Agreement. A claim for unpaid commission was advanced on a similar basis against Speed; but in this case there was no claim for damages for breach of any fixed-term contract. Separate claims were also made against WR and Mrs Rooney personally. But these were resolved prior to trial and the only remaining issue is as to the costs of this part of the case.

The principal grounds upon which Stoneygate defended the proceedings were that the Image Rights Representation Agreement was void for mistake or was unenforceable as being in unreasonable restraint of trade. But even if the Agreement was valid and enforceable, it was not admitted that Stoneygate was in breach of contract; and various other partial defences were raised, most notably by way of a challenge to Proactive's claim that it was entitled to commission on payments falling due after it had ceased to provide any services under the Agreement or, at the very least, after the expiration of the eight-year term.

For its part, Proactive contended that, even if the Agreement would otherwise have been unenforceable on the grounds of restraint of trade, Stoneygate had affirmed it and was therefore precluded from challenging its validity. In any event, it was contended that Proactive was still entitled to recover any sums which had already fallen due prior to any challenge to the enforceability of the Agreement. Yet further, even if the Agreement was void or unenforceable, Proactive asserted a right to a restitutionary remedy in respect of the services which it had provided; and it contended that the amount of any restitutionary compensation should be assessed on essentially the same basis as the remuneration which would have been payable under the Agreement itself. On behalf of Stoneygate, however, it was argued that this was inappropriate, that the Court did not have sufficient material to assess any such remuneration and that any assessment would have to take place on another occasion.

In relation to Speed, the principal issue was as to the nature and terms of any contractual relationship between the parties. Proactive contended that there was or must have been an express agency agreement on substantially the same terms as in the case of Stoneygate, save as to duration, or alternatively that a contract on those terms had been concluded by conduct. Speed, on the other hand, contended that, at best, there was no more than a series of ad hoc agreements limited to individual transactions, but that the better analysis was that Proactive was entitled to no more than a restitutionary remedy in respect of services rendered.

Judgment:

The judge held that the Image Rights Representation Agreement was not void for mistake but that it was unenforceable on grounds of restraint of trade and had not been affirmed. In those circumstances, he held that Proactive could not pursue any contractual claim under the Agreement and could not, therefore, recover any commission which would otherwise have fallen due from Stoneygate or would have become due in the future. Nor could it pursue a claim for damages for breach of the Agreement.

Even if the Agreement had been valid and enforceable, the judge concluded that, on the true analysis of the contract, Proactive would not have been entitled to recover commission on monies receivable by Stoneygate after the expiration of the eight-year

term. For the period between the breakdown of relations in October 2008 and the acceptance of Stoneygate's repudiatory breach of contract in December 2009, however, it would have been entitled to damages or a restitutionary remedy which would have taken into account the loss of commission and any savings accruing to it as a result of not having to provide any further services under the Agreement. In respect of the period from December 2009 to the end of the eight-year term, it would likewise have been entitled to damages for the premature determination of the agreement.

But even though the Agreement was unenforceable, the judge held that Proactive was entitled to a restitutionary remedy to reflect the reasonable value of the services which it had provided under the Agreement insofar as it had not already received remuneration for such services in accordance with the terms of the Agreement. But he rejected Proactive's contention that the quantum of any such compensation should be measured by reference to the commission which would have been payable under the Agreement; and directed that the assessment of the restitutionary claim should take place at a later hearing. He did, however, hold that there was a separate agreement under which Proactive had provided accounting services to Stoneygate in respect of which it was entitled to judgment in the sum of £5,000 plus VAT.

As for Speed, the judge held that there was no sufficient evidence of an express agreement between the parties but that an agreement could be inferred from conduct under which Proactive was to provide services similar to those which it provided for Stoneygate and that, in return, Speed would pay commission on sums receivable from third parties at the same rate of 20%. But, as in the case of Stoneygate, the judge was not persuaded that Proactive was entitled to commission on sums falling due after it ceased to provide these services. Accordingly, he concluded that Stoneygate is entitled to judgment against Speed in the total sum of £90,475.25.

Reasons for the Judgment:

Mistake: The defence of mistake was founded on the contention that the parties to the Image Rights Representation Agreement were labouring under various misapprehensions of fact at the time when they entered into the Agreement in early 2003. These were: firstly, that all parties to the original 2002 Agreement mistakenly intended and believed that it would and did relate solely to off-field activities; secondly, that they likewise intended and believed that it would and did incorporate a valid and effective provision for early termination; thirdly, that the parties to the Image Rights Representation Agreement dated 16th January 2003 mistakenly believed that the earlier Agreement was valid and enforceable; and, fourthly, that they likewise believed that it embodied a provision for early termination in the form of clause 8. It was alleged that each and all of these mistakes meant that the Image Rights Representation Agreement was fundamentally different in nature from that which the parties had contemplated and that it was therefore void as a matter of law.

The judge found that, as a matter of fact, the parties were not mistaken about any of these matters at the time when the Agreement was entered into. He rejected the evidence of Mr Stretford to the effect that, at the material time, he did not know that the 2002 Agreement extended to on-field activities; and he inferred that Mr Neil Rodford (who is now Proactive's Chief Executive but who did not give evidence at

the trial) must also have been aware of its scope and terms from the outset. The supposed right of early termination embodied in clause 8 of the Image Rights Representation Agreement reflected a similar provision in the 2002 Agreement. It was accepted at trial by both sides that, as a matter of law and construction this did not confer a right of early termination but was an ineffective attempt to stipulate the damages payable in the event of breach. But the judge was not persuaded that any of the parties erroneously believed that it gave a right of early termination at the time when either Agreement was entered into. As for WR himself and his parents, the judge was not persuaded that they held any relevant erroneous belief at any time in relation to either Agreement.

Accordingly, the defence of mistake failed on the facts. But even if the factual basis of the defence had been made out, the judge concluded that it would not have succeeded as a matter of law.

Restraint of Trade: The judge heard both factual and expert evidence on this issue. The principal argument advanced on behalf of Proactive was that the Image Rights Representation Agreement was not a contract of a kind to which the doctrine applied since it simply imposed restrictions upon Stoneygate and WR during the currency of the Agreement and that, in any event, it did not prevent him from pursuing his primary occupation as a professional footballer.

The judge held that the Agreement imposed very substantial restraints upon WR's freedom to exploit his earning capacity over a very lengthy period which was well in excess of anything which was to be found elsewhere in the market for agency services of this kind. Furthermore, WR was only 17 years of age at the time when the Agreement was entered into; and he and his parents were wholly unsophisticated in legal and commercial matters. Nonetheless, they were neither advised to take independent legal advice; nor did they seek or take such advice. The judge concluded that this was not a standard form of contract which had been moulded by market forces and that it was not the outcome of a process of negotiation between equals. In those circumstances, after considering a number of leading authorities on the topic, he held that the doctrine of restraint of trade applied to the Agreement. He rejected an argument to the effect that Stoneygate was bound by a provision in the Agreement reciting, contrary to the fact, that WR and his Stoneygate had sought, taken and understood independent legal advice.

In those circumstances, as a matter of law, it was incumbent upon Proactive, as the party seeking to enforce the Agreement, to demonstrate that the restrictions were reasonable having regard to the legitimate interests of the parties. In order to do so, Proactive sought to rely on a number of factors, such as the alleged commercial risk it had undertaken in agreeing to act as agent for such a young player, its contractual obligation to use its best endeavours to promote his commercial interests and the need to adopt a long-term strategy in order to develop the value of the player's brand. The judge concluded that most of these factors were of little weight. He recognised, however, that a strategic approach was desirable in the interests of all parties. But he did not consider that Proactive had made out its case that this required an eight-year contractual tie. In the circumstances, he concluded that Proactive had failed to justify the restraints imposed on Stoneygate and WR under the Agreement and that it was therefore unenforceable.

The judge also rejected certain further arguments advanced on behalf of Proactive. One of these was based on the concept of affirmation. In his capacity as a director of Stoneygate, Mr Stretford's clearly knew that Proactive had received legal advice to the effect that there was a risk that the Agreement might be held to be unenforceable on the grounds of restraint of trade; and it was suggested that this knowledge must be imputed to Stoneygate, since he was also a director of that company. But the judge did not accept this submission, so that the affirmation argument failed on its facts. In any event, however, the argument was expressly based solely on what was termed "common law" affirmation as to which the only authority was a single decision at first instance which the judge would have declined to follow, so that it would also have failed as a matter of law.

The judge also rejected the argument that Proactive could sue for monies which had fallen due under the Agreement whilst the parties remained content to operate in accordance with its terms and before any restraint of trade argument was raised on behalf of Stoneygate. He considered that in accordance with orthodox legal principle, the court would not provide any contractual remedy to a party who had to rely for that purpose on a contract which was unenforceable on grounds of restraint of trade.

But the judge held that since Proactive had provided various services to Stoneygate under a contract which was unenforceable and Stoneygate had freely accepted those services, Proactive was entitled to recover the reasonable value of those services from Stoneygate by way of restitution without having to rely on the Agreement. He considered, however, that there was insufficient evidence to permit an assessment of the appropriate sum and that such an assessment would have to take place on a later occasion.

Speed: The judge considered that there was no evidence of any express agreement between Proactive and Speed but that both parties appeared to have modelled their dealings on the Image Rights Representation Agreement between Proactive and Stoneygate. The judge held that, in those circumstances, their conduct gave rise to or evidenced a contract between them and that the essential terms of that contract were based on those contained in the Agreement between Proactive and Stoneygate, albeit on a non-exclusive basis and without any fixed term. Accordingly, Proactive was entitled to commission falling due so long as the contractual relationship subsisted, but not thereafter.